

individuals, may be forgiven at the emotional level, but such denials are nevertheless deeply wrong. As Professor Ariely would say, the mistaken beliefs are predictably irrational.

Long before behavioral economics, Justice Holmes noted the attachment effect:

It is in the nature of a man's mind. A thing which you enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask for no better justification than the deepest instincts of man.⁶⁴

We may not be able to extinguish such instincts, but policy makers and judges should be aware of their presence and reject them when asserted.

Moral Panics, Folk Devils, and Fear as a Tactical Weapon

The power of the concepts "thief" and "trespasser" is traceable to the fundamental negative associations they invoke. Thieves and trespassers are usually metaphorical, fictive creations (outside of course, people, who actually do steal your wallet or enter your land without your permission and refuse to leave).¹ They are also examples of moral panics. Moral panics in copyright are the flip side of the initial classification of copyright as property. The appellation thief or trespasser is meaningless without an owner of property from whom one can steal or commit trespass. In Daniel Defoe's famous novel, did the cannibals care a hoot about Robinson Crusoe's fenced-in habitation and cave? Hardly; to them, he was food, and if they had eaten him, they would not have taken over his created space; nor would it have prevented Crusoe from becoming an *entr ee* if he had claimed a fee simple absolute over his living quarters and refused entry to the cannibals as trespassers. What good, then, is it to say you own property if there are no thieves or trespassers to do battle with? Copyright owners claiming status as property owners *need* to create conflict with others to create their status; the classical way in which such conflict is created is through moral panics.

Moral Panics

The concept of *moral panics* was most famously expounded by British sociologist Stanley Cohen in his 1972 book, *Folk Devils and Moral Panics*.² Professor Cohen was curious about what was called the "mods and rocker" phenomenon: "rampaging teenage gangs confronting each other at seaside resorts during English Bank Holidays."³ Although part of this era was covered in the Austin Powers movies, many will not be familiar with it, so I quote this brief, droll description from Wikipedia:

Gangs of mods and rockers fighting in 1964 sparked a moral panic about British youths, and the two groups were seen as folk devils.

The rockers adopted a macho biker gang image, wearing clothes such as black leather jackets. The mods adopted a pose of scooter-driving sophistication, wearing suits and other clean-cut outfits. Rockers poured scorn on the mods. . . . The rockers considered mods to be weedy, effeminate snobs. Mods saw rockers as . . . oafish and grubby.⁴

Both groups were regarded as a threat to "proper" society. This phenomenon of regarding those who are young and different as a threat to the moral fabric was hardly limited to the United Kingdom. Elvis Presley was believed to pose such a threat to society that when he made his second appearance on TV's *Toast of the Town* hosted by Ed Sullivan on October 28, 1956, singing "Hound Dog," the television cameras were forbidden to show him from the waist down.

An amusing example of alleged danger posed to society by rock and roll was the FBI investigation into the lyrics of the song "Louie Louie," as recorded in 1963, by the Kingsmen, a short-lived rock band from Washington State.⁵ The song was written in 1955 by Richard Berry, a Los Angeles musician who wrote a first-person song in which a Jamaican sailor tells Louie, a bartender, that he's leaving to meet his girl ("Louie, Louie/Me gotta go"). The band broke up shortly after the recording, with lead singer/rhythm guitarist Jack Ely never to return. Ely's voice on the recording could not be replicated by those who came after because of its uniqueness—Ely wore braces at the time of the recording and had strained his voice the night before in a ninety-minute jam session; as a result the lyrics were slurred and indecipherable, which oddly enough led to the moral panic.

The moral panic was launched by the FBI at J. Edgar Hoover's personal insistence, although it was Hoover's obsession that gave the song its seemingly enduring popularity. Hoover was convinced that the lyrics were obscene and launched an extensive two-year investigation. There was also an FCC hearing at which the FCC attempted to discern the actual lyrics.⁶ (It was an urban legend that the "true" lyrics could be discovered by playing the 45 rpm single at 33-1/3 rpm). The Post Office conducted an investigation too. The song was banned on many radio stations and in Indiana by fiat of the governor. Nothing came of the government's more than two-year investigation, because the lyrics were not in fact even "dirty."

Because this is a book about copyright, I want to point out that for 30 years, the Kingsmen were not paid any royalties; it was only after suit in 1998 that they were awarded ownership of all their early recordings, including "Louie Louie."⁷ Richard Berry, who wrote the song and recorded it in April 1965 with the Pharaohs, was paid a one-time, flat amount of \$750 for all publication rights, and thus didn't benefit from the sale of the 2,000 covers of his song.⁸

Moral panics have been described as "a reaction by a group of people based on the false or exaggerated perception that some cultural behavior or group, frequently a minority group or a subculture, is dangerously deviant and poses a menace to society." It has also been more broadly defined as an "episode, condition, person or group of persons" that has in recent times been "defined as a threat to societal values and interests."⁹ Moral panics have occurred in many cultures and times, including the well-known examples of the Salem witch hunts, comic books,¹⁰ and McCarthyism. They play on deep fears, and are greatly aided by the media's eagerness to sell papers or gain viewers. Youth are a particular target for moral panics:

The problematization of youth can be seen to partake of a longstanding popular association of youth with 'crime' and 'delinquency.' Historically, youth have been the subject of successive waves of social anxiety or moral panics, which focus on the threat that young people supposedly represent to morality, body, and property.¹¹

It is not coincidental that the vast majority of the Recording Industry Association of America's (RIAA) 35,000 lawsuits have been filed against young people.

John Springhall wrote in his engaging book, *Youth, Popular Culture and Moral Panics: Penny Gaffs to Gangsta-Rap, 1830-1996*,¹² that "[e]ach new panic develops as if it were the first time such issues have been debated in public and yet the debates are strikingly similar."¹³ The formal working out of a moral panic can be described this way:

1. Signs appear indicating that imminent danger is threatening.
2. The danger occurs, followed by an immediate unorganized response.
3. Those affected by the danger form a preliminary picture of what has happened and of their own condition.

4. A number of different responses are developed to help those attacked by the danger to return the community to its former equilibrium, either by suppressing the danger or controlling it so that it no longer poses any danger. This typically occurs through legislation or police action.¹⁴

It is important to keep in mind that the term "panic" in "moral panic" is not intended to "evoke the image of a frenzied crowd or mob: atavistic, driven by contagion and delirium, susceptible to control by demagogues and, in turn, controlling others by 'mob rule.'"¹⁵ Nor does it imply that the subject of the moral panic "does not exist or happened at all and that reaction is based on fantasy, hysteria, delusion or being duped by the powerful."¹⁶ Moral panics are not always based on "The Big Lie."¹⁷ Instead, moral panics can take an existing problem of little or no consequence and turn it into an existential one to further a political agenda.¹⁸ Moral panics are not irrational acts by those who construct them, but rather are the result of deliberate political opportunism. Chas Critcher has written, "The problem is . . . distorted and exaggerated . . . hyped up by the media and other interest groups[.] unspeakable monsters are . . . manufactured [with] the end result . . . the adoption of measures all out of proportion to the actual threat."¹⁹

In copyright, the Digital Millennium Copyright Act of 1998, which vested copyright owners with control over the design of consumer goods through new rights against anticircumvention devices and a right to require the inclusion of industry-mandated digital rights management information is a perfect example of the use of a moral panic that resulted in the adoption of measures all out of proportion to the original threat. Testifying in favor of the legislation, here is the moral panic, courtesy of Jack Valenti:

Like Emerson's doctrine that "for every gain there is a loss and for every loss there is a gain," within the glittering potential of the Internet lies the darker forms of thieves, who armed with magical new technology, are capable of breaking-and-entering conventional barriers to steal copyrighted material borne by the Internet by just about anybody with a working computer.²⁰

Later, in reaction to the advent of peer-to-peer networks, Mr. Valenti sought to tie such networks to the dissemination of child pornography, asserting that peer-to-peer file sharing made available "the most throat-choking child porn" "on a scale so squalid it will shake the very core of your being."²¹ Two years after the events of September 11, 2001, Mr. Valenti linked copyright infringement to terrorists, testifying before Congress that trafficking in counterfeit and pirated goods "accounts for much of the money the international terror network depends on to feed its operations."²² This moral panic was so enticing that in February 2008, a member of Congress used it in testifying in favor of a bill proposing protection for high-end fashion designs.²³ The Congressman was quoting not directly from the source, but rather from a retelling contained in an op-ed piece published in the *New York Times* by *Newsweek* contributor Dana Thomas on August 30, 2007:

Most people think that buying an imitation handbag or wallet is harmless, a victimless crime. But the counterfeiting rackets are run by crime syndicates that also deal in narcotics, weapons, child prostitution, human trafficking and terrorism. Ronald K. Noble, the secretary general of Interpol, told the House of Representatives Committee on International Relations that profits from the sale of counterfeit goods have gone to groups associated with Hezbollah, the Shiite terrorist group, paramilitary organizations in Northern Ireland and FARC, the Revolutionary Armed Forces of Colombia.²⁴

Note here the media's role in perpetuating a moral panic and in a context far removed from its subsequent invocation, fashion designs. Note too that Mr. Thomas doesn't say that the listed terrorist groups or paramilitary organizations themselves are involved in the condemned behavior, but rather "groups associated with" them, a description of deliberate vagueness. He didn't do his own research into the issue but instead quoted from someone else, and without doing any investigation into the truth of the assertions. Indeed the same assertion was made by an Administration official before the House of Representatives intellectual property subcommittee. That witness was unable to point to a single criminal organized crime group connected to file sharing.²⁵

The alleged source of the problems leading to a moral panic stampede are "folk devils":

A folk devil is a person or group of people who are portrayed in folklore or the media as outsiders and deviant, and who are blamed for crimes or other sorts of social problems.

The pursuit of folk devils frequently intensifies into a mass movement that is called a moral panic. When a moral panic is in full swing, the folk devils are the subject of loosely organized but pervasive campaigns of hostility through gossip and the spreading of urban legends. The mass media sometimes get in on the act or attempt to create new folk devils to create controversies. Sometimes the campaign against the folk devil influences a nation's politics and legislation.²⁶

Folk devils are portrayed as deviants, but as Stanley Cohen noted, this description leads to questions such as: "deviant to whom?" or 'deviant from what?'; when told that something is a social problem, [one] asks 'problematic to whom?'²⁷ The answer is of course the status quo, the existing social, political, or in the case of copyright, business order. But because the "existing" social, political, and business orders are constantly changing, new folk devils have to be invented to meet the occasion. Folk devils are a tool to accomplish social, political, or commercial objectives, and there is no better way to gain society's acceptance of such control than through the manufacture of fear, which explains the copyright industries' regular use of it.

Copyright Owners and Moral Panics

The transparent obviousness in the use of moral panics and folk devils is so simple to document that one might ask why they continue to be employed. The answer is because they are successful in achieving the goals of those who use them. Much like negative political advertising continues to be used despite polls showing the public disapproves of it, moral panics and folk devils are used because they effectively appeal to our "easy instincts, not our better angels."¹ Moral panics "reveal a lot about the workings of power, specifically who has the capacity to define a social problem and prescribe appropriate action."² Moral panics thus reveal disturbing truths about our political and legal process, in which a false public perception is created "by emphasizing emotional threats . . . in order to increase support for risky policies."³

Moral panics are essential to proponents of ever-expanding copyright rights⁴ and for the most pragmatic of reasons: It is hard to enact controversial legislation granting powerful new rights to those who already have excessively powerful rights unless you can convince legislators that folk devils pose an existential threat. In the United States, the most colorful expositor of moral panics and folk devils was Jack Valenti.

/// Jack Valenti: Master of Moral Panics

Throughout his career as the Motion Picture Association of America's (MPAA) chief lobbyist, Mr. Valenti skillfully and successfully employed moral panics and folk devils before Congress in an effort to gain increased copyright protection. As metaphors, Mr. Valenti's moral panics provided the means by which busy and sympathetic members of Congress could appear to be engaged in sober reasoning. Moral panics in copyright

judges or nearers to win their concurrence. J. AS MR. VALENTI WROTE IN HIS book, *Speak Up With Confidence*:

The ultimate ambition of a good speaker is to create a rapport with the audience. What a decisive piece of language is that French word, *rapport*. Rapport is an embrace, an affectionate warmth, a mutual reaching out, a harmonious friendliness that is the warranty of affinity and concord among people.⁸

In my thirteen years working in Washington, D.C., including seven in the legislative branch, I saw no other witness who thought of testifying before Congress as involving an "embrace, an affectionate warmth, a mutual reaching out, a harmonious friendliness that is the warranty of affinity and concord among people," but Mr. Valenti did, and his audience felt that he did. This "concord among people" was also a shrewd device for the transference of his metaphorical assertions through feelings. Scientists have long studied how facial gestures and feelings play an important role in the way we form meaning. Dr. Arnold Modell, in an article called "Emotional Memory, Metaphor, and Meaning," explained: "[N]umerous studies . . . document the reciprocal tracking of the facial expressions that are exchanged . . . [suggesting] that we are born with the capacity to construct intersubjective meanings in reaction to the interchange of feelings."⁹ Mr. Valenti also knew that mutual affection leads to better believability; again from his book: "Believability is the largest asset a speaker can project. Your own words, words that flow from your heart, and your brain, fall on more receptive ears."¹⁰ No one who heard Mr. Valenti's flowery, metaphorically charged testimony had any doubt Mr. Valenti followed his own advice.

Mr. Valenti was also a voracious reader, especially of history and the classics, including the Greek and Roman rhetoricians. He was quite familiar with the ancient Greek concept of *decorum*, which had a very different meaning than its current usage, polite behavior. In ancient times, it referred to the rhetorical concept, developed by Aristotle in his *Rhetoric*, and worked out further by Cicero and Quintilian that the style of speaking should be tailored to the subject, the audience and the occasion. As Richard Lanham observed: "No idea was more carefully worked out in rhetorical theory nor more universally acclaimed; everyone writing about rhetoric touches on it one way or another."¹¹ Professor Lanham also makes another point; that is,

involve the construction of a political strategy for obtaining political benefits. They are not hyperbole; they are the core of a careful strategic plan to alter the copyright landscape. And it is a landscape that was and remains conducive to Hollywood. In a December 13, 1974, interview on National Public Radio, Mr. Valenti candidly explained the affinity between members of Congress and Hollywood:

I think politicians and movie actors and movie executives are similar in more ways than they're different. There is an egocentric quality about both; there is a very sensitive awareness of the public attitude, because you live or die on public favor or disfavor. There is the desire for publicity and for acclaim, because, again, that's part of your life. . . . And in a strange and bizarre way, when movie actors come to Washington, they're absolutely fascinated by the politicians. And when the politicians go to Hollywood, they're absolutely fascinated by the movie stars. It's a kind of reciprocity of affection by people who both recognize in a sense they're in the same racket.⁵

It is not coincidental that Mr. Valenti's background was in the advertising and political consulting worlds. In 1952, he cofounded Weekley & Valenti, a Texas advertising and political consulting agency. For 13 years, until November 22, 1963, he perfected the type of messaging that is common to both worlds. On the day of President Kennedy's assassination, Mr. Valenti and his agency were handling press for the trip. After the assassination, Valenti, a friend of fellow Texan Lyndon Johnson, was present at the swearing in of Johnson onboard Air Force One, and can be seen in the left-hand corner of the famous picture of the swearing in.⁶ He rode with Johnson on the plane to Washington, and became a "special assistant" to him in the White House. In 1966, at the request of Lew Wasserman, head of Universal Studios (and the force behind the Betamax suit against Sony), he left the White House and became the president of the Motion Picture Association of America, where he remained for 38 years. He died on April 26, 2007. In my seven years working in the federal legislative branch, he was the best lobbyist I knew. I always felt happy to be in his presence, even though he was lobbying on behalf of clients who did not always deserve what he sought. Unlike most advocates, he knew the audience he was playing to—in his case, Congress (and its staff), and he was a master of what rhetoricians call *comprobatio* ("complimenting one's

that the style in which one addresses ones chosen audience was part of a careful construction of an alternate reality:

Decorum . . . amounts to . . . the "social trick" par excellence. We create, with maximum self-consciousness and according to precise rules, an intricate structure of stylistic forces balanced carefully as to perceiver and perceived, and then agree to forget that we have created it and to pretend that it is nature itself we are engaging with. Rhetorical theory has spent endless time discussing how to adjust utterance to this preexistent social reality without reflecting on how that reality has been constituted by the idea of decorum. Like the human visual system, rhetorical decorum is a bag of tricks which constitutes for us a world that it then presents as "just out there" awaiting our passive acceptance.¹²

Professor Lanham could just as easily have been referring to Hollywood motion pictures and the "suspension of disbelief" that is the essence of the art of movies and other forms of art.¹³ A critical part of this process was persuading members of Congress that a dire threat existed to the motion pictures industry, copyright law, and the public at large. In trying to persuade his Congressional audience, Mr. Valenti used moral panics with a deftness that would have astounded Stanley Cohen.

/// **Moral Panics, Home Video, and the Boston Strangler: The Real Story**

The Home Video Market and Thomas Edison

The question of whether people prefer to view motion pictures in private or in public has existed from the inception of the art form. On May 20, 1891, Thomas Edison unveiled both a motion picture camera, called the "kinetograph," and a viewer for movies, called the "kinestoscope." The kinestoscope was contained in a wooden cabinet; customers would insert coins and look ("peep" in the parlance of the day) through an individual kinestoscope at a continuous loop of a twenty-second 35-millimeter black-and-white film. Kinetoscope parlors grew up showing multiple shorts for a single admission. Other exhibitors, especially the Latham brothers, thought there was more money to be made in showing longer

films, on a larger screen, to a mass audience. Edison disagreed because such an approach would cut into his market of selling the kinestoscope machines: money from viewing went to the exhibitors. Edison is reported to have scoffed that his company was

making these peep show machines and selling a lot of them at a good profit. If we put out a screen machine there will be a use for maybe ten of them in the whole United States. With that many screen machines you would show the pictures to everyone in the country—and then it would be done. Let's not kill the goose that lays the golden egg.¹⁴

As an historian of the motion industry observed in language that could be applied to all the copyright industries, regardless of the era:

At the time, Edison was not just an inventor, but also a manufacturer selling kinestoscopes, and a studio head, producing movies for them. Like studio chiefs who'd succeed him decades later, Edison seemed to be hoping that technological progress would hold off, so it didn't pinch his profits. And he was assuming that no new technology would ever vault past the existing technology's revenue generating abilities.¹⁵

Once it became apparent that mass theatrical exhibition was the future, Edison decided to use his patents to eliminate his competitors for the movie projection market. After Edison lost a patent infringement case against the sole remaining serious competitor, Biograph, Edison created a trust among a number of companies in the movie industry and the Eastman Kodak company, which supplied the film. Called the Motion Picture Trust, the new enterprise pooled patents, drove out middlemen, prohibited the sale of movie prints to theaters, all toward extracting monopolistic prices and eliminating competitors. The Trust even created its own enforcement arm, the General Film Company, to engage in heavy-handed, coercive conduct toward those who resisted, conduct that included seizing and destroying unlicensed machines and refusing to supply movies to the so-called "independent" exhibitors. A number of these independent exhibitors moved to Hollywood, helping to establish the West Coast film industry. The independents attacked the trust in the courts as an unlawful restraint of trade, as it indeed was. On October 1, 1915, a federal trial court held that the trust had violated anti-trust laws. In language that may be applied to the conduct of

so many copyright owners in the various copyright wars, the court wrote: "There is deep-grained in human nature the impulse to influence, and, so far as it can be done, control the actions of others. It is too much to expect that this control, when secured, will always be exerted for altruistic ends."¹⁶

Cartrivision and the First Home Rental Market

In 1972, about three years before the introduction in the United States of the Sony Betamax videocassette recorder, Cartridge Television Inc. of Palo Alto, California, introduced the Cartrivision system. The system was contained in a combination 25-inch color TV/VCR console that sold at the equivalent of \$6,800 in 2008 dollars. The Cartrivision system had both playback and off-the-air taping capabilities. In addition to shows they had taped off-the-air, playback capabilities included pre-recorded 8-inch square cassettes, but because there were no video rental or sale stores, consumers had to order the cassettes by mail from a catalogue provided by a retailer like Sears or Montgomery Ward. The rental tapes had red colored cassettes (to distinguish them from the tapes sold to copy off-the-air), and could not be rewound by the consumer. If a consumer wished to view the movie again, he or she had to take it to a retailer who had a special rewinding machine, and a new rental fee had to be paid. Thirteen months after introduction, manufacture of the Cartrivision system stopped. There were many reasons for the system's failure, not all of which were attributable to the restrictions placed by copyright owners, but efforts to control marketing and pricing of the home video market would repeat itself a mere three years later with the filing of the infamous Betamax lawsuit.

The Betamax Case and the Fight for the Home Video Market

On April 12, 1982, Jack Valenti testified before Congress as the lead witness about the alleged dangers posed to the motion picture industry by videocassette recorders:

We are facing a very new and a very troubling assault . . . and we are facing it from a thing called the video cassette recorder and its necessary companion called the blank tape.

we are going to watch our lives with . . . Congress at least protects one industry . . . whose total future depends on its protection from the savagery and the ravages of this machine.

[Some say] that the VCR is the greatest friend that the American film producer ever had. I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone.¹⁷

Note here that Mr. Valenti spoke of the VCR as a threat not only to the large corporations he represented, but also and much more broadly to the American public. It is the essence of moral panics that folk devils be demonized as a threat to society itself. Mr. Valenti knew keenly that it was not enough to appear before Congress as a special pleader for his clients; instead, he had to appear as the savior of society itself, which could only be saved, of course, by Congress giving powerful rights to his clients. Canadian criminologist Laureen Snider noted the phenomenon of turning formerly acceptable behavior into criminal behavior—something that is de rigeur in copyright and which Mr. Valenti regularly lobbied for:

[C]alling something "criminal" is an ideological and moral claim. It categorizes a particular behaviour as an act that causes social harm, one that injures everyone in a geographically defined area. The act is [no] longer a private matter, nor a dispute to be settled by the parties directly involved. Furthermore, calling an act a crime is a claim for public resources, a summons that obligates the state to monitor and enforce.¹⁸

Majid Yar has noted that calling something a crime in the context of the Copyright Wars is not meant to be descriptive of acts that violate statutes but is instead a political strategy to redefine social norms in a way that will lead the state to intervene and criminalize behavior that is not, in fact, criminal:

[C]rime and criminality need to be understood as constructions that emerge from processes taking place beyond the sphere of legislation and judicial judgment. The identification of conduct with crime depends crucially upon a wider consensus that the behaviour in question constitutes a breach of acceptable social norms, that it partakes of some moral wrongdoing or injury that offends certain very strong

we are going to be doing is exporting our jobs out of this country to another country, beyond the real of our own shore.

...

There is going to be a VCR avalanche. Exports of VCRs [sic] from Japan totaled 2.57 million units in 1981. No. 2, the United States is the biggest market. No. 3, February 1982, which is the latest data, shows the imports to the United States are up 57 percent over 1981. This is more than a tidal wave. It is more than an avalanche. It is here.

...

Here is the weekly *Variety*, Wednesday, March 10[.] [h]eadline, "Sony Sees \$400 Billion Global Electronics Business by the Decade's End," \$400 billion by the decade's end. In 1981, Mr. Chairman, this United States had a \$5.3 billion trade deficit with Japan on electronic equipment alone.

...

Now, the question comes, well, all right, what is wrong with the VCR[?] One of the Japanese lobbyists, Mr. Ferris, has said that the VCR—well, if I am saying something wrong, forgive me. I don't know. He certainly is not MGM's lobbyist.

...

I am one who has a belief that before the next few years the Japanese will have built into their machines an automatic situation that kills the commercial.

...

Mr. Ferris has said that the opposition is saying that the American producers are greedy and it is terrible that they want to extract more money and they are triple and double and quadruple dipping in all these markets and they are saying why in the devil should we go and make all this money. Why don't we stop? Haven't we got enough? Aren't we rich enough off of television and everybody?

Well, this charge is so riddled with absurdities that I hardly know where to begin, but, by jingo, I will begin. Now, I think it is quite intemperate—I hope they don't make this argument tomorrow

collective sentiments. . . . [R]ecent attempts to construct rhetorically intellectual property offences (specifically breaches of copyright, dubbed "piracy") as beyond the bounds of morally acceptable behavior. These efforts can be viewed as forms of . . . "moral entrepreneurship," a concerted enterprise on the part of empowered social actors to redefine the boundaries and limits of transgressions.¹⁹

There is no corporate industry better able to develop, shape, and market such a social and political campaign than Hollywood. Who, in Mr. Valenti's opinion, did American society have to be saved from in the case of VCRs? Mr. Valenti selected one of the crudest tactics in the book of moral panics: jingoism, in the form of Japan-bashing. In this one piece of testimony alone, I have excerpted only a few of Mr. Valenti's attacks on the Japanese:

Now, my first card, Mr. Chairman, deals with what I consider to be one of the essential elements that you cannot ignore and, indeed, you must nourish. The U.S. film—and I will read this—"The U.S. film and television production industry is a huge and valuable American asset." In 1981, it returned to this country almost \$1 billion in surplus balance of trade. And I might add, Mr. Chairman, it is the single one American-made product that the Japanese, skilled beyond all comparison in their conquest of world trade, are unable to duplicate or to displace or to compete with or to clone. And I might add that this important asset today is in jeopardy.

....

It is a piece of sardonic irony that this asset, which unlike steel or silicon chips or motor cars or electronics of all kinds—a piece of sardonic irony that while the Japanese are unable to duplicate the American films by a flank assault, they can destroy it by this video cassette recorder.

....

Now, again, citing the fact that 100 percent of these machines are made in Japan and 85 percent of all of the blank tapes are made in Japan, and I say that, Mr. Chairman, because I have to keep coming back to this trade asset because if the Congress doesn't act, then what

because of the answer I am about to give you—to charge the Americans with greed when the Japanese companies are swollen with profits.

...

Now, I have here the profits of Japanese companies, if you want to talk about greed. Here, Hitachi, Matsushita, Sanyo, Sony, TDK, Toshiba, Victor, all of whom make these VCRs [sic]. Do you know what their net profits were last year? \$2.8 billion net profit. Indeed, Matsushita, one company alone, makes more net profits than the entire American film and television industry combined. He wants to talk about greed.²⁰

The nature of Mr. Valenti's remarks were so exaggerated that in concluding that day's hearings, the committee chairman, Congressman Robert Kastenmeier joked, "our witnesses tomorrow, as Mr. Valenti would call them, [are] the Japanese witnesses," although none of the witnesses were Japanese, but instead all Americans, representing American companies and groups.

Mr. Valenti's VCR remarks are oft-repeated for their "Boston Strangler" reference but are usually censored to exclude his Japan-bashing. The content of his remarks has not, to the best of my research, ever been spelled out. His remarks were not off the cuff, or reflective of an isolated event; instead, they were part of sustained, well-financed effort to ban VCRs by the motion picture studios that began in 1976, six years before his remarks; an effort that was fought in the courts all the way to the U.S. Supreme Court, which heard oral argument in the case an unusual two times and then split 5-4 after an earlier 6-3 vote the opposite way. The battle was fought as well as in Congress, which held three years of hearings on the issue, including on video rental, another area Mr. Valenti and his clients attempted to control.

The story of the motion picture studios' war against the videocassette machine is told in an excellent 1987 book by James Lardner called *Fast Forward: Hollywood, the Japanese, and the VCR Wars*—note the use of "wars" here. Mr. Lardner traced his interest in the intersection of copyright and technology (specifically VCRs) to a spring 1982 legal panel discussion on the issue. At the discussion, Mr. Valenti, in the days when vulgar xenophobia against the Japanese was both common and acceptable in polite society, railed against the Japanese and their machines, which

would, he predicted, turn the United States into an *entertainment desert*,²¹ by which he presumably did not mean Palm Springs. (The record industry earlier had xenophobic fears about the introduction of the compact disc; the head of consumer electronics manufacturer Denon observed, "in [19]82, most folks in the American record business had figured that the CD was some kind of foreign trick."²²) Mr. Lardner also heard the opposite view, from Charles Ferris, representing the electronics industry, who described the VCR as "the best friend Hollywood ever had."²³ Mr. Ferris' remark is what led to Mr. Valenti's later "Boston Strangler" metaphor.

The VCR wars had a far more prosaic beginning, in 1976, in a lawsuit brought by MCA/Universal Pictures against the Sony Corporation over the latter's Betamax VTR (video tape recorder, as it was then known). The first Betamax VCR²⁴ was part of a combined video and 19-inch TV console set. The VCR was placed side by side with the TV, to the right (facing the TV), on a pedestal base.²⁵ In Japan it was called a Sony LV-1801, and the VCR was called an SL-6300. In the United States, the machine was called an LV-1901, and the VCR was called an SL-6200 and sold for \$2,295 (\$9,202 in 2008 dollars). Importantly, although it had audio/video inputs/outputs, it had no tuner, and thus could not tape off-air.

On April 16, 1975, Sony introduced the first freestanding Betamax, the SL-7300 (called the 7200 in the United States and not marketed until February 1976). The SL-7300 was the SL-6200 without the console but (importantly) with a built-in tuner and audio/video outputs, and was the machine MCA representatives saw. The recording time was short, which became an issue with the introduction of VHS VCRs, which offered from two to four hours of recording time. In 1977, the second generation Betamax, the SL-8300 (the SL-8200 in the United States) was the response to the JVC HR-3300 VHS, introduced in 1976.²⁶ The SL-8300 was the first Betamax to have two recording speeds and used the new L-500 Beta videocassette.

The machines were, it goes without saying, expensive. The SL-7300 had a price of \$1,295 (\$5,192 in 2008 dollars; and it should be noted that at the time there was no market at all for prerecorded videocassettes because the SL-7300 was the first machine on the market, and it caught the motion picture studios by surprise). As we shall now discuss, the studios and others were developing the video laser disc as a possible home format, but not videocassettes.

In the summer of 1976, Sony's advertising agency sent MCA a mock-up of an ad for the Betamax, touting its ability to permit viewers to tape for later viewing shows that were being simultaneously broadcast, what became known as time-shifting.²⁷ The news of such a machine on the market drew a quizzical, and then highly negative reaction. The mock-up had been sent to MCA's legal department, which in turn sent it to MCA's president, Sidney Sheinberg.²⁸ The following week, Sheinberg and his boss, Lew Wasserman, chairman of MCA's board, had a dinner meeting with Akio Morita, the chairman of Sony and Harvey Schein, president of Sony's American affiliate. MCA had been developing a video laser disc called DiscoVision for which it had been trying to find a partner for manufacture, and Sony was deemed such a possibility.²⁹ Laser discs weren't recordable, a distinct advantage from the studios' perspective. Much to Sony's shock, at the dinner, MCA threatened Sony with an infringement action if it did not withdraw the SL-7300.

MCA then made good on its threat, after speaking to other studios to get them on board. Disney agreed to be a co-plaintiff, and Warner would assist with legal costs. The studios' trade association, the Motion Picture Association of America (MPAA) would participate as an amicus.³⁰ In addition to suing Sony and its American subsidiary (for contributory infringement), other defendants were the advertising agency (Doyle Dane Bernbach), retail stores at which the Betamax were sold, and a straw consumer—a client of MCA's law firm. Although Sony quickly tried to settle the case by proposing a compulsory licensing scheme, according to James Lardner, the head of Sony of America, Harvey Schein, felt that

The real obstacle . . . was MCA's commitment to the videodisc. "Because why buy a videodisc machine when you buy a videocassette machine that does everything it does plus it records off the air and makes home movies? I don't think it was accidental that the company that took the lead in fighting the videocassette was the company that had all the patents on the videodisc."³¹

MCA quickly employed a full range of metaphors. Mr. Sheinberg, debated with Mr. Schein on Walter Cronkite's show; as recounted by Mr. Schein: "He called me a 'highway man.' He equated Sony with the highwaymen of old who stole other people's property."³²

At this time, there was no home video market (the Carttrivision system having failed), and thus no harm to such a nonexistent market. Nor, as the suit was only about taping off-air, free, over-the-air broadcast works, would there be any possible harm to that market—people were merely taping works they had already been invited to watch for free and at a more convenient time. The lawsuit was not, therefore, concerned with infringement of copyright: The studios did not care about consumers copying. Rather, the suit was intended to eliminate a competing format and loss of advertising revenue.³³

Litigation was simply a means to gain control over the technology in order to perpetuate existing business models. Sidney Sheinberg was quite candid about this, at least after he lost in the Supreme Court: "The case was really about leverage. If we won, we would have the leverage to get a royalty on the sale of the machines and blank tapes."³⁴ The royalties on the machines were simply a naked grab to profit off a competitor's superior technology. The royalty on blank tapes were not designed to compensate for lost sales, but rather for perceived lost advertising revenue: Laser discs could not record, and thus the motion picture industry could retain its existing business model, that is, movies would be released exclusively in theaters, and then well after the theatrical run was over, they would appear on television. The TV networks would pay Hollywood for airing the movies, supported by advertisements. Laser discs would fit into this scheme by being released after the TV run. Videocassettes upset this scheme because people could tape the TV airing and, in doing so, "zap" or fast-forward (hence the title of the Lardner book) through the commercials. The Nielsen company started tracking this phenomenon, and by 1984 estimated that 60 percent of VCR owners "frequently" or "usually" fast-forwarded through commercials.³⁵ Fewer viewers of commercials meant less revenue for the TV networks as the advertisers would pay the networks less, and if the networks got paid less, Hollywood believed it would get a lower price for their goods. James Lardner relates the reaction of the advertisers:

Fear of "zapping" became an obsession. Burger King produced a series of "speedproof" ads designed, it was said, to get the message across even when viewed at an accelerated pace by an impatient VCR user. NBC went this trick one better with its broadcast of the World Cup soccer matches: it made the program and the commercial inseparable,

by parking ads in a corner of the screen while the game continued around them. Other sponsors turned their commercials into epic productions lush with special effects and exotic locations in the style of Steven Spielberg and George Lucas.³⁶

This effort continues today, it should be noted, from direct product placement in movies, to making products an integral part of TV plots.

We can now put Mr. Valenti's "Boston Strangler" comment in better context, beginning with the xenophobic introduction. The hearing was a rare one outside of Washington, in Los Angeles:

Now, the question comes, well, all right, what is wrong with the VCR. One of the Japanese lobbyists, Mr. Ferris, has said that the VCR—well, if I am saying something wrong, forgive me. I don't know. He certainly is not MGM's lobbyist. That is for sure. He has said that the VCR is the greatest friend that the American film producer ever had.

I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone.

The VCR avalanche, I told you about that. Now, what about the VCR owners. Now, from here on out, Mr. Chairman, I am going to be speaking about a survey done by the Media Statistics Inc., which is a prestigious firm out of Silver Spring, [Maryland]. We, meaning the MPAA, did not commission this survey. We bought it after it was done when we heard about it. So, this was not a case—we have commissioned a lot of things, but this is not one of them.

Now, I want to tell you about it because I think it is absolutely fascinating. This survey was taken in October 1981. It is the newest and freshest data available. Here is what it says. Median income of a VCR owner is between \$35,000 and \$50,000 a year. Not a lot of what we call today the truly needy are buying these machines. One-third of all the owners have incomes of more than \$50,000. Now, here is the next one: 87 percent, 86.8 percent of all these owners erase or skip commercials. I have here, Mr. Chairman, if you are not aware of how this works—this is Panasonic. This is a little remote control device that you use on machines. It has on here channel, rewind, stop, fast forward, pause, fast advance, slow, up, down, and visual search, either going left or right.

Now, let me tell you what Sony says about this thing. These are not my words. They are right straight from McCann Erickson, whom you

will hear from tomorrow, who is the advertising agency for Sony and here is what they say. They advertise a variable beta scan feature that lets you adjust the speed at which you can view the tape from 5 times up to 20 times the normal speed.

Now, what does that mean, Mr. Chairman? It means that when you are playing back a recording, which you made 2 days or whenever—you are playing it back. You are sitting in your home in your easy chair and here comes the commercial and it is right in the middle of a Clint Eastwood film and you don't want to be interrupted. So, what do you do? You pop this beta scan and a 1-minute commercial disappears in 2 seconds.

Mr. RAILSBACK. Is that all bad?

Mr. VALENTI. If you are watching a Clint Eastwood film it is the most cheerful thing you can do. However, if you are an advertiser who has paid \$280,000 a minute to advertise, he feels a very large pain in his stomach as well as in his checkbook because it destroys the reason for free television, the erasure, the blotting out, the fast forwarding, the visual searching, the variable beta scans. The technology is there and I am one who has a belief that before the next few years the Japanese will have built into their machines an automatic situation that kills the commercial.

Being advertised today in all the video magazines, and if any of you take video magazines, here is a marvelous little device called the Killer. It eliminates those black and white commercials. You put the Killer onto your Sony and it automatically takes out the commercial. You don't like the Killer, try the editor. The editor will do the same thing. It will wipe out commercials.

The technology is there in my judgment, in the next several years, where an integral part of the machine will be automatic Killer. But you don't need that now as long as you have this. Indeed, when my son is taping for his permanent collection, he sits there and pauses his machine and when he is finished with it, he has a marvelous Clint Eastwood movie and there is no sign of a commercial. It is a brand new movie and he can put three of those on one 6-hour tape.

Now, the average—

Mr. KASTENMEIER. May I interrupt, Jack, on that point?

Mr. VALENTI. Yes.

Mr. KASTENMEIER. And it is a point that just occurs to me. Actually, the advertiser doesn't pay for a taped replay of any program

of that sort. He pays only for a live telecast, where his commercial appears and no matter how it is deferred, he doesn't pay for the deferral because that person wasn't there watching it the first time, presumably it is missed for commercial—

Mr. VALENTI. Mr. Chairman, I am going to defer that question because I have at this table Mr. Eliasberg, for 34 years a practitioner and a student of research in what Nielson and Arbitron present to networks and advisers, what they pay for and what they don't pay for. And rather than me, race over, take time, may I defer the question to Mr. Eliasberg.³⁷

Once Mr. Valenti had exhausted his store of metaphors, he was unable to answer the real economic question at the heart of the dispute.

The other necessary context to Mr. Valenti's testimony was that it took place six months after the Ninth Circuit Court of Appeals in California had issued its opinion in the suit brought by MCA against Sony, and finding Sony liable for infringement.³⁸ The circuit court had reversed a 1979 ruling in Sony's favor by the trial judge,³⁹ meaning that the court of appeals had ruled in the studios' favor. Congress' reaction to the court of appeals was swift and negative; multiple bills were introduced to permit sale of VCRs and home-taping; it was reaction to those bills that Mr. Valenti testified as the lead witness. His purpose was to raise a moral panic that would defeat the legislation. In addition to his metaphors and folk devils, there was an array of experts hired to provide the statistical support for the moral panic. Indeed, Mr. Valenti was well aware (and rightly so) of the skepticism of such experts, and adverted to this in his testimony. The other side of course had its witnesses and experts too, but Congress was spared the trouble of enacting legislation when, on January 17, 1984, the Supreme Court, by a 5-4 vote reversed the Ninth Circuit, ruling for Sony.⁴⁰

Hollywood and Video Rental

The motion picture industry was not done with the VCR however. Between the first oral argument in the Supreme Court and the second, the Senate intellectual property subcommittee held a hearing on a bill introduced by Senator Charles McC. Mathias of Maryland.⁴¹ The bill would have amended Section 109 of the Copyright Act to ban the

unauthorized rental or lending of motion pictures. Section 109 codifies what is called in the United States the "first sale" doctrine and in other countries the "exhaustion doctrine."⁴² When a copyright owner voluntarily sells or gives away a copy of his or her work, the purchaser or possessor of that copy is free to do what he or she wants with it. The first sale doctrine is what permits secondhand bookstores to operate, and it is what permitted video rental stores to operate. Those stores purchased lawfully made copies of videocassettes, and although the studios had no objection to the sale of those copies to consumers, they did object to their rental. The reason for the objection was easy to discern. If a video store bought 10 copies of a movie for sale, the studios would get a cut of all 10 sales. If a video store bought one copy and rented it 10 times, the studio would get a cut of only one copy, while the video store would earn money from 10 rentals (after deducting the cost of the cassette and overhead).

The studios' approach to video rental was the same as it is to every issue: If someone else is making money off of one of our products, that money should be ours, even if that someone else had paid the full price the studios had asked for at the time. Indeed, although the bill gave the studios the right to stop all rentals, in a wink-wink-nudge-nudge, Congress was assured that the studios wouldn't exercise that right⁴³ but would instead use the right to extract monopolist prices from store owners. In typical Orwellian fashion, this would lead to, in the studios' words, "negotiat[ing] and establish[ing] correct business practices so that the retail method of lending motion pictures will continue."⁴⁴ The best way to ensure that video rental stores would continue was to leave them alone, and although this is ultimately what happened, the studios attempted, from 1983 to 1986, to change the business practices through a radical revision to Section 109. The studios' strategy had been clear since at least 1981, as this quote from a video rental store executive reveals: "The studios want total control of the cassette from the manufacturer. The odds of that total control are fairly low, but in an attempt to do that we'll see constant revisions of rental schemes . . ." ⁴⁵ In 1985, Blockbuster Video was founded, and in 1986, there were over 2,500 video rental stores. The stores would buy pre-recorded videos from the studios for about \$50 and then repeatedly rent the same tape to consumers. For top movies, this was a profitable practice, and one the studios wanted a share of. An alternative response by the studios would have been to significantly drop the retail sale price of videocassettes in order to spur

sales, an approach a few studios like Paramount and Disney took, but not Universal/MCA.

All the studios sought legislation that would have given them the ability to strangle the home video market, a point made by Senator Dennis DeConcini in his questioning of Register of Copyrights David Ladd:

Given the early unsuccessful efforts by [the studios] to develop the market for video cassette and rentals, why should we assume here in the committee that a handful of producers, all from California or other far distant places from the marketplace, will make better decisions about pricing and marketing than the thousands of retailers who, after all, are closer to the consumer, and are currently free to make those decisions under the First Sale Doctrine, and have worked hard and successfully in developing those markets?⁴⁶

Senator DeConcini here identifies the central trope of the Copyright Wars: Copyright industries fail to innovate but are saved by others who do. Resenting the success of the innovator, copyright owners then claim that the innovator's success is caused solely by the value provided by the copyright owner. The innovator is described metaphorically as a parasite, fattening itself off of copyright owners. The solution put forth is for the innovator to disgorge a healthy share of its profits to copyright owners (who, left to their own devices, would have starved to death decades ago). After such economic castration, innovations are no longer regarded as a threat but rather as one more dependable source of income feeding the beast.

Following Register Ladd in testifying was Jack Valenti. Mr. Valenti, this time testifying in *favor* of the legislation, was again careful to couch his special pleading on behalf of his clients in terms of the public interest:

The bill you have before you is going to be of lasting benefit to the public, because it is aimed directly at the folks who want to buy or rent prerecorded video cassettes and video discs. Today, that market is fenced off. It is entangled in an ancient barrier that baffles competition, flexibility of action and flexibility of pricing, which is the ready companion of any marketplace.⁴⁷

The market Mr. Valenti was describing was the free market, the very market that had allowed the studios to set a punishing \$20 surcharge

on the sale price for the cassettes that were rented by stores. What Mr. Valenti was miffed about was his clients' inability to *legislatively interfere* with the free market, seen in this comment: "a [studio that] makes [its] product available to VCR owners can deal *only* in the sale market, because [it] has no control [over] the videocassettes [it] has sold to distributors/retailers once they leave [its] hands."⁴⁸ What the studios sought was for Congress to interfere with the free market by giving the studios full downstream control.

The alleged threat to the free market came from the first sale doctrine, which had been a part of copyright law from the nineteenth century and is based on ancient abhorrence of restrictions on trade, the sort of restrictions Mr. Valenti, with an Orwellian twist, was attempting to impose in the name of free trade. In short, Mr. Valenti was attempting to overturn centuries of common (and later statutory) law that *protected* the free market. The studios of course were trying to have things both ways. They could have refused to release any movies on videocassette and killed the rental market. But because others had developed that market at no expense to the studios, the studios didn't want to kill the rental goose that laid the golden egg; they wanted the gold for themselves and were unconcerned with the health of the geese—rental stores that developed the market off of which copyright owners were fattening themselves. The studios believed the foie gras belonged to them. This attempt to have things both ways—to have others develop the distribution market and to then come in and monopolize it—has been followed by copyright owners from the inception of copyright and demonstrates that copyright is not an engine of free expression, but a yoke around innovation put on to retard progress by preserving existing and failed business models.

The original market for VCRs was time-shifting, thanks to the *Sony* decision. A nascent videocassette sale and rental market began in the late 1970s, but the studios priced the cassettes at a price from \$55 to \$75—from \$225 to \$300 in 2008 dollars. It was the studios that had retarded the sale market by pricing them far too high. This mistake is born out in the statistics. In 1979, rentals outnumbered sales by a four-to-one margin. By 1982, when the bills were introduced, the spread was 22 to 1 with sale prices reaching \$100 per videocassette. It is this spread, caused by the studios' own greed that led them to attempt to alter the first sale doctrine so that they could control the rental market.

The studios failed, however, and it was in the public's and their best interest that they did. As Sumner Redstone, chairman of Viacom, later remarked, home video was "the bonanza that saved Hollywood from bankruptcy."⁴⁹ Alas, Hollywood did not learn from the VCR experience, and what they didn't learn was that home copying leads to greater viewing and therefore more money, and they didn't learn that the courts are not about to interfere with home copying.

§ The Redbox Suit

The most recent episode in the studios' long-running efforts to control the home video market to the detriment of consumers is revealed in a dispute between Universal Studios and Redbox, a company that sells and rents DVDs through kiosks. As explained in a declaratory judgment action filed by Redbox against Universal⁵⁰ in October 2008, in the Delaware Federal District Court:

22. Kiosks typically hold up to 700 DVDs comprising 70–200 individual titles. The kiosks are updated weekly with a supply of new release DVDs. A single kiosk may hold up to as many as forty-five (45) copies of a popular release.

....

24. . . . Much of Redbox's success depends on maintaining a business model that satisfies the expectations of the retail outlets and consumers.

25. Consumers can rent DVDs from Redbox kiosks for \$1 per night—a lower cost than alternative brick-and-mortar outlets or alternative sources for DVD rental. In comparison, some 175 million DVDs were rented in the United States last month, at an average cost of approximately \$3.25.

26. Consumers can also purchase previously-viewed DVDs from Redbox, beginning 12 days after their release, for only \$7. In comparison, 50 million newly-released DVD movies were sold last month at an average price of approximately \$18.50 from other sources.

27. Consumer preference for Redbox rentals can largely be attributed to its ability to conveniently provide consumers with lowcost rentals on the same day that a DVD is released by a studio and made available

for home viewing. This date is known as the "street date." Over 60% of the rental demand for a particular title offered by Redbox occurs within 45 days of the 60% of the rental demand for a particular title offered by Redbox occurs within 45 days of the street date.

As we shall see, consumer choice and availability of DVDs for rental on the "street date" are alleged by Redbox to be an anathema to Universal. In August 2008, the problems began. As asserted in Redbox's court papers:

37. On Tuesday, August 26, 2008, USHE representatives visited Redbox's headquarters in Oakbrook Terrace, Illinois. . . .

39. During the meeting USHE presented the Revenue Sharing Agreement to Redbox and stated that Redbox had until the close of business the following day (i.e., August 27, 2008) by which to sign the Revenue Sharing Agreement. Redbox had no prior notice as to the nature of this proposal, which would materially and adversely alter the conditions under which consumers are able to rent and buy DVDs from kiosk outlets.

40. During the meeting USHE said that if Redbox refused to sign the Revenue Sharing Agreement and the distributors continued to supply Universal DVDs to Redbox, USHE would stop selling any Universal DVDs to VPD and Ingram.

41. . . . USHE has threatened to cut off sales to VPD and Ingram if they continue to provide these services without a signed Revenue Sharing Agreement from Redbox.⁵¹

In other words, the papers allege that unless Redbox agreed to Universal's terms, Universal would demand that Redbox's suppliers cut Redbox off, and that if those suppliers refused, they too would be cut off. The proposed deal, by contrast, would have had Universal cut out the suppliers by selling directly to Redbox. The proposed revenue-sharing agreement is attached to Redbox's complaint, but the relevant provisions of it for our purposes are detailed in Redbox's papers:

45. The Revenue Sharing Agreement is a naked restriction on output that directly reduces the supply of goods to consumers, and will increase the prices consumers must pay.

- a. The Revenue Sharing Agreement artificially constrains output by prohibiting Redbox from renting to consumers any DVD until "forty-five (45) days following [the] DVD sell-through street date established by USHE with respect to a Title";
- b. The Revenue Sharing Agreement also limits the number of DVDs of a single copyrighted work that any particular kiosk may carry based upon a formula that correlates to the gross box office revenue of the movie. Although Redbox would offer as many as forty-five copies of a popular DVD in one kiosk to meet consumer demand, the maximum number of copies per kiosk authorized under the Revenue Sharing Agreement is eight.
- c. The Revenue Sharing Agreement also seeks to require Redbox to "destroy 100% of the units removed from an active rental machine" and certify that it has done so. This directly reduces the supply of previously-rented disks available in the market place, artificially restricting supply and increasing prices.

46. The provisions of the Revenue Sharing Agreement will substantially limit consumer access to copyrighted works and simultaneously damage Redbox's ability to meet consumer demand.

47. Not only is Redbox's distribution system more efficient than other existing methods of providing DVDs to consumers (\$1 per night vs. \$3.25 for the average rental; \$7 sale price for a 12-day old DVD vs. \$18.50 for a new one), but it is also less expensive than other methods that USHE seeks to develop including internet download services (the typical price of a new full-length purchased on iTunes, for example is \$14.99 and the so-called "rental" price for time-limited access to the downloaded copy is \$3.99, USHE's affiliates have said) and Video-on-Demand (the average price of watching a video-on-demand movie is \$4.00).

48. The Revenue Sharing Agreement will have the effect of restricting output, eliminating competition in the rental and sales markets and raising prices to consumers.⁵²

The Redbox litigation is unique only because one company refused to comply and chose to reveal the terms a studio sought to impose. The studios can say publicly whatever they want about their concern for consumers and their efforts to satisfy consumer desires, but the Redbox agreement stands as irrefutable evidence to the contrary.

The studios' perpetual insistence on controlling consumer behavior in Redbox is small potatoes compared to what they achieved in the Digital Millennium Copyright Act.⁵³

The Digital Millennium Copyright Act

Access Controls

In 1998, the MPAA and the RIAA successfully lobbied Congress for powerful new rights in the Digital Millennium Copyright Act (DMCA), making it a civil and criminal violation

- to circumvent a technological measure that effectively controls access to a work protected under this title;⁵⁴
- to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title;⁵⁵

These provisions mark the Rubicon in copyright as they vested for the first time in the then 208-year history of copyright: (1) a right to control access to works; (2) a right to control the design of consumer electronics created by third parties; and, (3) a right to prohibit acts designed to circumvent (1) and (2). Taken together, these three rights vest in copyright owners the right to impose their preferences on the market and to ignore consumers' preferences. Prior to these provisions, the copyright laws were technology neutral: They did not regulate technologies, but rather uses of copyrighted material, regardless of the