Introduction To New Media And Old Metaphors 2015 Nova Law review Symposium

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Abstract

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The medium, or process, of our time—electric technology is reshaping and restructuring patterns of social interdependence and every aspect of our personal life.

It is forcing us to reconsider and re-evaluate practically every thought, every action, and every institution formerly taken for granted.

Everything is changing: you, your family, your education, your neighborhood, your job, your government, your relation to the others. And they’re changing dramatically.

On February 12 and 13 of 2015, Nova Southeastern University Shepard Broad Law Center, in conjunction with the Nova Law Review and NSU Sports and Entertainment Law Society (SELS) presented the 2015 annual Nova Law Symposium. The program brought together seventeen voices in media and entertainment to provide an interdisciplinary review of issues involving business and industry responses to the transformative impact of new media on traditional entertainment and media, including journalism, sports, film, broadcast, gaming, music, and similar areas.

In 1967, Marshall McLuhan and Quentin Fiore published a cultural wake-up call regarding the intersection of media and culture. They discussed the influence of modern media on the restructuring of society. As they noted, “[t]oday’s child is growing up absurd, because he lives in two worlds, and neither of them inclines to grow up. . . . Mere instruction will not suffice.”

The book noted the cultural as well as economic shifts underway by the rise of media as the organizing principle for society. In doing so, McLuhan and Fiore also noted common practice that defines legal jurisprudence, the tendency to use precedent and past as the framing principle for understanding new phenomenon. “When faced with a totally
new situation, we tend always to attach ourselves to the objects, to the flavor of the most recent past.5

The tendency to look back was aptly captured by noted scholar Arthur Miller. In 1993, Miller used the parable of “old wine in new bottles” to frame what has become the central intellectual property debate of the past twenty years, namely the question whether the existing legal framework can adequately adjust to the information age.6

Rarely, however, does media define law. Instead “metaphors express analogies.”7 Metaphors to help us shape our understanding and relate abstract structures to our own, shared experiences.

The Nova Law Review symposium and the articles captured in this edition address these changes. The speakers and authors have gamely endeavored to look forward, peering back to the minimum extent necessary to identify the trajectory of their paths.

The articles enable scholars to address the technological changes required of artists, industry, courts, and legislatures. Nonetheless, the historical perspective remains essential to update the law itself. The articles address how laws once designed for daily print newspapers and burlesque houses apply in the modern age. Under pre-Internet laws, for example, a republisher of a libel was as liable for the statement as the original publisher.8 Special laws were enacted to immunize Internet Service Providers and others from responsibility for republishing such content. That leads to questions beyond libel such as revenge porn,9 social media

5. Id. at 73–74. (“We look at the present through a rear-view mirror. We march backwards into the future.”).
6. “To some, these issues were nothing more than the same old wine, and they fit nicely into the old doctrinal bottles. Others, although regarding computer technologies as a new wine, nonetheless found satisfactory answers in the old bottles. The controversy . . . was generated by those who believe that we really are dealing with a sufficiently new wine that it requires new conceptual bottles.” Arthur R. Miller, Copyright Protection for Computer Programs, Databases, and Computer Generated Works: Is Anything New Since CONTU?, 106 HARV. L. REV. 977, 979 (1993).
8. Restatement (Second) of Torts § 578 (1977) (“Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”).
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harassment, and other new issues in communications for which neither the common law rules of the republisher nor the blanket immunity serve well. The old bottles break when filled with these new issues, just as McLuhan anticipated they would.

New examples abound. The FCC has introduced efforts to regulate the Internet under Title II of the Communications Act of 1934 as a “common carrier,” an ancient common law concept once used to assure equitable prices from the rail and shipping industries. Common carrier laws were incorporated into telecommunications to manage broadcast and telephony. Now we must consider whether the regulation of data packets can be done in the same manner we once regulated crates and goods.

In copyright and patent, even the concept of property has come under attack in academic and in Congress. The conversations held during the symposium and the papers that follow, however, focus on the creation and dissemination of new inventions and creative works. These articles provide an effective path toward the future.

In Professor Michael Epstein’s article, Reclaiming the Promise of Free Local Broadcasting: Spectrum Reallocation and Public Interest in the Post-Aereo Age, Professor Epstein highlights the Twenty-First century trend away from over-the-air broadcast to Multi-channel Video Programming Distributors (MVPDs) such as cable or internet service providers. Even cable and satellite are at risk of disintermediation from mobile and wireless devices. Professor Epstein identifies the societal consequence of these shifts as a diminution on the “free, over-the-air model of broadcast distribution enshrined in the Communications Act of 1934 and enforced by the Federal Communications Commission (FCC) through regulation.”

The work highlights that this debate is far more than a discussion of which conglomerate should control the profits derived from content distribution, but rather the policy decision affects which content is created

and how the public is served with free and openly accessible content. The benefit to the public is discussed through the consequence of broadcast spectrum allocation. “If the right balance is struck, broadcasters, pay television MVPDs, broadband companies, phone carriers and the government could all benefit from a Spectrum Reduction Plan.”

The importance, however, remains for the broader public. “[M]ost importantly, the public would also benefit, since spectrum reduction to broadcasters means more spectrum is available for the public benefit elsewhere, and broadcasters would still need to operate in the “public interest, convenience and necessity.”"

Professor Jason Zenor focused on a different aspect of media regulation—that of journalist shield laws. In his article, Shielding Acts of Journalism: Open Leaks Sites, National Security, and the Free Flow of Information, Professor Zenor proposes “a model shield law that protects the publishing of national security information which serves the public interest and does not create an immediate, irreparable harm.” Professor Zenor explains the modern challenge posed by WikiLeaks, bloggers, and the blurring of professional and non-professional journalists. Unlike bloggers and non-traditional media websites, “the traditional media are exempt from prosecution under the Espionage Act and cannot be punished for publishing truthful information that is legally obtained.”

Professor Zenor sets his debate for effective journalistic shield laws against the backdrop of websites and organizations dedicated to public dissemination of any and all leaked information. These sites bear both similarities and differences to traditional media and the old laws simply cannot operate to make nuanced distinctions between those sites essential to a free press and those harmful of a civil society. Professor Zenor provides a new model to rationalize these competing demands and provide a new set of metaphors to frame the next iteration of the Fourth Estate.

In Christina Scelsi’s article, Care and Feeding of Privacy Policies and Keeping the Big Data Monster At Bay: Legal Concerns in the Age of the Internet of Things, attorney Scelsi introduced the Internet of Things to the fields of entertainment and media privacy, noting that the Internet of Things “will affect nearly every industry, whether in terms of better planning as a result of the analysis of data collected by smart devices, or in the increased efficiencies created by the ability for people to use devices to communicate data to people located remotely.”

Attorney Scelsi moves her analysis to the health law sector where the implications of data security are perhaps the most profound for most individuals. In doing so, she illustrates the porous nature of the distinctions between media communications and the communications integral to personal autonomy as well as those of business and industry. As the metaphors shift
and the analogies expand, the entire world becomes the stage upon which the new media takes shape.

Professor Brian Frye utilizes metaphor directly. In his article, Copyright as Charity, Professor Frye uses the lessons of copyright and the lessons of the nonprofit sector to suggest regulatory approaches to update copyright law itself. As he explains, “[c]opyright and charity law complement each other by solving market and government failures in works of authorship in different ways.”

He points out that “new technologies like crowdfunding and the open-source movement enable authors and donors to solve certain market and government failures previously addressed by copyright and charity law, without the need for the indirect subsidies that copyright and charity law use to provide incentive to marginal authors and donors.” Reflecting on Professor Frye’s article, it seems logical to extrapolate that when the market failure is solved through new technology and more efficient communications strategies, the market no longer fails and the subsidy may no longer be needed. Lessons from copyright law policy and social welfare policy help illustrate their strengths and weaknesses to highlight policy suggestions.

This issue also features a student comment by Dylan Fulop, titled Petrella v. Metro-Goldwyn-Mayer: A ‘Stairway’ to Countless Copyright Claims. Mr. Fulop discusses the role that latches has been interpreted by the Supreme Court in Petrella v. Metro-Goldwyn-Mayer, Inc. In this interesting copyright dispute, the Court emphasized the statutory authority of Congress over the common law traditions of copyright, while retaining the equitable nature of the latches doctrine.

Laches, we hold, cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window. As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff. And a plaintiff’s delay can always be brought to bear at the remedial stage, in determining appropriate injunctive relief, and in assessing the “profits of the infringer . . . attributable to the infringement.”

Mr. Fulop builds on the Petrella analysis involving the motion picture, Raging Bull, to address the potential claims in music litigation, specifically the Led Zeppelin classic, Stairway to Heaven. The extension of Petrella will continue to be a contentious one, as the three-year window for copyright damages often does not coincide with the creation or primarily popularity of the infringement actions.

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14. No. 12-1315, slip op. (U.S. May 19, 2014)
15. Id. at 2.
These articles and the seventeen discussants at the symposium illustrate that society is only at the cusp of the true transformation. Interactive glasses from Google and Microsoft will marry a wearer’s perception of the world with real sight and virtual sight. Digitally connected devices can communicate with each other and monitor the speed of our moving car, the steps we walk, the media we watch, and the company we keep. Tomorrow’s laws regulating these devices may bear little relationship to the regulations currently on our books. Yet the hindsight with which we view the world will continue to shape society’s perception of the law and human relations, even if it does not provide an adequate guide for particular jurisprudence.

Although the symposium focused on the field of entertainment and media, conversations, presentations, and published articles highlight much more. The technology affects constitutional issues of privacy, criminal search, publicity rights, consumer rights and many related areas of law. It is my hope that the symposium and this edition of the *Nova Law Review* further this important dialogue on the future of media jurisprudence.

As policy makers, we must be careful not to “put new wine into old bottles: else the bottles break, the wine runs out, and the bottles perish: but they put new wine into new bottles, and both are preserved.”16 Neither, however, can we do nothing. “The wine in the bottle does not quench thirst.”17 By testing the metaphors, trying new regulations, and debating the future of new media, we will grow the best policy for the information age.

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17. GEORGE HERBERT, THE ENGLISH POEMS OF GEORGE HERBERT: TOGETHER WITH HIS COLLECTION OF PROVERBS ENTITLED JACULA PRUDENTUM 241 (1902) (Google eBook Ed.)