

2013

A Three-Tiered Public Policy Approach to Copyright Misuse in the Context of Tying Arrangements

Sandy Azer

Recommended Citation

Sandy Azer, *A Three-Tiered Public Policy Approach to Copyright Misuse in the Context of Tying Arrangements*, 82 Fordham L. Rev. 81 (2013).

Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss1/2>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

A THREE-TIERED PUBLIC POLICY APPROACH TO COPYRIGHT MISUSE IN THE CONTEXT OF TYING ARRANGEMENTS

Sandy Azer*

*Over two decades since the copyright misuse doctrine was first recognized in *Lasercomb America, Inc. v. Reynolds*, a uniform approach for determining whether a specific behavior constitutes misuse still does not exist. Circuit courts have commonly applied two competing approaches to the misuse analysis. One approach centers on the public policy underlying copyrights; the other approach centers on antitrust principles. This Note explores relevant jurisprudence and elucidates the shortfalls of each approach. It then proposes a compromise that underscores the interplay between copyright and antitrust laws. The proposed resolution aims to provide a much-needed uniform misuse analysis that does not overlook the important policies underlying copyright law, or disregard antitrust principles relevant in the context of tying arrangements.*

TABLE OF CONTENTS

INTRODUCTION.....	82
I. AN OVERVIEW OF COPYRIGHT AND ANTITRUST LAW.....	85
A. <i>An Introduction to Copyright Law</i>	85
1. A Brief History: From England’s Statute of Anne to America’s Copyright Act of 1976.....	86
2. Title 17: Expansive Copyright Protection.....	88
a. <i>The Statutory Requirements</i>	89
b. <i>Statutory Grants and Enforcement</i>	91
3. The Misuse Doctrine Puts Copyright Protection in Check	92
B. <i>An Introduction to Antitrust Law</i>	97
1. Brief History: The “Trust” Problem Gives Birth to Antitrust Laws.....	98
2. The Sherman Act: The Cornerstone of Antitrust Policy	99

* J.D. Candidate 2014, Fordham University School of Law; B.S., 2009, University of Connecticut. I would like to thank Professor Mark Patterson for his guidance, and my parents for love that fuels my ambitions.

3. The Treatment of Tying Arrangements Under Antitrust Law.....	100
a. <i>The Per Se Rule</i>	102
b. <i>The Rule of Reason</i>	103
II. THE PUBLIC POLICY APPROACH VERSUS THE ANTITRUST APPROACH.....	105
A. <i>The Application of the Public Policy Approach</i>	105
1. Fourth Circuit: Defense Prevails.....	105
2. Ninth Circuit: Defense Prevails	107
3. Fifth Circuit: Defense Prevails.....	109
4. Ninth Circuit: Defense Fails	110
B. <i>The Application of the Antitrust Approach</i>	113
1. Seventh Circuit: Defense Fails.....	114
2. Eighth Circuit: Defense Fails.....	115
3. First Circuit: Defense Fails	115
III. A THREE-TIERED EVALUATIVE APPROACH TO A BETTER-DEFINED PUBLIC POLICY ANALYSIS.....	117
A. <i>The Public Policy Approach Yields Inconsistent Results</i>	117
B. <i>The Antitrust Approach Does Not Satisfy Policies Embedded in Copyright Law</i>	118
C. <i>Copyright Misuse Should Be Analyzed Under a Three-Tiered Approach</i>	120
1. The Public Policy of Promoting Progress	121
2. The Economic Feasibility of Available Alternatives	122
3. The Critical Business Justifications	124
CONCLUSION.....	124

INTRODUCTION

In early December 2012, Google released its “Maps” application for Apple’s iPhone. For many iPhone 5 users, this was indeed an early Christmas present. The iPhone 5, the smartphone that millions of Americans preordered and eagerly anticipated for most of 2012, had been released without Google Maps and came preloaded instead with Apple’s own mapping application. The decision to replace Google Maps with its own mapping application in the iOS 6 operating system is yet another example of Apple’s “compulsion . . . to have end-to-end control of every product that it [makes].”¹ To Apple’s disappointment, however, it became immediately apparent that its mapping application was inferior to that of its

1. WALTER ISAACSON, STEVE JOBS 561 (2011).

rival.² Saving the day, or more accurately, lost iPhone users, Google readily stepped in and released yet another top-notch mapping application.³ As a leader in technology, Apple has not accepted defeat and is pushing to improve its Maps application.⁴ It is anticipated that Apple's revamping efforts will be evident in its latest iOS 7 operating system.⁵ As computer software, both Apple Maps and Google Maps are copyrighted works.⁶

Assuming that Apple is successful in its "quest for perfection"⁷ and creates a superior mapping application for the iOS 7 operating system, would conditioning the purchase of the iPhone on the use or purchase of its copyrighted mapping application be a misuse of Apple's copyright? If so, would a defendant in an infringement claim be able to assert the misuse as an affirmative defense?

In this hypothetical scenario, Apple's attempt to tie one of its products to another is a classic example of a tying arrangement.⁸ A tying arrangement involves conditioning the sale or licensing of one product on the customer's agreement to purchase or license another.⁹ Consistent with that definition, a "'block' or 'package'" license, requiring a buyer or lessee to take more than one copyrighted product, can also constitute a tying arrangement.¹⁰ The "tying" product is the one sought by the consumer and the "tied" product is the one additionally required, which the consumer is essentially coerced to purchase or lease.¹¹ In the example above, the iPhone is the

2. Michael Liedtke, *Google Maps Return to iPhone with New Mobile App*, ASSOCIATED PRESS (Dec. 13, 2012, 7:14 PM), <http://bigstory.ap.org/article/google-maps-return-iphone-new-mobile-app>.

3. Nicole Goodkind, *Google Maps: Did Apple Cave to Consumer Pressure?*, CNBC (Dec. 14, 2012, 12:37 PM), http://www.cnbc.com/id/100315928/Google_Maps_Did_Apple_Cave_to_Consumer_Pressure ("[Google Maps] has become the most downloaded free application in the Apple app store."); David Pogue, *A Better Google Maps App for Apple and Android Devices*, N.Y. TIMES (July 10, 2013, 9:00 AM), <http://pogue.blogs.nytimes.com/2013/07/10/an-improved-google-maps-app-for-apple-and-android-devices/>.

4. Tim Cook, *A Letter from Tim Cook on Maps*, APPLE, <http://www.apple.com/letter-from-tim-cook-on-maps/> (last visited Sept. 20, 2013).

5. Daniel Eran Dilger, *iOS 7 Maps Go Full Screen, Navigation Gets Night Mode, New Siri Options*, APPLE INSIDER (July 12, 2013, 12:55 PM), <http://appleinsider.com/articles/13/07/12/ios-7-maps-go-full-screen-navigation-gets-night-mode-new-siri-options>.

6. See *infra* Part I.A.2 for a discussion of how software can qualify as copyrightable.

7. ISAACSON, *supra* note 1, at 561.

8. James B. Stewart, *The Shadow of Steve Jobs in Apple's Maps Push*, N.Y. TIMES, Oct. 6, 2012, at B1, available at <http://www.nytimes.com/2012/10/06/business/apples-map-app-could-raise-antitrust-concerns.html>.

9. BLACK'S LAW DICTIONARY 1660 (9th ed. 2009); see also *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498 (1969).

10. *United States v. Loew's, Inc.*, 371 U.S. 38, 55 (1962), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

11. *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 461 (1992); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958) (defining a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier"); *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1423 (9th Cir. 1995).

tying product and Apple's mapping application is the tied product. This Note explores the treatment of copyright misuse in the context of tying arrangements in an attempt to answer the questions above and similar ones.

While tying arrangements can give rise to independent antitrust claims,¹² the focus of this Note is the copyright misuse doctrine and the lack of clarity surrounding its application to tying arrangements. By definition, copyright creates a limited monopoly;¹³ thus, courts frequently invoke antitrust law when copyright holders attempt to use their copyright in impermissible ways.¹⁴ Other courts have approached the copyright inquiry from a public policy perspective.¹⁵ Therefore, a general understanding of both copyright and antitrust laws is necessary to contextualize the different approaches courts pursue in determining copyright misuse.¹⁶

From an intellectual property perspective, tying arrangements raise red flags because copyright owners and patent holders can use them "to obtain property rights outside the scope of the patent and the copyright and [to] obtain benefits in markets outside the coverage of the grant."¹⁷ Similarly, such arrangements are sometimes condemned from an antitrust perspective because they can unlawfully restrain trade of the tied product.¹⁸

Yet a dispute exists regarding whether, in some cases, tying can be economically justified. Many commentators advocate for the continued illegality of tying arrangements because such arrangements "injure rivals in the tied product market by cutting off their access to adequate markets,"¹⁹ facilitate collusion and "anticompetitive price discrimination,"²⁰ and work in opposition to the goal of promoting "the maximization of consumer welfare."²¹ In contrast, other commentators argue that such arrangements should be presumed lawful because of the benefits they confer on buyers and society, such as lower transaction costs.²² This Note, consonant with the weight of case law, adheres to the former view, maintaining that tying arrangements should continue to be proscribed to prevent their harmful effects.

12. See 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 9–10 (3d ed. 2006).

13. See *Brilliance Audio, Inc. v. Haight Cross Commc'ns, Inc.*, 474 F.3d 365, 373 (6th Cir. 2007). See generally Scott L. Bach, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 382–84 (1986).

14. See *infra* Part II.B.

15. See *infra* Part II.A.

16. See *infra* Part II.

17. Ilan Charnelle, *The Justification and Scope of the Copyright Misuse Doctrine and Its Independence of the Antitrust Laws*, 9 UCLA ENT. L. REV. 167, 173 (2002); see *infra* Part II.

18. See *infra* Part I.B.3.

19. 1 HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY & CHRISTOPHER R. LESLIE, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* 21–32 (2d ed. Supp. 2012).

20. *Id.*

21. E. THOMAS SULLIVAN, HERBERT HOVENKAMP & HOWARD A. SHELANSKI, *ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS I* (6th ed. 2009).

22. See 9 AREEDA & HOVENKAMP, *supra* note 12, at 36–38.

Part I provides an overview of copyright and antitrust laws as relevant to the context of this Note. Part II explores policy rationales and relevant case law in the context of tying arrangements under the public policy and antitrust approaches, respectively, underscoring the lack of uniformity in the evaluation of copyright misuse. Finally, Part III points out the inadequacies of these two approaches, which are predominantly applied by courts, and proposes a multi-tiered approach that would provide a more defined framework to the misuse analysis while holding steadfast to the underlying goals of copyright law.

I. AN OVERVIEW OF COPYRIGHT AND ANTITRUST LAW

This Part provides background information on copyright and antitrust laws for Part II's discussion of the public policy and antitrust approaches and Part III's proposed three-tiered approach to the judicial treatment of possible tying arrangements implicating copyright.

A. *An Introduction to Copyright Law*

Article 1, Section 8, Clause 8 of the U.S. Constitution enumerates important and expansive powers given to Congress.²³ Specifically, Clause 8 gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁴ In interpreting this clause, the U.S. Supreme Court has reasoned,

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.²⁵

23. U.S. CONST. art. I, § 8, cl. 8.

24. *Id.* The Patent and Copyright Clause is the basis for U.S. patent and copyright laws. While patent law, which protects new innovations, is relevant in the context of the development of the misuse doctrine, patent law more generally is outside the scope of this Note. For more information on patent law, see MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 31–35 (5th ed. 2010).

25. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (observing that the grant of copyright protections “is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”); *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1263 (D.C. Cir. 2005) (“The Clause authorizes the granting of a temporary monopoly over created works, in order to motivate authors and inventors while assuring the public free access at the end of the monopoly.”); LEAFFER, *supra* note 24, at 17 (“In general, arguments for establishing property rights in anything . . . are justified on two fundamental grounds: first, a person’s moral right to reap the fruits of his or her own labor . . . and second, a utilitarian rationale that views copyright law as an incentive system

This desire to incentivize creators and inventors has become especially important in the post-industrial era, which marked the rise of technological developments and information industries.²⁶ At the same time, however, a capitalistic market crumbles if it abandons its competitive elements and becomes overly monopolistic.²⁷ As such, restraints and limitations are often put in place to ensure the functionality of our multifaceted, and often convoluted, economic system.²⁸ In this manner, the broadly defined copyright grants are prevented from becoming excessively or perpetually protective at the expense of public creativity and future developments.²⁹

To provide a clear understanding of copyright law, this section briefly summarizes its historical development, the requirements and scope of the copyright grant, and the evolution and treatment of the misuse doctrine.

1. A Brief History: From England's Statute of Anne to America's Copyright Act of 1976

The first copyright act, the Statute of Anne, was passed in England in 1710,³⁰ and granted authors the limited exclusive right to make copies of their own work.³¹ This statute was the last response in a series of efforts to balance the benefits of the printing press with authors' ownership rights.³² The invention of the printing press made the publishing process more time efficient and less costly, naturally benefiting publishers and sellers.³³ However, the original authors obtained no additional benefit from these large-volume publications.³⁴ The Crown's first response was to implement

designed to produce an optimal quantity of works of authorship, and thereby enhance public welfare.”).

26. A 2006 Report estimated that in 2005, the copyright industries accounted for 6.56 percent of the U.S. Gross Domestic Product. STEPHEN E. SIWEK, ECONOMISTS INCORPORATED, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT 2 (2007), available at www.iipa.com/pdf/2006_siwek_full.pdf; see also LEAFFER, *supra* note 24, at 2 (“While the U.S. continues to experience large and growing trade deficits, the copyright industries continue to thrive in overseas sales and exports.”).

27. See generally 2B PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 8 & n.2 (3d ed. 2007); RICHARD A. POSNER, ANTITRUST LAW 9 (2d ed. 2001).

28. See, e.g., 17 U.S.C. §§ 107–112; *infra* Part I.A.3.

29. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) (“Copyright law strikes a precarious balance. To encourage authors to create and disseminate original expression, it accords them a bundle of proprietary right in their works. But to promote public education and creative exchange, it invites audiences and subsequent authors to use existing works in every conceivable manner that falls outside the province of the copyright owner's exclusive rights.”).

30. An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, 8 Ann., c. 19 (1710) (Eng.).

31. LEAFFER, *supra* note 24, at 2, 4.

32. *Id.* at 4.

33. *Id.*

34. *Id.*

temporary measures, chartering the Royal Stationers' Company,³⁵ which exercised essentially unchecked monopoly power over publications and prohibited publication prior to its approval.³⁶ After 138 years, however, the Company's exclusive license expired, resulting in unregulated competition.³⁷ Parliament responded by passing the Statute of Anne which limited authors' rights to a specific number of years and "declared that [the statute's] ultimate purpose was to enhance public welfare by encouraging the dissemination of knowledge."³⁸ Toward the end of the century, the House of Lords reinforced that purpose in *Donaldson v. Beckett*, which established that a copyright does not exist in perpetuity and that the work falls into the public domain upon the expiration of the copyright grant.³⁹

In the United States, the first Copyright Act was passed in 1790⁴⁰ pursuant to the constitutional authority of the Patent and Copyright Clause.⁴¹ This Act was "modeled on the Statute of Anne, [and] set the tone for future statutes."⁴² Over the years, U.S. copyright law has drastically changed, covering much broader ground and granting protection for a much longer term.⁴³ Nonetheless, two important features of copyright law have remained consistent throughout its development in the United States: its acclimation to technological changes and its underlying purpose.⁴⁴

In 1905, President Roosevelt "called for complete revision of the copyright law to meet modern conditions," and four years later, Congress passed the Copyright Act of 1909.⁴⁵ Notably, in contrast to prior

35. The Royal Stationers' Company was a London-based company that was involved in the sale and trade of books. See generally CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY* 31–33 (1960).

36. LEAFFER, *supra* note 24, at 4.

37. *Id.*

38. *Id.*

39. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 838.

40. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831); Colin Morrissey, Note, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 *FORDHAM L. REV.* 3059, 3064 (2010).

41. Some commentators have argued that the source of the language of the Patent and Copyright Clause was the Statute of Anne. See, e.g., L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* 242 (2009); Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 *HARV. J.L. & TECH.* 287, 306–07 (2002). However, others have opined that because the Clause was adopted in a secret proceeding and without debate, the framers' intent and the purpose of the clause's adoption are unknown. LEAFFER, *supra* note 24, at 6; Ralph Oman, Register of Copyrights, *The Copyright Clause: "A Charter for a Living People"* (Aug. 10, 1987), reprinted in 17 *U. BALT. L. REV.* 99, 102–03 (1987).

42. LEAFFER, *supra* note 24, at 6; see PATTERSON & BIRCH, *supra* note 41, at 242.

43. See generally PATTERSON & BIRCH, *supra* note 41, at 260–64.

44. See LEAFFER, *supra* note 24, at 3–4.

45. *Id.* at 7. For a detailed discussion of the 1909 Act, see generally W. Ron Gard & Elizabeth Townsend Gard, *The Present (User-Generated Crisis) Is the Past (1909 Copyright Act): An Essay Theorizing the "Traditional Contours of Copyright" Language*, 28 *CARDOZO ARTS & ENT. L.J.* 455, 458–60 (2011). See also Kate Cross, Comment, *David v. Goliath: How the Record Industry Is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 *TEX. TECH L. REV.* 1031, 1039–41 (2010).

legislation, under the 1909 Act, copyright protection was triggered by publication and not by registration of the work,⁴⁶ and imposed strict liability on all infringers.⁴⁷ The 1909 Act, however, failed to conform to the first international copyright convention,⁴⁸ the Berne Convention for the Protection of Literary and Artistic Works.⁴⁹ The Berne Convention remains the principal copyright convention today, and its success is evidenced “by its large number of adherents, which by the mid-1980s included every major country in the world except China, the Soviet Union, and the United States.”⁵⁰ The 1909 Act conflicted with the Berne Convention in two major ways: (1) it required notice on all published works, and (2) it provided for a much shorter term of copyright protection.⁵¹ As a result, the 1909 Act prevented the United States from conforming with international copyright law.⁵²

Congress amended the 1909 Act gradually, reflecting the evolving needs of society and rapid technological changes.⁵³ Eventually it became apparent that a new and revised copyright statute was necessary, and Congress authorized revision efforts in 1955.⁵⁴ After two decades “of reports and extensive hearings,” the Copyright Act of 1976 was passed.⁵⁵ In 1989, the United States finally became a contracting party to the Berne Convention.⁵⁶

2. Title 17: Expansive Copyright Protection

The Copyright Act of 1976 was codified in Title 17 of the U.S. Code and constitutes the current federal law on copyright protection.⁵⁷ This section will explain its important provisions.

46. LEAFFER, *supra* note 24, at 7. See Gard & Gard, *supra* note 45, at 468 (“Under the 1909 Copyright Act, federal legal protection only occurred upon the act of publication, recognized as a required series of formal steps that gave proper notice of one’s intent to enforce the copyright. In contrast, federal copyright protection under the 1976 Copyright Act arises automatically upon creation of the work . . .”).

47. See generally Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 381–83 (2002).

48. LEAFFER, *supra* note 24, at 7–8.

49. See Berne Convention for the Protection of Literary and Artistic Works art. 7, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979).

50. *Id.* at 8.

51. *Id.*

52. *Id.* at 7–8.

53. *Id.* at 9.

54. *Id.*

55. *Id.*

56. *WIPO-Administered Treaties*, WORLD INT’L PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Sept. 20, 2013). For more information on the implementation of the Berne Convention in the United States, see LEAFFER, *supra* note 24, at 11–15.

57. Also, to the extent that federal and state copyright laws conflict, federal law preempts. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228 (1964); MARY LAFRANCE, *COPYRIGHT LAW IN A NUTSHELL 2* (2008).

a. The Statutory Requirements

Section 102 of Title 17 provides that copyright protection subsists “in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁵⁸ Based on § 102, there are three copyright requirements: (1) originality, (2) works of authorship, and (3) fixation in a tangible medium.⁵⁹ This section provides a brief explanation of each of the requirements, respectively.

Originality of the work is the first requirement and the “*sine qua non* of copyright.”⁶⁰ To be original, a work must be both independently created by the author and at least minimally creative.⁶¹ A work is independently created if it is not copied from other works,⁶² and any “creative spark” satisfies the creativity requirement, “‘no matter how crude, humble or obvious’ it might be.”⁶³ Generally, the author of the work is presumed to be the one that created the work in question and the one entitled to copyright ownership.⁶⁴ Nonetheless, a legal entity, such as a corporation, can be the “author” of the work under the work for hire doctrine.⁶⁵

58. 17 U.S.C. § 102(a) (2006). In other words, “two essential elements—[an] original work and [a] tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.” H.R. REP. NO. 94-1476, at 53 (1976).

59. 17 U.S.C. § 102(a).

60. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (“The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.”).

61. See generally *Feist Publ’ns, Inc.*, 499 U.S. at 345.

62. See *id.* at 345–46 (“[A] work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

63. *Id.* at 345 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, COPYRIGHT § 1.08[C][1] (1990)). “Originality does not require ‘novelty, ingenuity, or aesthetic merit.’” *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 141 (5th Cir. 1992) (quoting H.R. REP. NO. 94-1476, at 51 (1976)); see *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951) (“All that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’” (quoting *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945))); see also *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 278 (6th Cir. 1988).

64. 17 U.S.C. § 201(a) (2006); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

65. 17 U.S.C. § 101 (“A ‘work made for hire’ is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”); see also *Scherr v. Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting); LEAFFER, *supra* note 24, at 195–96.

“Works of authorship” is the second statutory requirement and includes: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.⁶⁶ This list of categories is illustrative of copyrightable expressions and is not exhaustive.⁶⁷ The first category, “literary works,” is defined as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects . . . in which they are embodied.”⁶⁸ Computer programs and software copyright protection falls under this category.⁶⁹ Because “‘literary works’ in section 101 includes expression not only in words but also ‘numbers, or other . . . numerical symbols or indicia,’” computer programs, which are expressed in object code, are also copyrightable.⁷⁰

It is important to note, however, that copyright protection for any work of authorship is limited to *how* an idea is expressed and does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁷¹ Such material is subject to patent, not copyright, protection.⁷²

66. 17 U.S.C. § 102(a)(1)–(8).

67. H.R. REP. NO. 94-1476, at 54 (1976) (stating that the list of categories are “‘illustrative and not limitative,’ and . . . do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect”); see LAFRANCE, *supra* note 57, at 8.

68. 17 U.S.C. § 101; see, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 94–95 (2d Cir. 1987); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (holding that while facts are not protected, the specific compilation of the facts can fall within the scope of copyright protection).

69. See LAFRANCE, *supra* note 57, at 16 (stating that the “literary works” category “includes all types of computer software—operating system software and applications software”); LEAFFER, *supra* note 24, at 101; see, e.g., *Johnson Controls, Inc. v. Phx. Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989); *Apple Computer, Inc. v. Formula Int’l, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247 (3d Cir. 1983).

70. *Franklin Computer Corp.*, 714 F.2d at 1249 (“[A] computer program, whether in object code or source code, is a ‘literary work’ and is protected from unauthorized copying, whether from its object or source code version.”).

71. 17 U.S.C. § 102(b). For example, “[w]hile the factual information conveyed in a map, such as landmarks and street locations, is not entitled to copyright protection, ‘any originality in the manner of expression employed in communicating the factual information’ can be protected by a copyright.” *City of N.Y. v. Geodata Plus, LLC*, 537 F. Supp. 2d 443, 450 (E.D.N.Y. 2007) (quoting *Sparaco v. Lawler, Matusky, Skelly, Eng’rs LLP*, 303 F.3d 460, 467 (2d Cir. 2002)); see *Corbello v. DeVito*, 844 F. Supp. 2d 1136, 1152 (D. Nev. 2012) (“Copyright law only protects expression of ideas, not the ideas themselves.” (quoting *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624–25 (9th Cir. 2010))); see also Anthony J. Mahajan, Note, *Intellectual Property, Contracts, and Reverse Engineering After ProCD: A Proposed Compromise for Computer Software*, 67 FORDHAM L. REV. 3297, 3301 (1999).

72. See LEAFFER, *supra* note 24, at 31–32.

As to the third and last requirement, a work is “fixed” if it is in any “tangible medium of expression,” such as in writing or a drawing.⁷³ The tangible embodiment must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁴ If the fixation is made without the author’s consent, however, such as recording a concert where recording was prohibited, it will not qualify for copyright protection.⁷⁵

While the foregoing underscores the expansive scope of the statute, the requirements it sets forth are quite permissive.⁷⁶ The first requirement, originality, is satisfied based on a de minimus standard—so long as the work is not copied and there is a spark of creativity.⁷⁷ The second requirement, work of authorship, encompasses a long and not exhaustive list of categories, so that virtually any original work can be found to meet this requirement. The last requirement, fixation, is met so long as any tangible medium of expression is used, which practically only excludes conversations and other events not captured via a tangible medium at the time they occurred. Accordingly, a wide range of works can be copyrighted under the statute.

b. Statutory Grants and Enforcement

Once an original work of authorship is fixed in tangible form,⁷⁸ the statutory requirements of ownership are met and copyright protection is triggered,⁷⁹ giving the owner the exclusive right to reproduce,⁸⁰ distribute copies,⁸¹ publically perform⁸² or display the work,⁸³ and prepare derivative

73. 17 U.S.C. § 102(a).

74. 17 U.S.C. § 101. For example, “an unscripted live event, such as a football game, is ordinarily not eligible for copyright protection. In contrast, a recording of that event is copyrightable.” LAFRANCE, *supra* note 57, at 11.

75. 17 U.S.C. § 1101; *see* LAFRANCE, *supra* note 57, at 12–13.

76. *See generally* Deborah Kemp, *Copyright on Steroids: In Search of an End to Overprotection*, 41 MCGEORGE L. REV. 795, 805 (2010); Mark E. Dailey, *Abstraction, Filtration, Comparison: The Difficult Task of Defining and Applying an Appropriate Substantial Similarity Test for Computer Software*, 34 SUFFOLK U. L. REV. 415, 442 (2001).

77. “Originality is not a stringent standard; it does not require facts be presented in an innovative or surprising way.” *Am. Massage Therapy Ass’n v. Maxwell Petersen Assocs., Inc.*, 209 F. Supp. 2d 941, 947 (N.D. Ill. 2002).

78. *See supra* Part I.A.2.a.

79. Copyright protection automatically attaches to the copyrightable work. STEPHEN FISHMAN, *THE COPYRIGHT HANDBOOK* 7 (Richard Stim ed., 10th ed. 2008); *see* LAFRANCE, *supra* note 57, at 3 (“Under current law, compliance with formalities is not a prerequisite to copyright protection. Thus, a work that satisfies § 102 is protected by federal copyright from the moment it is fixed in a tangible medium of expression, without regard to whether it bears a copyright notice or has been registered.”).

80. 17 U.S.C. § 106(1).

81. *Id.* § 106(3).

82. *Id.* § 106(6).

83. *Id.* § 106(5).

works.⁸⁴ Copyright protection runs for the life of the author plus seventy years.⁸⁵ For joint works, the seventy-year term starts to run upon the death of the last author.⁸⁶ If the author is unknown, or if the work is a product of work for hire, protection lasts for 120 years from creation or ninety-five years from publication, whichever is first to expire.⁸⁷

The copyright owner may also choose, but is not required, to register the copyright with the U.S. Copyright Office.⁸⁸ As long as the certificate of registration is made before, or within five years of, the work's first publication, it constitutes prima facie evidence of the facts stated in the certificate and the copyright's validity.⁸⁹ Registration and subsequent notice of the copyright is also beneficial to the owner because it gives the public notice of the protected work, and eliminates the possibility that the defendant's liability will be mitigated based on an assertion of innocent infringement.⁹⁰

Copyright infringement involves the exercise of a copyright owner's exclusive rights without prior authorization.⁹¹ The burden of proof in a copyright infringement claim falls on the plaintiff, who must establish ownership of a valid copyright and the defendant's infringement of that copyright.⁹² More specifically, the copyright owner must establish three things: (1) the existence of a valid copyright by proving that the requirements of § 102(a) are satisfied,⁹³ (2) violation of the owner's exclusive right under § 106, and (3) improper appropriation by showing that the infringer created a "substantially similar" work to the copyrighted work.⁹⁴

3. The Misuse Doctrine Puts Copyright Protection in Check

The courts, pursuing a balance between protecting authors and inventors and enabling market competition, have further shaped and limited the broad constitutional grant enumerated in Article I and the expansive protections set forth in Title 17. The copyright misuse defense doctrine is a product of that pursuit. The misuse defense "has its historical roots in the unclean hands defense,"⁹⁵ barring intellectual property owners from recovery when a defendant affirmatively proves that the culpable plaintiff used the

84. *Id.* § 106(2).

85. *Id.* § 302(a).

86. *Id.* § 302(b).

87. *Id.* § 302(c).

88. FISHMAN, *supra* note 79, at 7.

89. 17 U.S.C. § 410(c).

90. *Id.* § 401(d).

91. LEAFFER, *supra* note 24, at 419.

92. *Int'l Media Films, Inc. v. Lucas Entm't, Inc.*, 703 F. Supp. 2d 456, 462 (S.D.N.Y. 2010).

93. *See supra* Part I.A.2.a.

94. LEAFFER, *supra* note 24, at 419–20; *see* FISHMAN, *supra* note 79, at 319.

95. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792 (5th Cir. 1999).

protected intellectual property right “to secure an exclusive right or limited monopoly not [otherwise] granted.”⁹⁶

Misusing the copyright does not invalidate it but rather renders it unenforceable until the misuse has been “purged.”⁹⁷ This has been interpreted as requiring that “the improper practice has been abandoned and that the consequences of the misuse of the patent [or copyright] have been dissipated.”⁹⁸ While the copyright is unenforceable due to misuse, any defendant or potential defendant can affirmatively raise the misuse defense, even in the absence of any injury or harm.⁹⁹ In other words, causal connection between the misuse and the injury is not a required element of the misuse defense.

The misuse defense is an affirmative defense.¹⁰⁰ Briefly, this means that a defendant invoking the misuse defense concedes infringement *if the copyright use is valid*, but asserts that the plaintiff was using its copyright in an improper way.¹⁰¹

The copyright misuse defense was a logical extension of the patent misuse defense.¹⁰² Patent misuse was first expressly recognized in the 1942 Supreme Court decision, *Morton Salt Co. v. G. S. Suppiger Co.*¹⁰³ In *Morton Salt Co.*, G. S. Suppiger Company licensed its patented salt-depositing machines on the condition that users use the patentee’s own salt tablets with the leased machines.¹⁰⁴ When Morton Salt Company failed to do so, the patentee brought an infringement claim against Morton Salt Company seeking an injunction and damages.¹⁰⁵ The Supreme Court refused to grant the patentee relief, reversing the Seventh Circuit’s decision.¹⁰⁶ The Seventh Circuit’s holding was based on the finding that the tie-in had not “substantially lessened competition or tended to create a monopoly” and thus did not constitute a violation of antitrust laws.¹⁰⁷ Contrary to the Seventh Circuit’s antitrust approach, the Supreme Court

96. *Id.* at 793; *see infra* Part II.

97. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 n.22 (4th Cir. 1990).

98. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 493 (1942), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

99. *See Lasercomb*, 911 F.2d at 978; *Apple Inc. v. Psystar Corp.*, No. C 08–03251 WHA, 2009 WL 303046, at *2 (N.D. Cal. Feb. 6, 2009).

100. *See Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868 (Fed. Cir. 1997); *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001 (Fed. Cir. 1986); David Scher, Note, *The Viability of the Copyright Misuse Defense*, 20 *FORDHAM URB. L.J.* 89, 94 (1992).

101. *See LEAFFER, supra* note 24, at 535.

102. *See generally Lasercomb*, 911 F.2d at 973; Charnelle, *supra* note 17, at 168–74; Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 *COMM. L. & POL’Y* 565, 570 (2006) (“Copyright misuse is a [sic] not a new doctrine. It emerged from patent law and has been used by the courts since the landmark patent misuse case, *Morton Salt Co. v. G. S. Suppiger Co.*”).

103. 314 U.S. 488.

104. *Id.* at 490.

105. *Id.* at 489.

106. *Id.* at 490.

107. *Id.*

purported to apply an “equity rationale,” pursuant to which public policy “forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office *and* which it is contrary to public policy to grant.”¹⁰⁸ Interestingly, the Court did not specify how the use was “contrary to public policy,” and instead limited its analysis to a showing that the patent secured a “limited monopoly not granted by the Patent Office.”¹⁰⁹ The Court held that the tying arrangement was an attempt to “*restrain competition* in the marketing of unpatented articles, salt tablets, for use with the patented machines, and [was] aiding in the creation of a limited monopoly in the tablets not within that granted by the patent.”¹¹⁰

Though this case arose as an antitrust claim under the Clayton Act, the Supreme Court decided it in its capacity as a “court of equity,” considering simply whether the patentee’s action was “contrary to public policy.”¹¹¹ The Court’s public policy analysis differed in form, but not in function, from the Seventh Circuit’s antitrust analysis, because both were concerned with restraints on competition, an antitrust concept.¹¹² While the two courts seemed to apply different analyses, they actually reached opposing conclusions based on varying interpretations of the facts. Simply stated, the Seventh Circuit, applying an antitrust analysis, found that competition was not restrained. By contrast, the Supreme Court, purporting to apply a public policy analysis but in fact applying an antitrust analysis, found that competition was restrained.

Unsurprisingly, this landmark decision, often cited by courts applying and extending the misuse doctrine, left much uncertainty and confusion for subsequent courts to weed through.¹¹³ This Note addresses how later decisions, extending to copyrights the misuse doctrine as it was first articulated in *Morton Salt Co.*, have reached different conclusions as to whether the antitrust or the public policy approach is appropriate in the misuse analysis. Furthermore, those applying the latter approach have not done so with the same public policy considerations in mind.¹¹⁴

This lack of uniformity is exacerbated by the fact that, in the context of copyrights, the Supreme Court has not expressly approved or upheld the misuse defense.¹¹⁵ The Supreme Court has, however, suggested in a

108. *Id.* at 492 (emphasis added).

109. *Id.*

110. *Id.* at 491 (emphasis added).

111. *Id.* at 490.

112. *G. S. Suppiger Co. v. Morton Salt Co.*, 117 F.2d 968 (7th Cir. 1941), *rev'd*, 314 U.S. 488 (1942), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

113. See Note, *Clarifying the Copyright Misuse Defense: The Role of Antitrust Standards and First Amendment Values*, 104 HARV. L. REV. 1289, 1291 (1991) (“Almost immediately, the relationship between patent misuse doctrine and antitrust law became confused.”).

114. See *infra* Part II.A.

115. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) (“[N]o United States Supreme Court decision has firmly established a copyright misuse defense in a manner analogous to the establishment of the patent misuse defense by *Morton Salt*.”).

number of other cases that “the purpose and policy of patent misuse apply as well to copyright,”¹¹⁶ and has also “given at least tacit approval of the defense”¹¹⁷ in *United States v. Loew’s, Inc.*¹¹⁸ In *Loew’s, Inc.*, the defendants, distributors of copyrighted motion picture feature films, “conditioned the license or sale of one or more feature films upon the acceptance by the station of a package or block containing one or more unwanted or inferior films.”¹¹⁹ The Court, applying an antitrust analysis, found it “clear that the tying arrangements here both by their ‘inherent nature’ and by their ‘effect’ injuriously restrained trade” and held that recovery for infringement should be denied.¹²⁰ In this decision, the Court extended the patent misuse doctrine to copyrights, reasoning, “Accommodation between the statutorily dispensed monopoly in the combination of contents in the patented or copyrighted product and the statutory principles of free competition demands that extension of the patent or copyright monopoly by the use of tying agreements be strictly confined.”¹²¹ In doing so, the Court implicitly approved, but fell short of expressly articulating, the copyright misuse defense.¹²²

Nonetheless, the copyright misuse defense has been expressly articulated by a number of lower courts and was even applied far earlier than its articulation, as evinced in *M. Witmark & Sons v. Jensen*.¹²³ In this 1948 decision, the plaintiffs, motion picture companies, alleged copyright infringement by defendants, theater owners, of certain copyrighted musical compositions.¹²⁴ The defendants countered that the plaintiffs were not entitled to relief because they had illegally extended their copyrights and violated the Sherman Antitrust Act.¹²⁵ Based on the finding that the plaintiffs had the “power to deny to any theatre owner . . . the right to

Nonetheless, “[t]here is little doubt that copyright misuse will eventually resurface in the Supreme Court and be reconciled. On this point, lower courts and commentators alike agree; however, divergent opinions abound as to what should be the proper scope and guiding principles for copyright misuse.” Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 888 (2000).

116. *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 846 (Fed. Cir. 1992) (collecting Supreme Court cases); see *Lasercomb*, 911 F.2d at 976 (“[S]ince copyright and patent law serve parallel public interests, a ‘misuse’ defense should apply to infringement actions brought to vindicate either right. . . . Both patent law and copyright law seek to increase the store of human knowledge and arts by rewarding inventors and authors with the exclusive rights to their works for a limited time. At the same time, the granted monopoly power does not extend to property not covered by the patent or copyright.”).

117. *Atari Games Corp.*, 975 F.2d at 846.

118. *United States v. Loew’s, Inc.*, 371 U.S. 38, 38 (1962), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

119. *Id.* at 40.

120. *Id.* at 49–50 (quoting *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911)).

121. *Id.* at 49.

122. Charnelle, *supra* note 17, at 171.

123. 80 F. Supp. 843 (D. Minn. 1948).

124. *Id.* at 844.

125. *Id.*

exhibit films containing Ascap music,”¹²⁶ a right without which “no theatre owner would be able to stay in business,” the district court held that the plaintiffs unlawfully extended their copyright monopoly, and thereby violated the public policy goals of copyright law.¹²⁷ As a result, the court also held that “it [was] not necessary to determine whether anti-trust violations alone would deprive plaintiffs of the right of recovery.”¹²⁸ By denying recovery to the copyright owners based on both the defendants’ antitrust contention and the finding that the plaintiffs had illegally extended their copyrights, the court effectively permitted application of what is known today as the copyright misuse defense.¹²⁹

In 1990, the copyright misuse defense was clearly articulated by the Fourth Circuit in *Lasercomb America, Inc. v. Reynolds*.¹³⁰ In *Lasercomb*, the plaintiff, a software program developer, brought an infringement claim alleging that defendants acted in violation of the standard licensing agreement, which restricted “licensees from creating any of their own CAD/CAM die-making software.”¹³¹ The court extended the patent misuse defense to copyrights and explained its rationale as follows:

The origins of patent and copyright law in England, the treatment of these two aspects of intellectual property by the framers of our Constitution, and the later statutory and judicial development of patent and copyright law in this country persuade us that parallel public policies underlie the protection of both types of intellectual property rights. . . . [T]hese parallel policies call for application of the misuse defense to copyright as well as patent law.¹³²

Accordingly, the court held that the broadly restrictive licensing terms constituted a valid defense of copyright misuse and the plaintiff “should have been barred . . . from suing for infringement of its copyright.”¹³³

Since then, many district and circuit courts, including the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Federal Circuits, have recognized the copyright misuse doctrine.¹³⁴ These courts, however, have not followed a

126. ASCAP is an acronym for the American Society of Composers, Authors, and Publishers. *Id.* It is a voluntary association that protects performing rights. *About ASCAP*, AM. SOC’Y COMPOSERS, AUTHORS & PUBLISHERS, <http://www.ascap.com/about/> (last visited Sept. 20, 2013). The plaintiffs in this case were ASCAP members. *Jensen*, 80 F. Supp. at 844.

127. *Jensen*, 80 F. Supp. at 846, 850.

128. *Id.* at 850.

129. *Id.* at 846.

130. 911 F.2d 970 (4th Cir. 1990).

131. *Id.* at 972.

132. *Id.* at 974. The court further stated that “a misuse of copyright defense is inherent in the law of copyright just as a misuse of patent defense is inherent in patent law.” *Id.* at 973.

133. *Id.* at 979.

134. Charnelle, *supra* note 17, at 171; *see Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999); *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 846 (Fed. Cir. 1992); *Lasercomb*, 911 F.2d at 976; *United Tel. Co. of Mo. v. Johnson Publ’g Co.*, 855 F.2d 604, 610–12 (8th Cir. 1988); *Saturday Evening Post*

uniform method of analysis in addressing the copyright misuse defense. This Note discusses the two approaches that have most commonly been applied by courts: a public policy approach and an antitrust approach. While the focus of this Note is copyright misuse in the context of tying arrangements, most of the discussion is also applicable to other areas of intellectual property law.

B. An Introduction to Antitrust Law

Antitrust law seeks to protect market competition “by setting limits on the collusive and predatory conduct and monopolistic abuses that free markets often breed.”¹³⁵ The sources of antitrust law in the United States are federal laws, state laws, and judicial jurisprudence. Of most importance is the Sherman Act, a federal law passed in 1890 in “an effort to codify the English common law governing restraints of trade and monopolies.”¹³⁶ Subsequently, a number of federal statutes, like the Clayton Act, and regulations, promulgated by the Federal Trade Commission, were created.¹³⁷ These federal antitrust laws clearly signified that “Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.”¹³⁸ In addition, most states have enacted general antitrust statutes with the Sherman Act as the foundation.¹³⁹ Finally, as is often the case with legislation, judicial interpretation has shaped and defined antitrust law.¹⁴⁰

This section provides an overview of the historical context that necessitated the enactment of the Sherman Act, explains its provisions applicable to tying arrangements, and ultimately describes the antitrust law treatment of tying arrangements.

Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1199–1201 (7th Cir. 1987); CBS, Inc. v. Am. Soc’y of Composers, Authors, & Publishers, 607 F.2d 543, 544–45 (2d Cir. 1979).

135. DOUGLAS BRODER, U.S. ANTITRUST LAW AND ENFORCEMENT: A PRACTICE INTRODUCTION 2 (2010). “The design of the Sherman Act was intended to restore the balance between necessary business arrangements having primarily reasonable objectives and effects, and arrangements which were unduly restrictive and attributable to anticompetitive motives.” 1 EARL W. KINTNER, FEDERAL ANTITRUST LAW 240-41 (1980); *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”). *See generally* Ramsey Hanna, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STAN. L. REV. 401 (1994).

136. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 8 (2000).

137. BRODER, *supra* note 135, at 6–7.

138. Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951) (quoting A. E. Staley Mfg. Co. v. FTC, 135 F.2d 453, 455 (7th Cir. 1943)).

139. BRODER, *supra* note 135, at 2.

140. SULLIVAN & GRIMES, *supra* note 136, at 8 (“The broadly worded provisions of the Sherman and Clayton Acts have invited—indeed required—judicial construction.”).

1. Brief History: The “Trust” Problem Gives Birth to Antitrust Laws

American antitrust policies were influenced by English common law relating to trade and monopolies.¹⁴¹ During the nineteenth century, the old English common law definition of agreements in “restraint of trade” was expanded from not-to-compete covenants to “restrictions on trade in general.”¹⁴² This newly defined concept of trade restrictions marked the beginning of efforts by “American courts [to] mold[] the broadened doctrine into a useful, if imperfect, general antimonopoly instrument.”¹⁴³ With respect to public grants of monopolies, England’s Statute of Monopolies of 1623 represented “the formal culmination of English opposition to” grants of monopolies which restrained trade; such opposition later “became an established part of the American tradition.”¹⁴⁴

Aside from British influences, the economic climate in the United States during the latter half of the nineteenth century further pushed the application of the common law, and brought to light the significance of laws regulating competitive behaviors.¹⁴⁵ During that time period, a number of businesses and organizations consolidated to create what became known as “trusts.”¹⁴⁶ The trusts were originally formed as means of protecting competitors from the “[f]ierce cutthroat competition” that accompanied the laissez-faire era,¹⁴⁷ but they ultimately restrained competition instead by appropriating markets and profits among its members.¹⁴⁸ The states were first to respond to public disapproval of trusts and similar agreements.¹⁴⁹ At least twenty-six states outlawed arrangements that stifled competition via statutory or constitutional prohibitions.¹⁵⁰ Despite their efforts, the states were unable to adequately address the nationally reaching “trusts” problem due to a “lack of coordinated and aggressive public prosecution,”¹⁵¹ as well as “jurisdictional and legislative limitations.”¹⁵² With this background, the Sherman Act was

141. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY* 36 (1954).

142. WILLIAM R. ANDERSEN & C. PAUL ROGERS III, *ANTITRUST LAW: POLICY AND PRACTICE* 7 (3d ed. 1999).

143. *Id.*

144. *Id.* at 6.

145. See BRODER, *supra* note 135, at 6–7.

146. See generally JOHN MOODY, *THE TRUTH ABOUT THE TRUSTS: A DESCRIPTION AND ANALYSIS OF THE AMERICAN TRUST MOVEMENT*, at xii–xiv (1904).

147. KINTNER, *supra* note 135, at 80.

148. *Id.* at 81.

149. *Id.* at 129; see Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 606 (2012) (“At the turn of the nineteenth century, antitrust emerged because of the public’s fear of ‘trusts.’”).

150. ABA SECTION OF ANTITRUST LAW, *STATE ANTITRUST ENFORCEMENT HANDBOOK* 4 (2d ed. 2008).

151. ANDERSEN & ROGERS, *supra* note 142, at 8.

152. Richard E. Donovan, *Antitrust Litigation*, in *COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* § 89:7 (Robert L. Haig ed., 3d ed. 2010).

enacted “to supplement . . . the preexisting antitrust enforcement engaged in by the states.”¹⁵³

2. The Sherman Act: The Cornerstone of Antitrust Policy

The Sherman Act is named for Republican Senator John Sherman.¹⁵⁴ His 1888 resolution was adopted by the Senate without debate¹⁵⁵ and signed by President Benjamin Harrison into law in 1890,¹⁵⁶ thereby producing “the first general statute dealing with the trust problem.”¹⁵⁷ The Sherman Act was formally titled, “An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies.”¹⁵⁸ The Act’s original objectives can be inferred from its formal title, as well as the significant role its enforcement plays in today’s competitive market.¹⁵⁹

Immediately after its passage, the government successfully “curb[ed] the power and monopolistic abuses of the trusts that had come to dominate the American economic scene”¹⁶⁰ by using “its newfound power to break up trusts or cartels in the steel, rail, and petroleum industries.”¹⁶¹ Since then, the aggressiveness of antitrust enforcement has varied in response to the economic and political climate at any given period.¹⁶² Despite such variations, it is widely accepted today that the Sherman Act is the most important source of federal statutory authority in antitrust policy.¹⁶³

The first two sections of the Sherman Act, which are most relevant in the context of tying arrangements, “contain the substantive matter of the act, defining the offenses and providing certain penalties.”¹⁶⁴ Section 1 states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹⁶⁵ Section 2 prohibits

153. *Id.*

154. THORELLI, *supra* note 141, at 166.

155. *Id.*

156. KINTNER, *supra* note 135, at 238.

157. THORELLI, *supra* note 141, at 166.

158. KINTNER, *supra* note 135, at 125–26.

159. *Id.*; *see* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions [T]he policy unequivocally laid down by the Act is competition.”).

160. ANDERSEN & ROGERS, *supra* note 142, at 22.

161. BRODER, *supra* note 135, at 6.

162. *See id.* at 4.

163. *See* KINTNER, *supra* note 135, at 125 (“The Sherman Antitrust Act of 1890 is the cornerstone of American antitrust policy.”).

164. THORELLI, *supra* note 141, at 221.

165. 15 U.S.C. § 1 (2006).

monopolization, attempt, or conspiracy “to monopolize any part of the trade or commerce among the several States, or with foreign nations.”¹⁶⁶

3. The Treatment of Tying Arrangements Under Antitrust Law

Tying arrangements are generally asserted under one or both of the first two sections of the Sherman Act. Since both of these sections are written in broad terms, judicial interpretation plays an important role in defining their reach.¹⁶⁷ Earlier cases evidenced a strong disapproval of tying arrangements. For instance, in *Northern Pacific Railway Co. v. United States*, Justice Harlan stated that

‘tying agreements serve hardly any purpose beyond the suppression of competition.’ They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons ‘tying agreements fare harshly under the laws forbidding restraints of trade.’¹⁶⁸

However, courts have subsequently moved away from such strong anti-tying arrangement views while still maintaining the illegality of these practices. For example, in *Jefferson Parish Hospital District No. 2 v. Hyde*, the Court stated that

not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller’s decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts.¹⁶⁹

As *Jefferson Parish* established and later courts upheld, not every instance of tying is unlawful. Tying arrangements are “an object of antitrust concern . . . [when they] force buyers into giving up the purchase of substitutes for the tied product [or] destroy the free access of competing suppliers of the tied product to the consuming market.”¹⁷⁰ In other words, when a tying arrangement has anticompetitive effects, it is condemned

166. *Id.* § 2.

167. See SULLIVAN & GRIMES, *supra* note 136, at 7. It is also because of this “flexible, practical approach, by which challenged conduct would be evaluated in light of continuing experience as to its effect on competition in evolving economic conditions, that the Sherman Act has retained its essential character and vitality since its enactment.” KINTNER, *supra* note 135, at 239.

168. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (quoting *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305–06 (1949), and *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 606 (1953)).

169. 466 U.S. 2, 11–12, (1984), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

170. *United States v. Loew’s, Inc.*, 371 U.S. 38, 44–45 (1962) (citation omitted), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

under antitrust laws “even if one or more of the products in question is [protected].”¹⁷¹

These arrangements fall under section 1 of the Sherman Act, which forbids agreements that restrain trade or commerce. Because tying arrangements can exist without restraining trade, “[n]ot all tying agreements are illegal.”¹⁷² Meanwhile, some categories of tying arrangements, at least in theory, always restrain trade and thus are per se illegal.¹⁷³ Arrangements that restrain trade, yet are not per se illegal, are analyzed under the rule of reason.¹⁷⁴

These two legal frameworks, per se illegality and the rule of reason, are generally applied by courts in determining whether challenged conduct amounts to an antitrust violation. The alleged unlawful conduct can be subject to minimal judicial scrutiny under per se illegality, or to a more searching analysis under the rule of reason.¹⁷⁵ While the per se analysis entails “a conclusive presumption of net anticompetitive effects,” the rule of reason “requires a court to engage in case-specific evaluation of evidence bearing on actual or predictable competitive effects.”¹⁷⁶

Under both rules, the burden of proof falls on the plaintiff to show that the challenged agreement or conduct violates the Sherman Act by unreasonably restraining competition.¹⁷⁷ In the context of tying arrangements, “this burden necessarily involves an inquiry into the actual effect of the challenged conduct on competition in the” market of the tied product.¹⁷⁸ The defendant has the burden of proof to establish the existence of a business justification under a rule of reason analysis and any other affirmative defenses.¹⁷⁹

The following subsections further discuss the application of both rules with respect to tying arrangements. It should be noted that although the case law discussed in these sections involves patents and not copyrighted works, this distinction is less of a concern here, where the focus is on the

171. HOVENKAMP, JANIS & LEMLEY, *supra* note 19, at 21–27.

172. BRODER, *supra* note 135, at 50.

173. *Id.* at 46, 50.

174. *Id.* at 51; *see also* U.S. Philips Corp. v. Int’l Trade Comm’n, 424 F.3d 1179, 1185 (Fed. Cir. 2005) (“If the particular licensing arrangement in question is not one of those specific practices that has been held to constitute per se misuse, it will be analyzed under the rule of reason.”). *See generally* Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 607 (2012).

175. *See* BRODER, *supra* note 135, at 50–51. *See generally* Markham, *supra* note 174, at 593.

176. Markham, *supra* note 174, at 593.

177. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *see also* *Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977).

178. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 90 (2009).

179. *See, e.g.,* *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1350 (9th Cir. 1987).

methods of analyses generally utilized in antitrust law and not on the specific intellectual property at issue.

a. The Per Se Rule

Trade restraints are per se illegal only if they constitute a “naked restrain[t] of trade with no purpose except [the] stifling of competition.”¹⁸⁰ Justice Marshall explained the rationale behind the per se rule as follows:

Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.¹⁸¹

Per se analysis is not commonly applied by courts and is limited to cases where “experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.”¹⁸² Even when the per se analysis is applied, “‘considerable inquiry into market conditions’ may be required before . . . condemnation is justified.”¹⁸³ For a tying agreement to constitute a per se violation, the plaintiff must establish four elements:¹⁸⁴ (1) the products or services are separate,¹⁸⁵ (2) the sale or licensing of one product is conditioned on the sale or licensing of another product,¹⁸⁶ (3) the seller has sufficient economic power in the tying

180. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20 (1979) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)); *see also Jefferson Parish*, 466 U.S. at 14 (1983) (“[T]he law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other.”); *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977) (holding that per se rules are “appropriate only when they relate to conduct that is manifestly anticompetitive”).

181. *United States v. Container Corp. of Am.*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

182. *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 344 (1982); *see also Broad. Music*, 441 U.S. at 9–10 (“[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations.”).

183. Markham, *supra* note 174, at 610; *see also NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) (“[W]hile the court has spoken of a ‘per se’ rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.”).

184. *See* JULIAN O. VON KALINOWSKI, PETER SULLIVAN, MAUREEN MCGUIRL, RALPH FOLSOM & FRANK FINE, *ANTITRUST LAWS AND TRADE REGULATION* § 22.02[1] (2d ed. 2012).

185. *See, e.g., Ungar v. Dunkin’ Donuts of Am., Inc.*, 531 F.2d 1211, 1218 (3d Cir. 1976); *Microsoft Corp. v. Computer Support Servs., Inc.*, 123 F. Supp. 2d 945, 951 (W.D.N.C. 2000).

186. *See Abercrombie v. Lum’s Inc.*, 345 F. Supp. 387, 391 (S.D. Fla. 1972); *Hammond Ford, Inc. v. Ford Motor Co.*, 39 F.R.D. 604, 605–06 (S.D.N.Y. 1966).

product's market to be able to enforce the tie-in,¹⁸⁷ and (4) a "not insubstantial" amount of commerce in the tied product's market is foreclosed.¹⁸⁸ As to the third element, requiring market power,¹⁸⁹ some courts have endorsed a more searching analysis, requiring proof of power in the relevant market or presence of a tie-in between an unpatented and a patented product before concluding that the arrangement is unlawful.¹⁹⁰ Further, in practice, the fourth requirement providing "that the tie must affect a substantial volume of commerce in the tied-product market is virtually always met, even where the volume of affected commerce is slight."¹⁹¹

*International Salt Co. v. United States*¹⁹² provides an example of the application of the per se analysis. In *International Salt Co.*, the government brought an action against International Salt, patent owner "on two machines for utilization of salt products."¹⁹³ The government alleged that the restriction in the leases requiring "lessees to purchase from [International] all unpatented salt and salt tablets consumed in the leased machines" violated section 1 of the Sherman Act.¹⁹⁴ Based on the finding that the contracts at issue affected a volume of business that "cannot be said to be insignificant or insubstantial," and the rationale that it "is unreasonable, per se, to foreclose competitors from any substantial market," the Court held that "International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws."¹⁹⁵

b. The Rule of Reason

Although the per se analysis may provide for greater administrative convenience, courts more frequently engage in the searching rule of reason analysis.¹⁹⁶ The rule of reason requires a determination of whether the practice's procompetitive aspects outweigh its anticompetitive harm.¹⁹⁷ The plaintiff must "do far more to prove the unreasonableness of the alleged

187. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461–79 (1992); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–7 (1958). Note that in contrast to a per se analysis, under the rule of reason a tying violation may be established despite the absence of this element. See *infra* Part I.B.3.b.

188. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14–22 (1984), *abrogated* by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *N. Pac. Ry. Co.*, 356 U.S. at 5–6.

189. Also called "monopoly power." See *Eastman Kodak Co.*, 504 U.S. at 466.

190. *Ill. Tool Works Inc.*, 547 U.S. at 43.

191. Christina Bohannon, *IP Misuse As Foreclosure*, 96 IOWA L. REV. 475, 501 (2011).

192. 332 U.S. 392 (1947).

193. *Id.* at 394.

194. *Id.*

195. *Id.* at 396.

196. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason.'").

197. See BRODER, *supra* note 135, at 51–52.

practice than where the allegations involve per se illegality.”¹⁹⁸ Ultimately, the factfinder “must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its conditions before and after the restraint was imposed, and the restraint’s history, nature, and effect.”¹⁹⁹ In *Board of Trade of Chicago v. United States*, the Court explained the factors and information to be considered as follows:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.²⁰⁰

Furthermore, some courts have held that a rule of reason violation can be established in the absence of market power, a requirement for per se illegality, so long as the plaintiff can prove sufficient anticompetitive impact in the tied product.²⁰¹ The rule of reason analysis is also distinguishable from the per se rule in that it allows the proponent of the alleged tying arrangement “to argue that she had a legitimate business justification for imposing a tie-in.”²⁰² For instance, the business justification functions as a defense to the misuse doctrine under a rule of reason analysis, excusing the copyright owner’s misuse so long as it was motivated by a legitimate purpose.²⁰³

Essentially, the underlying rationale behind the rule of reason analysis is that a single factor is not decisive on its own, but “[r]ather, the fact finder ‘weighs all of the circumstances’ in deciding whether the challenged

198. *Id.* at 51.

199. *State Oil Co.*, 522 U.S. at 10.

200. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918); *see* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. ‘Under this rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.’ Appropriate factors to take into account include ‘specific information about the relevant business’ and ‘the restraint’s history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration.” (citations omitted) (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977), and *State Oil Co.*, 522 U.S. at 10)).

201. *See* *White Motor Co. v. United States*, 372 U.S. 253, 262–63 (1963); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6–7 (1958).

202. CHRISTOPHER R. LESLIE, *ANTITRUST LAW AND INTELLECTUAL PROPERTY RIGHTS: CASES AND MATERIALS* 138 (2011).

203. *See* *Times Herald Printing Co. v. A.H. Belo Corp.*, 820 S.W.2d 206, 211 (Tex. App. 1991).

practice is, on balance, competitively unreasonable.”²⁰⁴ Nonetheless, despite attempts to define the rule of reason, many questions remain unsettled. For instance, it is “unclear whether, and at what stage of the case a plaintiff is required to establish market power,” and whether the anticompetitive effects can be merely theoretical.²⁰⁵

II. THE PUBLIC POLICY APPROACH VERSUS THE ANTITRUST APPROACH

More than two decades since the copyright misuse doctrine was first recognized explicitly in *Lasercomb*, a uniform approach to determining whether a specific behavior constitutes misuse still does not exist. A tying arrangement can give rise to the copyright misuse defense either because it violates copyright principles as framed by the Constitution, or because it violates federal and state antitrust principles. This Note seeks to highlight the shortfalls of each of these commonly applied approaches through a discussion of selected copyright misuse cases.

A. *The Application of the Public Policy Approach*

The public policy approach is the more prominent method of evaluating copyright misuse. Under this approach, the misuse defense “continue[s] to be available against conduct that violates antitrust law,” but is also “available for practices that undermine [intellectual property] policies without violating antitrust law.”²⁰⁶ This section discusses four landmark cases in which the courts have applied the public policy approach in evaluating copyright misuse.

1. Fourth Circuit: Defense Prevails

The Fourth Circuit in *Lasercomb* clearly underscored the independence of copyright misuse from antitrust principles. In this case, the court stated that

204. WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:10 (2012–2013 ed. 2012).

205. Markham, *supra* note 174, at 638 (“Possibly the most important turn of events in a rule of reason case is when the judge decides whether a plaintiff’s burden includes proof of market power, yet the case law is inconsistent as to whether and when proof of market power is a requisite element of a plaintiff’s antitrust conspiracy case.”); *see* HOLMES & MANGIARACINA, *supra* note 204, § 2:10 (“The courts appear to be currently split on whether proof of actual anticompetitive effects such as supracompetitive prices, reduced output, or diminished service quality is required to prove a violation of the rule of reason, or whether it is enough to show a substantial risk of anticompetitive effects in light of the defendants’ market power and the nature and market context of the challenged conduct.”).

206. Bohannon, *supra* note 191, at 478; *see also* Charnelle, *supra* note 17, at 177 (“[T]he [misuse] doctrine is broader than antitrust law and principles so that it can provide a defense to copyright infringement even in cases where the misuse of the copyright would not violate antitrust laws and principles.”).

while it is true that the attempted use of a copyright to violate antitrust law probably would give rise to a misuse of copyright defense, the converse is not necessarily true—a misuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of antitrust law (such as whether the licensing agreement is “reasonable”), but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.²⁰⁷

Accordingly, the court plainly rejected reliance on the “‘rule of reason’ concept of antitrust law,”²⁰⁸ and instead endorsed the public policy approach.²⁰⁹ The court stated that the Constitution gave Congress the power to create copyright laws in order to promote progress,²¹⁰ and thus using the copyright in a manner which inhibits progress violates copyright law’s underlying public policy.²¹¹ In *Lasercomb*, the licensing agreement inhibited progress by prohibiting licensees from creating new software which in return prevented “new ideas and knowledge” from being introduced “into the public domain.”²¹² This restriction was therefore found to be a misuse of the copyright pursuant to the public policy analysis.²¹³

While *Lasercomb* involved restrictive licensing and not a tying arrangement, it is important to note that “the reasoning of *Lasercomb* does not turn on the particular type of anti-competitive behavior alleged,”²¹⁴ and was later cited by courts applying the public policy approach to the copyright misuse defense in the context of tying arrangements.²¹⁵ Most importantly, *Lasercomb* makes clear that the balance between increasing “the store of human knowledge and arts by rewarding inventors and authors with the exclusive rights to their works for a limited time,” and limiting that “granted monopoly power” by ensuring that it does not “extend to property not covered by the . . . copyright,” is necessary in order to hold true to the framers’ purpose of promoting progress.²¹⁶ Where that balance lies is often determinative of how a court applying the public policy approach will rule on the copyright misuse defense.

207. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (emphasis added).

208. *Id.* at 977 (“If, as it appears, the district court analogized from the ‘rule of reason’ concept of antitrust law, we think its reliance on that principle was misplaced.”).

209. *Id.* at 975.

210. *Id.* (“In giving Congress the power to create copyright and patent laws, the framers combined the two concepts in one clause, stating a unitary purpose—to promote progress.”).

211. *Id.* at 979.

212. *Id.* at 975.

213. *Id.* at 979.

214. *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1169–70 (1st Cir. 1994), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

215. *See, e.g., Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998); *infra* Part II.B.2.b.

216. *Lasercomb*, 911 F.2d at 976.

2. Ninth Circuit: Defense Prevails

The Ninth Circuit tracked *Lasercomb*'s application of the public policy approach in *Practice Management Information Corp. v. American Medical Ass'n*.²¹⁷ In *Practice Management*, the American Medical Association (AMA) licensed its copyrighted publication of the Physician's Current Procedural Terminology (CPT) on the condition that the federal agency, Health Care Financing Administration (HCFA), would not use any other competing coding system.²¹⁸ *Practice Management*, a publisher and distributor of medical reference works, brought suit claiming that the AMA misused its copyright by entering into that agreement.²¹⁹ In its opinion, the court did not explicitly use tying language and instead referred to the issue in terms of the "exclusivity requirement";²²⁰ nonetheless, the licensing agreement is an example of a tying arrangement, or more specifically a tie-out, as evidenced by the fact that the AMA licensed its CPT only on the condition that the HCFA would not use any other coding system.²²¹

In determining whether the AMA's licensing terms constituted copyright misuse, the Ninth Circuit, agreeing with the Fourth Circuit's determination in *Lasercomb*, rejected the argument that the defendant must "prove an antitrust violation to prevail."²²² The court subsequently held that "Practice Management established its misuse defense" because it demonstrated that the AMA's use of the copyright violated public policy.²²³ The Ninth Circuit, however, departed from the view of the Fourth Circuit as to what public policy entails.

In contrast with *Lasercomb*, *Practice Management* did not emphasize the importance of promoting progress or address how a copyright should not be used in a manner that interferes with that goal. While the court came close to expressing similar goals in stating that "copyrightability of the CPT provides the economic incentive for the AMA to produce and maintain the CPT," and destroying it could "prove destructive of the copyright interest, in encouraging creativity,"²²⁴ it ultimately found a violation of public policy on different grounds. The court stated:

What offends the copyright misuse doctrine is . . . the limitation imposed by the AMA licensing agreement on HCFA's rights to decide whether or not to use other forms as well. Conditioning the license on HCFA's

217. 121 F.3d at 521 ("We agree with the Fourth Circuit that a defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright misuse defense.").

218. *Id.* at 517.

219. *Id.* at 518.

220. *Id.* at 521.

221. *Id.* at 518.

222. *Id.* at 521.

223. *Id.*

224. *Id.* at 518 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[C], at 5-92 (1996)).

promise not to use competitors' products constituted a misuse of the copyright by the AMA.

. . . The terms under which the AMA agreed to license use of the CPT to HCFA gave the AMA a substantial and unfair advantage over its competitors. By agreeing to license the CPT in this manner, the AMA used its copyright "in a manner violative of the public policy embodied in the grant of a copyright."²²⁵

Therefore, it can be inferred that in the view of the Ninth Circuit, behavior amounts to a public policy violation if limitations are imposed on the licensee and if the copyright holder consequently gains a "substantial and unfair advantage over its competitors."²²⁶ Interestingly, neither *Lasercomb* nor the constitutional copyright grant mentions the effects of the copyright use, or misuse, on competitors.

The *Practice Management* approach, nevertheless, is readily distinguishable from the antitrust rule of reason approach. First, the court did not appear to be balancing the procompetitive against the anticompetitive effects of the licensing agreement, either directly or indirectly. In fact, the court did not recognize any procompetitive aspects of the agreement at all. Further, under a rule of reason analysis, the court would take "into account a variety of factors, including specific information about the relevant business, its conditions before and after the restraint was imposed, and the restraint's history, nature, and effect."²²⁷ The court here, however, did not contemplate a number of factors, but in contrast opined, "The controlling fact is that HCFA is prohibited from using any other coding system."²²⁸ Most importantly, the court did not decide, or seek to decide, whether the agreement imposed an "unreasonable restraint on competition."²²⁹

A finding that a behavior results in a "substantial and unfair advantage" over competitors, as the court found here, is not dispositive of the presence of unreasonable restraints on competition.²³⁰ If a competitor is at a disadvantage because, for example, its product is inferior, the court would surely not find a restraint on competition based on that fact alone. Similarly, being at a disadvantage as a result of a competitor's tying arrangement does not translate into a finding of a restraint on competition. More precisely, a disadvantage in competing is not equivalent to a restraint on others' ability to compete or to enter the market altogether.

225. *Id.* at 521 (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990)).

226. *Id.*

227. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

228. *Practice Mgmt.*, 121 F.3d at 521.

229. *State Oil Co.*, 522 U.S. at 10.

230. *Practice Mgmt.*, 121 F.3d at 521.

3. Fifth Circuit: Defense Prevails

In *Alcatel USA, Inc. v. DGI Technologies, Inc.*, the plaintiff, Alcatel (formerly DSC Communications Corporation (DSC)), possessed copyright protection for the operating system software which controlled the switches it designed and manufactured for long-distance telephone service providers.²³¹ The licensing agreement of the copyrighted software prohibited the customer “from copying the software or disclosing it to third parties,” and authorized the software’s use “only in conjunction with DSC-manufactured equipment.”²³² DSC brought suit alleging that despite the licensing terms, as a way of expanding the call-handling capacity of switches, DGI illegally copied DSC’s operating system code.²³³ In response, DGI asserted copyright misuse as a defense.²³⁴

On appeal, the Fifth Circuit recognized *Lasercomb*’s approach, stating that “the public policy which includes original works within the granted monopoly excludes from it all that is not embraced in the original expression.”²³⁵ Pursuant to that rationale, the court held that “despite the jury’s finding that DGI acted with unclean hands in its acquisition and use of DSC’s copyrighted software,” it was not “barred from invoking an equitable defense”²³⁶ of copyright misuse and “[a] reasonable juror could conclude, based on the licensing agreement, that ‘DSC ha[d] used its copyrights to indirectly gain commercial control over products DSC d[id] not have copyrighted.’”²³⁷ The court reached this holding after a detailed discussion of how the agreement inhibited DGI from creating its own software. For example, the court opined:

Despite the presence of some evidence . . . that DGI could have developed its own software, there was also evidence that it was not technically feasible to use a non-DSC operating system because the switch has a ‘common control’ scheme in which each microprocessor card in a network of such cards runs the same operating system. Hence, without the freedom to test its cards in conjunction with DSC’s software, DGI was effectively prevented from developing its product, thereby securing for DSC a limited monopoly over its uncopyrighted microprocessor cards.²³⁸

The court thus acknowledged that DGI may not have been completely prevented from creating its own software, but found it sufficient that there was evidence suggesting that it was not technically feasible for DGI to do so. If an action is not technically feasible, then a competitor is unlikely to

231. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 777 (5th Cir. 1999).

232. *Id.*

233. *Id.* at 778.

234. *Id.* at 792.

235. *Id.* at 793 (quoting jury instructions from *DSC Commc’ns Corp. v. DGI Techs., Inc.*, 898 F. Supp. 1183 (1995)).

236. *Id.* at 794.

237. *Id.* at 793.

238. *Id.* at 794.

pursue it, and in return, the public domain will be deprived of the additional, and potentially superior, product. Essentially, the determinative point in this case was that the licensing agreement violated the public policy of promoting progress and immobilized “[t]he purpose of copyright law [which] is to promote and protect creativity.”²³⁹ Accordingly, in *Alcatel*, the court’s framing of the public policy analysis mirrored that of *Lasercomb*.²⁴⁰ Interestingly, in *Alcatel*, the possibility of engaging in an antitrust analysis of the misuse defense was not even proposed, which reflects the court’s strong adherence to the public policy approach.

4. Ninth Circuit: Defense Fails

*Apple Inc. v. Psystar Corp.*²⁴¹ is a recent case where the interpretation of the relationship between the misuse defense and antitrust principles was determinative of the outcome. In the interest of clarity, this Note breaks the *Apple Inc.* litigation into three stages: the first stage covers the district court’s finding as to Psystar’s motion for leave to amend in order to assert counterclaims under the misuse doctrine (*Apple I*);²⁴² the second stage briefly summarizes the district court’s ruling on the misuse defense (*Apple II*);²⁴³ and, the third and final stage discusses the Ninth Circuit’s decision regarding the district court’s rejection of Psystar’s misuse defense (*Apple III*).²⁴⁴

This series of litigation commenced when Apple Inc. (Apple), the exclusive manufacturer and master licensor of the OS X operating system, asserted, among other claims, copyright infringement against Psystar Corp. (Psystar), the manufacturer and distributor of a tailored line of computers, for the unauthorized use of its computer operating system.²⁴⁵ Psystar counterclaimed, initially asserting antitrust violations.²⁴⁶ Apple successfully moved to dismiss those counterclaims.²⁴⁷

Subsequently, in *Apple I*, Psystar moved for leave to amend in order to assert counterclaims under the copyright misuse doctrine.²⁴⁸ The basis for

239. *Id.* at 787 (emphasis added).

240. See Charnelle, *supra* note 17, at 187–88 (“The court’s reasoning was consistent with the reasoning behind *Lasercomb* because in both cases, the court found misuse where the copyright owner restricted the creative efforts of its licensees in developing competitive software resulting in an unlawful extension of the copyright grant. In addition, public welfare would be harmed and progress constrained because DGI would be prevented from advancing technology by developing better microprocessor cards.”).

241. 658 F.3d 1150, 1152 (9th Cir. 2011).

242. *Apple Inc. v. Psystar Corp.*, No. C 08-03251 WHA, 2009 WL 303046, at *1 (N.D. Cal. Feb. 6, 2009).

243. *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 939 (N.D. Cal. 2009), *aff’d*, 658 F.3d 1150 (9th Cir. 2011).

244. *Apple Inc.*, 658 F.3d at 1152.

245. *Apple Inc.*, 2009 WL 303046, at *1.

246. *Id.*

247. *Id.*

248. *Id.*

Psystar's misuse defense was rooted in the allegation that Apple had wrongfully "leveraged its Mac OS copyrights in order to gain exclusive rights with respect to Mac OS-compatible computer hardware systems . . . via its End User License Agreements (EULA), which specifically required the consumers to install Mac OS *only* on Apple-labeled computers."²⁴⁹ More precisely, Psystar contended that the tying of the software to the hardware constituted a misuse of Apple's copyright of the Mac OS software.

In ruling on the narrow issue of whether Psystar's counterclaims could be amended, the district court quoted the Ninth Circuit in *Practice Management*, stating that "a defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright misuse defense."²⁵⁰ Finding that the previous order addressed the antitrust but not the copyright claims, the district court granted Psystar's motion, allowing it to assert the copyright misuse doctrine as an affirmative defense to Apple's infringement claim.²⁵¹

A few months later, the same judge, sitting for the same court, ruled that Psystar could not prevail on the misuse defense and granted Apple's motion for summary judgment in *Apple II*.²⁵² Although the district court recognized the public policy rationale underlying the copyright grant, it found the case before it distinguishable from *Practice Management* on the ground that, while the copyright holder in *Practice Management* limited the use of competitors' coding systems, "Apple ha[d] not prohibited purchasers of Mac OS X from *using* competitor's products. Rather, Apple ha[d] simply prohibited purchasers from using Mac OS X *on* competitor's products."²⁵³ The court further held that "Apple ha[d] not prohibited others from independently developing and using their own operating systems. Thus, Apple did not violate the public policy underlying copyright law or engage in copyright misuse."²⁵⁴

Psystar appealed to the Ninth Circuit in *Apple III*, asserting that by requiring the licensees to run their copies only on Apple computers, the licensing agreement tied the use of Apple's software to its hardware, and thus should have been found to be "an unlawful attempt to extend copyright protection to products that are not copyrightable."²⁵⁵ The court, however, was more persuaded by Apple's response, in which it asserted "that to adequately demonstrate copyright misuse, Psystar must show either that the

249. *Id.*

250. *Id.* at *2 (quoting *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998)).

251. *Apple Inc.*, 2009 WL 303046, at *4.

252. *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 933 (N.D. Cal. 2009), *aff'd*, 658 F.3d 1150 (9th Cir. 2011).

253. *Id.* at 940.

254. *Id.* at 939.

255. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1152 (9th Cir. 2011).

license agreement restricts creativity or that it restricts competition.”²⁵⁶ Applying this proposition to the facts, the court held that the license agreement did not restrict creativity or competition because “Psystar [was] free to develop both competing hardware and software,”²⁵⁷ and subsequently affirmed the granting of summary judgment on Psystar’s copyright misuse defense.²⁵⁸

The court’s analysis in this case reflects a hybrid approach to the copyright misuse defense. The court’s ruling permits the finding of misuse under two conditions: (1) if the licensing agreement restricts creativity; or (2) if the licensing agreement restricts competition.²⁵⁹ The first condition is consistent with the rulings in both *Lasercomb* and *Alcatel* where the public policy interest was phrased in terms of promoting progress, and undoubtedly restricting creativity would dampen that interest.

As to the second condition, it seems to build on the Ninth Circuit’s prior decision in *Practice Management* where the court found the copyright’s “substantial and unfair advantage over its competitors” to be violative of the public policy embodied in the copyright grant.²⁶⁰ The court in *Apple III* takes another step in the direction of an antitrust analysis through the use of a more encompassing concept—restricting competition.

Apple III can be compared to the Eighth Circuit’s decision in *United Telephone Co. of Missouri v. Johnson Publishing Co.*²⁶¹ In both cases, the misuse defense did not prevail because the tying arrangement did not “eliminate the possibility of . . . alternative method[s]” and consequently did not restrain competition.²⁶² In *United Telephone*, the court clearly applied a rule of reason analysis. In contrast, in *Apple III*, the court’s explicit reference to the public policy approach despite concurrently applying more of a rule of reason analysis, has further complicated an already perplexing defense.

By articulating two separate and distinguishable bases for a tying arrangement to give rise to a prevailing copyright misuse defense, the court broadens the scope of such a defense. As *Apple III* illustrates, however, the facts can be narrowly interpreted so that the defense ultimately fails. This point is best illustrated by examining how the Ninth Circuit in *Apple III* distinguished the Fifth Circuit’s ruling in *Alcatel* to reach an opposite conclusion on a factually similar case. In *Apple III*, the Ninth Circuit stated:

256. *Id.*

257. *Id.*

258. *Id.*

259. *See id.*

260. *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 521 (9th Cir. 1997), amended by 133 F.3d 1140 (9th Cir. 1998).

261. *United Tel. Co. of Mo. v. Johnson Publ’g Co.*, 855 F.2d 604 (8th Cir. 1988); *see infra* Part II.B.2.

262. *United Tel. Co.*, 855 F.2d at 612.

Unlike the licensing agreement in *Alcatel*, Apple's SLA [Software License Agreement] does not restrict competitor's ability to develop their own software, nor does it preclude customers from using non-Apple components with Apple computers. Instead, Apple's SLA merely restricts the use of Apple's own software to its own hardware. As the district court properly concluded, Apple's SLA has 'not prohibited others from independently developing and using their own operating systems.'²⁶³

However, the agreement in *Alcatel* provided, in relevant part, that "the customers [were] authorized to use the software only in conjunction with DSC-manufactured equipment."²⁶⁴ As such, it did not expressly prohibit or restrict a competitor's ability to develop their own software, but implicitly did so because it was "not technically feasible to use a non-DSC operating system . . . [and] without the freedom to test its cards in conjunction with DSC's software, DGI was effectively prevented from developing its product."²⁶⁵

Analogously, in *Apple III*, the licensing agreement which provided, in relevant part, that a user "agree[s] not to install, use or run the Apple Software on any non-Apple labeled computer, or to enable others to do so,"²⁶⁶ did not expressly prohibit competitors from creating their own software or limit the use of competitors' hardware altogether. It implicitly created such a limitation, however, because developing software is not an easy task, and it is at least conceivable that it might not have been technically feasible, or even possible, for Psystar to simply just develop its own "competing hardware and software."²⁶⁷

Nonetheless, it can be argued that even under a stricter application of *Alcatel*, Apple's SLA would not have violated public policy based solely on the rationale that the ability to use Apple's software with the competitor's hardware would have given the consumers greater options. Rather, it is probable that the defendant raising the defense would still need to prove that the restrictive agreement interfered with the goal of increasing "the store of human knowledge"²⁶⁸ or encouraging creativity pursuant to the underlying goals of the copyright grant.

B. The Application of the Antitrust Approach

Other courts evaluate copyright misuse in tying arrangements under antitrust principles. Pursuant to that approach, the analysis proceeds as it would if the claim had been brought as an antitrust violation. Thus, as explained in Part I.B., the court would likely apply an antitrust rule of

263. *Apple Inc.*, 658 F.3d at 1160.

264. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 777 (5th Cir. 1999).

265. *Id.* at 794.

266. *Apple Inc.*, 658 F.3d at 1155.

267. *Id.* at 1152.

268. *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990).

reason analysis, and while it may take into account public policy arguments, the core of the analysis would likely be focused on antitrust principles, such as restraints on competition and the existence of monopoly power.²⁶⁹

1. Seventh Circuit: Defense Fails

The Seventh Circuit has strongly advocated for the antitrust approach to intellectual property misuse.²⁷⁰ In *USM Corp. v. SPS Technologies, Inc.*, USM brought an action alleging that the patentee, SPS, “committed patent misuse by including a differential royalty schedule in the license agreement entered into as part of [an earlier] settlement.”²⁷¹ The Seventh Circuit rejected the public policy approach altogether, stating that it is “too vague a formulation to be useful; taken seriously it would put all patent rights at hazard.”²⁷²

In *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, one of the issues the Seventh Circuit addressed was whether a no-contest clause in a licensing agreement, prohibiting the defendant from challenging the validity of the plaintiff’s copyright, constituted copyright misuse.²⁷³ To avoid setting forth a federal common law that would run afoul of the Sherman Act,²⁷⁴ the court held, “What is needed is a balancing of the pros and cons of the clause in each case . . . [which] is best done under antitrust law.”²⁷⁵ The court then opined that it is unlikely that a copyright “would confer an economically significant monopoly, one that would raise the price of the monopolized good well above, and depress its output well below, the competitive level,”²⁷⁶ and concluded that “a no-contest clause in a copyright licensing agreement is valid unless shown to violate antitrust law.”²⁷⁷ The court further stated:

‘If misuse claims are not tested by conventional antitrust principles, by what principles shall they be tested? Our law is not rich in alternative concepts of monopolistic abuse; and it is rather late in the date to try to develop one without in the process subjecting the rights of patent holders to debilitating uncertainty.’ This point applies with even greater force to copyright misuse, where the danger of monopoly is less.²⁷⁸

Although *USM Corp.* did not involve a copyright or a direct tying arrangement and *Saturday Evening Post Co.* did not involve a tying arrangement, it can be reasonably inferred from both cases that the Seventh

269. See *supra* Part I.B.3.

270. See, e.g., *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 510 (7th Cir. 1982).

271. *USM Corp.*, 694 F.2d at 510.

272. *Id.*

273. *Saturday Evening Post Co.*, 816 F.2d at 1193.

274. *Id.* at 1200.

275. *Id.*

276. *Id.* at 1199.

277. *Id.* at 1200.

278. *Id.* (quoting *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982)).

Circuit would likely apply an antitrust analysis if presented with a copyright misuse defense arising out of a tying arrangement. This is evident by the court's antitrust analysis in both cases, strong opposition to the public policy approach in *USM Corp.*, and fear of creating a "federal common law rule that would jostle uncomfortably with the Sherman Act."²⁷⁹

Further, it can be inferred from the court's assertion that "the danger of monopoly is less"²⁸⁰ with copyrights than it is with patents that the court views copyrights and the threats posed on the market by copyright misuse as being less significant than those posed by patents. Accordingly, it is reasonable to assume that in the context of copyrights the Seventh Circuit is unlikely to provide a defendant raising a misuse defense greater means—such as would be provided under a public policy approach—of escaping liability from the infringement claim than it allowed in the context of patents.

2. Eighth Circuit: Defense Fails

In *United Telephone Co. of Missouri v. Johnson Publishing Co.*,²⁸¹ the Eighth Circuit applied an antitrust analysis after acknowledging the copyright misuse defense. The defendant asserted that the plaintiff, a publisher of white pages directories, misused the copyright by tying the "the purchase of the new entries . . . to the purchase of its entire 1985 customer list."²⁸² The court held that because United Telephone's license to reproduce its white pages listings did not "eliminate the possibility of an alternative method of updating Johnson's city directories,"²⁸³ United Telephone did not "misuse[] its copyright by *restraining competition*."²⁸⁴ Hence, the court reached a holding based on traditional antitrust principles by applying a rule of reason test that considered other alternatives and restraints on competition.

3. First Circuit: Defense Fails

In *Data General Corp. v. Grumman Systems Support Corp.*, Data General Corporation (DG) brought a claim against Grumman Systems Support Corporation (Grumman) for copyright infringement of its MV/Advanced Diagnostic Executive System (ADEX), "a new software diagnostic for [DG's] MV computers."²⁸⁵ Based on undisputed evidence establishing Grumman's illicit copying of ADEX, the lower court granted

279. *Id.*

280. *Id.*

281. 855 F.2d 604 (8th Cir. 1988).

282. *Id.* at 610.

283. *Id.* at 612.

284. *Id.* (emphasis added).

285. *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1154 (1st Cir. 1994), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

summary judgment on the copyright infringement claim in favor of DG.²⁸⁶ Grumman appealed, contending “that the district court prematurely dismissed its affirmative defenses and counterclaims.”²⁸⁷ One of Grumman’s affirmative defenses asserted that “DG [was] not entitled to enforce its copyrights . . . because it has ‘misused’ those property rights” by tying access to ADEX to the purchase of its aftermarket service, an “anti-competitive behavior in violation of federal antitrust laws.”²⁸⁸ The First Circuit, however, found the misuse defense to be “devoid of merit” because of a lack of sufficient “evidence to justify a trial on . . . Grumman’s antitrust counterclaims.”²⁸⁹ While the court acknowledged *Lasercomb*’s public policy approach,²⁹⁰ it did not inquire into the public policy rationales underlying copyright laws that may have been implicated in this case. By limiting its analysis to antitrust law, the court implicitly ruled that the misuse defense is predicated on a finding of an antitrust violation.

In summary, the cases analyzed above demonstrate the lack of a uniform approach to the copyright misuse analysis. These cases also suggest that under the antitrust analysis, the misuse defense is less likely to prevail because any behavior that does not harm competition would not amount to a misuse. Thus, the approach applied by the court is crucial because it is often determinative of the defendant’s fate in the infringement litigation. Further, while much overlapping exists between the public policy and antitrust approaches, the two bodies of law underlying those approaches are rooted in different policy rationales and should not be confined to each other’s legal boundaries.²⁹¹

Consequently, a strict application of the antitrust approach in evaluating copyright misuse is inadequate because it fails to account for behaviors that do not restrict competition but work in opposition to public policy rationales embedded in copyright law, whether defined as encouraging creativity, improving public welfare, or the like. At the same time,

286. *Id.* at 1155 (“It is essentially undisputed that Grumman technicians used and duplicated copies of ADEX left behind by DG field engineers. There is also uncontroverted evidence that Grumman actually acquired copies of ADEX in this manner in order to maintain libraries of diagnostics so that Grumman technicians could freely duplicate and use any copy of ADEX to service any of Grumman’s customers with DG’s MV computers.”).

287. *Id.* at 1152.

288. *Id.* at 1169.

289. *Id.* at 1170.

290. *Id.* at 1169–70 (recognizing that the *Lasercomb* court did not require proof of an antitrust violation for a successful misuse defense). For further discussion of *Lasercomb*, see *supra* Part II.A.2.

291. See Saami Zain, *Misuse of Misuse: Princo Corp. v. International Trade Commission and the Federal Circuit’s Misguided Patent Misuse Jurisprudence*, 13 N.C. J.L. & TECH. 95, 98–99 (2011) (“Antitrust is concerned primarily with protecting unfettered competition in markets for the purpose of benefitting consumers by lowering prices and/or increasing output, as well as providing incentives to innovate. Antitrust thereby proscribes conduct that harms, or is likely to harm, competition or the competitive process. While antitrust and misuse share certain policy goals (e.g., innovation, preventing abuses of patent power to harm competition), their goals and concerns are not entirely coextensive.”).

application of the public policy approach has been ambiguous and perplexing.²⁹² Part III explores these inadequacies in greater detail to underscore the need for a different, and better structured, approach.

III. A THREE-TIERED EVALUATIVE APPROACH TO A BETTER-DEFINED PUBLIC POLICY ANALYSIS

This section first discusses the inadequacies of both the public policy and antitrust approaches to the copyright misuse analysis in the context of tying arrangements. Subsequently, a three-tiered approach to the analysis is proposed which ratchets up and reframes the public policy approach. The proposed approach is aimed at achieving uniformity without sacrificing the important underlying goals of copyright and antitrust laws.

A. *The Public Policy Approach Yields Inconsistent Results*

Since a party prevailing on a copyright misuse defense can escape infringement liability, the outcome of the case often depends on the court's ruling on the misuse defense. As previously outlined,²⁹³ however, a uniform approach to evaluating this important defense is lacking,²⁹⁴ and even courts that purport to be applying the same approach have reached opposing results due to inconsistent determinations of what is violative of public policy.²⁹⁵ For instance, both the Fifth Circuit in *Alcatel* and the Ninth Circuit in *Apple Inc.* evaluated the misuse from a public policy perspective.²⁹⁶ Both cases concerned scenarios where the tying product was software and the tied product was manufactured by the copyright holder.²⁹⁷ Yet the two circuits reached different holdings with respect to whether the tying arrangement constitutes copyright misuse.²⁹⁸

Further, drawing from the cases discussed in Part II, three types of tying arrangements that can give rise to misuse under the public policy approach can be extracted: (1) arrangements that inhibit progress or discourage creativity,²⁹⁹ (2) arrangements which confer substantial and unfair advantage on the copyright holder,³⁰⁰ and (3) arrangements that either

292. See *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1103 (N.D. Cal. 2002) (explaining that the public policy approach "is often difficult to apply and inevitably requires courts to rely on antitrust principles or language to some degree").

293. See *supra* Part II.

294. See Frischmann & Moylan, *supra* note 115, at 897-900 (discussing the "two seemingly divergent approaches to assessing misuse (antitrust-based copyright misuse and public policy-based copyright misuse)").

295. See generally *supra* Part II.A.

296. See *supra* Part II.A.3-4.

297. See *supra* Part II.A.3-4.

298. See *supra* Part II.A.3-4.

299. *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990); *supra* Part II.A.1, 3.

300. *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998); *supra* Part II.A.2.

restrict creativity or competition.³⁰¹ Despite the potential appeal associated with the varying understandings of public policy, ultimately, the public policy approach provides no certainty to litigators. This is due to the fact that judicial discretion plays a crucial role in defining “public policy”³⁰² and in determining the factors amounting to an expansion of the granted right, as evident in the cases discussed.³⁰³

In the absence of a Supreme Court decision, courts have no guidance, aside from their subjective preferences, in deciding which public policy approach to apply. Even more disconcerting is the present uncertainty regarding whether the public policy approach is appropriate to the copyright misuse analysis in the first place. Furthermore, a strict application of the public policy approach disregards the fact that tying arrangements, by definition, reshape competition with respect to the products that are part of the arrangement and thus inevitably trigger antitrust principles.³⁰⁴ It is no surprise that “misuse has been criticized as being too vague and lacking coherence in both application and policy.”³⁰⁵

*B. The Antitrust Approach Does Not Satisfy Policies
Embedded in Copyright Law*

The antitrust approach does not achieve anything beyond the bounds of antitrust law. In large part this is because antitrust law is confined to the antitrust framework, which is narrower in both scope and perspective than the intellectual property framework.³⁰⁶ Copyright protection “is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”³⁰⁷ Antitrust law, in contrast, is concerned with promoting and maintaining healthy market competition.³⁰⁸ Accordingly, copyright misuse should not be limited to the scope of antitrust law.

Three plausible scenarios where the misuse defense could fail under the antitrust analysis approach but prevail under a public policy approach further illustrate the independence of the copyright misuse doctrine from antitrust principles.³⁰⁹ First, the copyright owner may exercise control over

301. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150 (9th Cir. 2011).

302. *See supra* Part II.A.

303. *See supra* note 292 and accompanying text.

304. *See supra* Part I.B.3.

305. Zain, *supra* note 291, at 96.

306. *See Charnelle, supra* note 17, at 177 (“[The copyright misuse] doctrine is broader than antitrust law and principles so that it can provide a defense to copyright infringement even in cases where the misuse of the copyright would not violate antitrust laws and principles.”).

307. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

308. *See generally* Hanna, *supra* note 135, at 420; *supra* Part I.B.

309. *See supra* Part II.A.1 for the proposition that copyright misuse is independent from antitrust principles.

areas outside the scope of the granted copyright monopoly, but without such control amounting to an antitrust claim. Under antitrust laws, establishing market power in the tying market is a requirement for per se illegality and an important factor in weighing the anticompetitive against the procompetitive effects in a rule of reason analysis.³¹⁰ Thus, a finding of market power is often indicative, or at least substantially indicative, of anticompetitive trade restraints in violation of the Sherman Act.³¹¹ However, it is unlikely that a copyright will gain enough market power³¹² to meet the searching scrutiny of antitrust laws because multiple similar copyrights can often lawfully coexist in the relevant market so long as each work is “independently created . . . [and] possesses at least some minimal degree of creativity.”³¹³ Accordingly, under some circumstances, a misuse of the copyright might fail to meet the requirements of antitrust law even though such use undermines the policies behind copyright law.³¹⁴ The public policy approach, by asking a different question, prevents such misuses from going unaccounted for in a copyright infringement claim.

In the second scenario, the defendant may fail to, or simply decide not to, assert an antitrust violation as a basis for the misuse defense. As the court in *Data General Corp.* acknowledged, “it is often more difficult to prove an antitrust violation when the claim rests on the questionable market power associated with a copyright” and the defendant might not be able to meet the necessary burden of proof.³¹⁵

In the third scenario, the defendant might rely solely on asserting antitrust violations in raising the misuse defense and still fail as a result of the court’s finding that antitrust laws have not been violated.³¹⁶ For example, in *Data General Corp.*, Grumman based its misuse defense solely on the alleged anticompetitive tying arrangement underlying the antitrust counterclaims, and the court dismissed the copyright misuse as a result of insufficient evidence as to the antitrust counterclaims.³¹⁷

In each of these three scenarios, the public policy approach inquiring into whether the plaintiff expanded “the statutory copyright monopoly in order

310. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461–79 (1992); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–7 (1958); see Charnelle, *supra* note 17, at 191 (“Antitrust violations often rest on the notion of finding market power, which requires a finding of a specified market share in the defined, relevant market.”). See generally *supra* Part I.B.3.a–b.

311. See generally Charnelle, *supra* note 17, at 191.

312. In *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, Judge Posner opined that it is unlikely that a copyright “would confer an economically significant monopoly, one that would raise the price of the monopolized good well above, and depress its output well below, the competitive level.” 816 F.2d 1191, 1199 (7th Cir. 1987).

313. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

314. See generally *supra* Part II.A.

315. *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1170 (1st Cir. 1994), *abrogated by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

316. *Id.*; see *supra* Part II.B.3.

317. *Data Gen. Corp.*, 36 F.3d at 1170; see *supra* Part II.B.3.

to gain control over areas outside the scope of the monopoly”³¹⁸ would enable the defendant to present a different set of facts, and essentially answer a different legal question not limited to an antitrust analysis, which is predominately based on the determination of anticompetitive restraints on competition.

It can even be argued that antitrust and copyright laws are in direct contention with each other. Antitrust law aims to protect competition and copyright law aims to protect the competitors. Antitrust law seeks to limit monopolistic behavior whereas copyright law grants a limited right to monopoly.³¹⁹ At minimum, misuse is broader than antitrust principles, and particular conduct can constitute misuse without amounting to an antitrust violation.³²⁰

Based on the foregoing, this Note argues in favor of a modified public policy approach. Nonetheless, due to the subjective and uncertain aspects of the public policy analysis, public policy interests should first be grounded in the constitutional grant of authority. Accordingly, the *Lasercomb* and *Alcatel* framing of the public policy analysis, in terms of whether the arrangement inhibits progress or creativity, should be adopted. Secondly, the public policy approach should not be viewed in a vacuum, and it should be treated as only part of a much more probing analysis. Accordingly, this Part proposes an approach under which the public policy question is only the first step in a three-step evaluation process. Additionally, in order to avoid an approach that would either work in opposition to, or impede application of, the Sherman Act,³²¹ the suggested approach encompasses aspects of the antitrust rule of reason analysis, but is tailored to the specific goals of copyright law instead of focusing only on restraints to competition.

C. Copyright Misuse Should Be Analyzed Under a Three-Tiered Approach

The current lack of uniformity deprives copyright owners of adequate notice as to what behaviors could potentially amount to misuse and lead to the detrimental result of being barred from recovery. At the same time, a potential copyright infringer cannot predict, with an adequate degree of certainty, the likelihood of success in asserting copyright misuse as an affirmative defense, and is thus deprived of the opportunity to take into account all benefits and risks before deciding to infringe the copyright.

318. *See In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1103 (N.D. Cal. 2002).

319. *See generally supra* Part I.

320. *See Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494 (1942); *see also supra* note 306 and accompanying text.

321. *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987).

The resolution proposed in this Note aims to provide much-needed uniformity without irritating or overlooking important goals of both copyright and antitrust law. This Note proposes a three-tiered framework, as follows. First, the court must determine whether the tying arrangement is outside the scope and boundaries of the copyright grant. If it is, the copyright misuse defense prevails. If it is not, the court must next inquire about the availability of feasible economic alternatives for the defendant. If there are, the defense fails. If such alternatives do not exist, the court must last examine whether the copyright owner has any critical business justifications for the tying arrangement. If so, the defense fails; if not, the defense prevails. The alleged infringer carries the burden of proof for the first two inquiries and the copyright owner carries the burden for the final inquiry. The following subsections describe the framework of the proposed approach in greater detail.

1. The Public Policy of Promoting Progress

The first step is a determination of whether the challenged behavior is within the scope and boundaries of the copyright grant. If the behavior is found to be outside the copyright grant, then the copyright misuse analysis comes to an end and the defense prevails. If, however, the tying arrangement does not interfere with public policy goals, it should not be deemed per se unlawful, even if it is too attenuated or seemingly unreasonable, and the court should proceed to the second tier of the analysis.

Since the behavior in question, or the specific tying arrangement giving rise to the defense, will almost certainly not be explicitly stated in the copyright certificate (assuming that the copyright is even registered),³²² the question of whether the arrangement falls within the copyright grant is directly related to whether it violates the public policies supporting copyright law. Accordingly, a mere showing of two separate products should not suffice and should not render the arrangement unlawful without further inquiry. In contrast with the antitrust approach,³²³ the question here should be narrowly defined—whether the products are tied in such a manner that frustrates the public policy underlying copyright grants. Following *Lasercomb* and *Alcatel*, arrangements that inhibit progress or discourage creativity should be found to violate the public policy underlying copyright laws.³²⁴ Thus, this uniform conception of the public policy supporting copyright law, which is most in line with the language and objectives of the constitutional grant of copyright power,³²⁵ should be

322. See *supra* Part I.A.2.b.

323. See generally *supra* Part I.B.3.

324. See generally *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772 (5th Cir. 1999); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

325. See *supra* Part I.A.

applied to avoid inconsistent results as seen in prior cases purporting to apply the public policy approach.³²⁶

Furthermore, a defendant asserting the copyright misuse defense should not be required to prove market power over “the tying product to enable it to restrain trade in the market for the tied product,” or that “a ‘not insubstantial’ amount of commerce in the market for the tied product is foreclosed.”³²⁷ These two elements are relevant to antitrust law because the evil it attempts to prevent directly relates to competition restraints and monopoly power.³²⁸ With copyright law, the focus is on finding a balance between rewarding the copyright holder and ensuring that the granted limited monopoly does not stifle progress;³²⁹ existence of trade restraints or monopoly power is not indicative of an encroachment on that goal.

To illustrate, in the Apple iPhone and mapping application hypothetical,³³⁰ if a defendant in a copyright infringement claim successfully proves, by relying on market studies, expert testimonies, or other pertinent evidence, that the arrangement hinders progress in the mapping application market and is thus violative of public policy, then the misuse defense bars the plaintiff’s recovery. If public policy goals are not frustrated, however, then the court proceeds to the second tier, inquiring into the economic feasibility of available alternatives. In that manner, the public policy approach continues to be available for conduct that undermines copyright policies without discounting antitrust principles that tying arrangements often trigger.³³¹

2. The Economic Feasibility of Available Alternatives

Tying arrangements, by definition, affect market competition in the tied product, and thus antitrust principles and laws are inevitably triggered. An analysis that stops at the public policy inquiry falls short, and is oblivious to the interplay between copyright law and antitrust law in balancing competition and monopoly forces in any given market. The following two tiers of the analysis account for that interplay while remaining conscious that antitrust violations can be asserted independent of the copyright misuse doctrine. Thus, the available alternatives and business justifications prongs, while important factors under the antitrust rule of reason analysis, are reframed here to address copyrights more specifically.

The second tier of the proposed approach accounts for conduct that may not violate public policy *per se*, but ultimately has that effect. In both *Lasercomb* and *Alcatel*, the agreements prohibited licensees from creating

326. See *supra* Part II.A.

327. KALINOWSKI, *supra* note 184, § 22.02; see *supra* Part I.B.3.

328. See generally *supra* Part I.B.

329. See generally *supra* Part I.A.

330. See *supra* intro.

331. See *supra* Part II.A.

new software—an example of conduct that directly hinders progress.³³² However, at times the arrangement in question does not directly impact progress but, instead, ultimately has that effect.³³³ When the cost of an alternative is substantial enough that a competitor in the tied product will likely not pursue it, then it is an unreasonable alternative. To some extent, this resembles the hybrid approach applied in *Apple Inc.*, because it essentially provides an alternative on which the defense can prevail in the absence of a public policy violation. This step of the analysis is distinguishable from *Apple Inc.*'s approach, however, because the focus is not on the effects of the restraint on competition, but rather, more specifically on whether such restraint will inevitably hinder progress by making it infeasible to participate in the market of the tied product.

In *Apple Inc.*, the Ninth Circuit's distinction of *Alcatel* is not very convincing. Just as the Fifth Circuit in *Alcatel* held that it is not technically feasible for DGI to use a non-DSC operating system, it is presumably not technically feasible for Psystar to simply just develop its own competing hardware and software.³³⁴ Thus, applying this approach would have given Psystar the opportunity to prove that it could not simply develop its own software. More precisely, a court applying the proposed approach would have reasonably reached the second tier of the analysis since the tying arrangement did not hinder progress, but rather prompted competitors to create their own products. Subsequently, the court would have considered all other alternatives to being excluded from the market as a result of the tying arrangement, and Psystar would have had to prove the alternatives' impracticability.

This tier of the analysis, by determining all other available alternatives to the consequences arising out of the tying arrangement and evaluating their economic feasibility, aims to eliminate disparities in outcomes under the public policy approach. In return, this ensures that the outcome of the defense does not turn on whether public policy was directly or indirectly violated.

It is also notable that the analysis here is not as searching as the antitrust rule of reason³³⁵ because factors that do not directly relate to the feasibility of alternatives should not be considered dispositive. In this context, the court is simply looking to see if the alternatives' infeasibility provides for a compelling enough reason, in the absence of a public policy rationale, to proscribe the tying arrangement in question.

For example, in an infringement claim brought against Google in the context of the Apple iPhone and mapping application hypothetical,³³⁶ this tier would play a crucial role in the analysis. If Apple were able to prove

332. See *supra* Part II.A.1, 3.

333. See, e.g., *supra* Part II.A.4.

334. See *supra* Part II.A.3–4.

335. See *supra* Part I.B.3.b.

336. See *supra* intro.

that the arrangement did not violate public policy because it did not hinder progress but rather encouraged its competitors to develop their own phones and mapping applications, Google would be given the opportunity to put forth the infeasibility of the alternatives. If Google prevailed with respect to this assertion, Apple would be found to have engaged in copyright misuse. In that manner, the modified public policy approach takes into account conduct that indirectly hinders progress by making it infeasible for competitors to participate in the market of the tied product.

3. The Critical Business Justifications

If the tying arrangement is found to violate public policy or to negate any economically feasible alternatives, the misuse defense should prevail unless the copyright owner is able to establish critical business justifications. This aspect of the analysis is similar to the antitrust legitimate business justification³³⁷ but is even more demanding because the court here would not be weighing a number of factors. Rather, a court would inquire as to whether there is a business justification so critical that it trumps the underlying copyright goals. To remain aligned with the constitutional copyright grant, the copyright owner's business justification should directly relate to its ability to exercise the granted limited monopoly power without any unreasonable burdens or interferences. Furthermore, this aspect of the analysis should be subject to the courts' most searching review as a way of ensuring that it is not a free pass to copyright owners but only an available option, permitted with caution.

With respect to the Apple mapping application hypothetical,³³⁸ it is difficult to conceive of any such critical need for Apple to tie its own mapping application to its iPhone. Accordingly, pursuant to the proposed approach, if the arrangement is found to either violate public policy or the competitors' alternatives are not feasible, Apple would be found to have misused its mapping application copyright.

CONCLUSION

The three-tiered approach proposed in this Note balances the burden of proof between the copyright owner and copyright infringer. It provides judicial expediency for the more straightforward cases by allowing any arrangement that frustrates the public policy goals embodied in the constitutional grant of copyright power to be deemed *per se* illegal. At the same time, in more complex cases, as the majority of cases are likely to be, it provides a multifaceted method of analysis under which the lack of economically feasible alternatives can establish misuse in favor of the defense, and the existence of critical business justifications can justify a tying arrangement that would otherwise constitute misuse.

337. *See supra* Part I.B.3.b.

338. *See supra* intro.

The proposed approach aims to further the policy rationales underlying copyright law, without intruding upon or unnecessarily replicating the policy rationales of antitrust law. More importantly, the proposed approach provides a defined framework, pursuant to which uniformity amongst courts can be achieved. At a minimum, it is an initial step toward achieving uniformity and clarifying the currently ambiguous and complex copyright misuse defense.