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Choosing Metaphors

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> *A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues. Who, then, will invest the funds to renovate and nourish its future life when no one owns it? How does the consumer benefit from that scenario? The answer is, there is no benefit.*
>
> —Jack Valenti[1]

The copyright law on the books is a large aggregation of specific statutory provisions; it goes on and on for pages and pages. When most people talk about copyright, though, they don't mean the long complicated statute codified in title 17 of the U.S. Code. Most people's idea of copyright law takes the form of a collection of principles and norms. They understand that those principles are expressed, if sometimes imperfectly, in the statutory language and the case law interpreting it, but they tend to believe that the underlying principles are what count. It is, thus, unsurprising that the rhetoric used in copyright litigation and copyright lobbying is more often drawn from the principles than the provisions.

One can greatly overstate the influence that underlying principles can exercise over the enactment and interpretation of the nitty-gritty provisions of substantive law. In the ongoing negotiations among industry representatives, normative arguments about the nature of copyright show up as rhetorical flourishes, but, typically, change nobody's mind. Still, normative understandings of copyright exercise some constraints on the actual legal provisions that the lobbyists can come up with, agree on, convince Congress to pass, and persuade outsiders to comply with. The ways we have

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of thinking about copyright law can at least make some changes more difficult to achieve than others.

Lawyers, lobbyists, and scholars in a host of disciplines have reexamined and reformulated copyright principles over the past generation, in ways that have expanded copyright's scope and blinded many of us to the dangers that arise from protecting too much, too expansively for too long. That transformation has facilitated the expansion of copyright protection and the narrowing of copyright limitations and exceptions.

At the turn of the century, when Congress first embraced the copyright conference model that was to trouble us for the rest of the century, the predominant metaphor for copyright was the notion of a quid pro quo.[2] The public granted authors limited exclusive rights (and only if the authors fulfilled a variety of formal conditions) in return for the immediate public dissemination of the work and the eventual dedication of the work in its entirety to the public domain.[3]

As the United States got less hung up on formal prerequisites, that model evolved to a view of copyright as a bargain in which the public granted limited exclusive rights to authors as a means to advance the public interest. This model was about compensation:[4] it focused on copyright as a way to permit authors to make enough money from the works they created in order to encourage them to create the works and make them available to the public. That view of the law persisted until fairly recently.

If you read books, articles, legal briefs, and congressional testimony about copyright written by scholars and lawyers and judges fifty years ago, you find widespread agreement that copyright protection afforded only shallow and exception-ridden control over protected works. Forty, thirty, even twenty years ago, it was an article of faith that the nature of copyright required that it offer only circumscribed, porous protection to works of authorship. The balance between protection and the material that copyright left unprotected was thought to be the central animating principle of the law. Copyright was a bargain between the public and the author, whereby the public bribed the author to create new works in return for limited commercial control over the new expression the author brought to her works. The public's payoff was that, beyond the borders of the authors' defined exclusive rights, it was entitled to enjoy, consume, learn from, and reuse the works. Even the bounded copyright rights would expire after a limited term, then set at fifty-six years.

A corollary of the limited protection model was that copyright gave owners control only over particular uses of their works.[5] The copyright

owner had exclusive rights to duplicate the work. Publishing and public performance were within the copyright owner's control. But copyright never gave owners any control over reading, or private performance, or resale of a copy legitimately owned, or learning from and talking about and writing about a work, because those were all part of what the public gained from its bargain. Thus, the fact that copyright protection lasted for a very long time (far longer than the protection offered by patents); the fact that copyright protection has never required a government examination for originality, creativity, or merit; and the fact that copyright protects works that have very little of any of them was defended as harmless: because copyright *never* took from the public any of the raw material it might need to use to create new works of authorship, the dangers arising from over-protection ranged from modest to trivial.

There was nearly universal agreement on these points through the mid-1970s. Copyright was seen as designed to be full of holes. The balance underlying that view of the copyright system treated the interests of owners of particular works (and often those owners were not the actual authors) as potentially in tension with the interests of the general public, including the authors of the future; the theory of the system was to adjust that balance so that each of the two sides got at least as much as it needed.[6] In economic terms, neither the author nor the public was entitled to appropriate the entire surplus generated by a new work of authorship.[7] Rather, they shared the proceeds, each entitled to claim that portion of them that would best encourage the promiscuous creation of still newer works of authorship.

If you're dissatisfied with the way the spoils are getting divided, one approach is to change the rhetoric. When you conceptualize the law as a balance between copyright owners and the public, you set up a particular dichotomy—some would argue, a false dichotomy[8]—that constrains the choices you are likely to make. If copyright law is a bargain between authors and the public, then we might ask what the public is getting from the bargain. If copyright law is about a balance between owners' control of the exploitation of their works and the robust health of the public domain, one might ask whether the system strikes the appropriate balance.[9] You can see how, at least in some quarters, this talk about bargains and balance might make trouble. Beginning in the late 1970s and early 1980s, advocates of copyright owners began to come up with different descriptions of the nature of copyright, with an eye to enabling copyright owners to capture a greater share of the value embodied in copyright-protected works.[10]

In the last thirty years, the idea of a bargain has gradually been replaced

by a model drawn from the economic analysis of law, which characterizes copyright as a system of incentives.[11] Today, this is the standard economic model of copyright law, whereby copyright provides an economic incentive for the creation and distribution of original works of authorship.[12] The model derives a lot of its power from its simplicity: it posits a direct relationship between the extent of copyright protection and the amount of authorship produced and distributed—any increase in the scope or subject matter or duration of copyright will cause an increase in authorship; any reduction will cause a reduction.

The economic analysis model focuses on the effect greater or lesser copyright rights might have on incentives to create and exploit new works. It doesn't bother about stuff like balance or bargains except as they might affect the incentive structure for creating and exploiting new works. To justify copyright limitations, like fair use, under this model, you need to argue that authors and publishers need them in order to create new works of authorship,[13] rather than, say, because that's part of the public's share of the copyright bargain. The model is not rooted in compensation, and so it doesn't ask how broad a copyright would be appropriate or fair; instead it inquires whether broader, longer, or stronger copyright protection would be likely to lead to the production of more works of authorship.

The weakness in this model is that more and stronger and longer copyright protection will always, at the margin, cause more authors to create more works—that's how this sort of linear model operates. If we forget that the model is just a useful thought tool, and persuade ourselves that it straightforwardly describes the real world, then we're trapped in a construct in which there's no good reason why copyrights shouldn't cover everything and last forever.

Lately, that's what seems to have happened. Copyright legislation has recently been a one-way ratchet, and it's hard to argue that that's bad within the confines of the conventional way of thinking about copyright. In the past several years we've seen a further evolution. Copyright today is less about incentives or compensation than it is about control.[14] What ended up persuading lawmakers to adopt that model was the conversion of copyright into a trade issue: The content industries, copyright owners argued, were among the few in which the United States had a favorable balance of trade. Instead of focusing on American citizens who engaged in unlicensed uses of copyrighted works (many of them legal under U.S. law), they drew Congress's attention to people and businesses in other countries who engaged in similar uses. The United States should make it a top prior-

ity, they argued, to beef up domestic copyright law at home, and thus ensure that people in other countries paid for any use of copyrighted works abroad. U.S. copyright law does not apply beyond U.S. borders, but supporters of expanded copyright protection argued that by enacting stronger copyright laws, Congress would set a good example for our trading partners, who could then be persuaded to do the same. Proponents of enhanced protection changed the story of copyright from a story about authors and the public collaborating on a bargain to promote the progress of learning, into a story about Americans trying to protect their property from foreigners trying to steal it.

That story sold. It offered an illusion that, simply by increasing the scope and strength and duration of U.S. copyright protection, Congress could generate new wealth for America without detriment or even inconvenience to any Americans. That recasting of the copyright story persuaded Congress to "improve" copyright protection and cut back on limitations and exceptions.[15]

The upshot of the change in the way we think about copyright is that the dominant metaphor is no longer that of a bargain between authors and the public. We talk now of copyright as property that the owner is entitled to control—to sell to the public (or refuse to sell) on whatever terms the owner chooses. Copyright has been transformed into the right of a property owner to protect what is rightfully hers. (That allows us to skip right past the question of what it is, exactly, that ought to be rightfully hers.) And the current metaphor is reflected both in recent copyright amendments now on the books and in the debate over what those laws mean and whether they go too far.

One example of this trend is the piecemeal repeal of the so-called first-sale doctrine, which historically permitted the purchaser of a copy of a copyrighted work to sell, loan, lease, or display the copy without the copyright owner's permission, and is the reason why public libraries, video rental stores, and art galleries are not illegal.[16] The first sale doctrine enhanced public access to copyrighted works that some were unable to purchase. Because the first sale doctrine applies only to copies of a copyrighted work, it became increasingly irrelevant in a world in which vast numbers of works were disseminated to the public through media such as television and radio, which involved no transfer of copies. Copyright owners who did distribute copies of their works, however, lobbied for the first sale doctrine's repeal. Congress yielded to the entreaties of the recording industry to limit the first sale doctrine as it applied to records, cassette tapes, and

compact discs in 1984, and enacted an amendment that made commercial record rental (but not loan or resale) illegal.[17] After the computer software industry's attempts to evade the operation of the first sale doctrine—by claiming that their distribution of software products involved licenses rather than sales[18]—received an unenthusiastic reception in court,[19] Congress partially repealed the first sale doctrine as it applied to computer programs.[20] Bills to repeal the first sale doctrine for audio/visual works were introduced in Congress,[21] but never accumulated enough support to be enacted. The actual bites these laws took out of the first sale doctrine were small ones, but in the process, the principle that the doctrine represents has been diminished.

If we no longer insist that people who own legitimate copies of works be permitted to do what they please with them, that presents an opportunity to attack a huge realm of unauthorized but not illegal use. If copyright owners can impose conditions on the act of gaining access, and back those conditions up with either technological devices, or legal prohibitions, or both, then copyright owners can license access to and use of their works on a continuing basis. Technological fences, such as passwords or encryption, offer some measure of control, and enhanced opportunities to extract value from the use of a work. The owner of the copyright in money management software, for example, could design the software to require purchasers of copies to authorize a small credit card charge each time they sought to run the program. The owner of the copyright in recorded music could release the recording in a scrambled format, and rent access to descramblers by the day. Technological controls, though, are vulnerable to technological evasion, which is where the part about legal controls comes in.

When copyright owners demanded the legal tools to restrict owners of legitimate copies of works from gaining access to them, Congress was receptive. Copyright owner interests argued that, in a digital age, anyone with access to their works could commit massive violations of their copyrights with a single keystroke by transmitting unauthorized copies all over the Internet. In order for their rights to mean anything, copyright owners insisted, they were entitled to have control over access to their works—not merely initial access, but continuing control over every subsequent act of gaining access to the content of a work.[22] Thus, to protect their property rights, the law needed to be amended to prohibit individuals from gaining unauthorized access to copyrighted works.[23]

Augmenting copyright law with legally enforceable access control could completely annul the first sale doctrine. More fundamentally,

enforceable access control has the potential to redesign the copyright landscape completely. The hallmark of legal rights is that they can be carefully calibrated. Copyright law can give authors control over the initial distribution of a copy of a work, without permitting the author to exercise downstream control over who gets to see it. Copyright law can give authors control over the use of the words and pictures in their books without giving them rights to restrict the ideas and facts those words and pictures express. It can give them the ability to collect money for the preface and notes they add to a collection of Shakespeare's plays without allowing them to assert any rights in the text of those plays. It can permit them to control reproductions of their works without giving them the power to restrict consumption of their works. Leaving eye-tracks on a page has never been deemed to be copyright infringement.

Copyrighted works contain protected and unprotected elements, and access to those works may advance restricted or unrestricted uses. Access controls are not so discriminating. Once we permit copyright owners to exert continuing control over consumers' access to the contents of their works, there is no way to ensure that access controls will not prevent consumers from seeing the unprotected facts and ideas in a work. Nor can we make certain that the access controls prevent uses that the law secures to the copyright owner, while permitting access when its purpose is to facilitate a use the law permits. If the law requires that we obtain a license whenever we wish to read protected text, it encourages copyright owners to restrict the availability of licenses whenever it makes economic sense for them to do so. That, in turn, makes access to the ideas, facts, and other unprotected elements contingent on copyright holders' marketing plans, and puts the ability of consumers to engage in legal uses of the material in those texts within the copyright holders' unconstrained discretion. In essence, that's an exclusive right to use. In other words, in order to effectively protect authors' "exclusive rights" to their writings, which is to say, control, we need to give them power to permit or prevent any use that might undermine their control. What that means is that a person who buys a copy of a work may no longer have the right to read and reread it, loan it, resell it, or give it away. But the law has been moving away from that principle for years.

A second example of this trend is the campaign to contract the fair-use privilege. Fair use was once understood as the flip side of the limited scope of copyright.[24] The copyright law gave the copyright holder exclusive control over reproductions of the work, but not over all reproductions.[25] The

justifications for fair use were various; a common formulation explained that reasonable appropriations of protected works were permissible when they advanced the public interest without inflicting unacceptably grave damage on the copyright owner. Fair use was appropriate in situations when the copyright owner would be likely to authorize the use but it would be a great deal of trouble to ask for permission, such as the quotation of excerpts of a novel in a favorable review or the use of selections from a scholarly article in a subsequent scholarly article building on the first author's research. Fair use was also appropriate in situations when the copyright owner would be unlikely to authorize, such as parodies and critiques, under a justification Prof. Alan Latman described as "enforced consent." The social interest in allowing uses that criticized the copyright owner's work, for example, outweighed the copyright owner's reluctance to permit them. Fair use was appropriate whenever such uses were customary, either under the implied-consent rubric or as a matter of enforced consent. Fair use was finally asserted to be the reason that a variety of uses that come within the technical boundaries of the exclusive rights in the copyright bundle, but were difficult to prevent, like private copying, would not be actionable.[26]

Recent reformulations of the fair use privilege, however, have sought to confine it to the implied-assent justification. Where copyright owners would not be likely to authorize the use free of charge, the use should no longer be fair. The uses that were permitted because they were difficult to police are claimed to be a subset of the impliedly permitted uses; should copyright owners devise a mechanism for licensing those uses, there would, similarly, no longer be any need to excuse the uses as fair.[27] In its most extreme form, this argument suggests that fair use itself is an archaic privilege with little application to the digital world: where technology permits automatic licensing, legal fictions based on "implied assent" become unnecessary.[28] Limiting fair use to an implied assent rationale, moreover, makes access controls seem more appealing. Thus, the fact that access controls would make no exception for individuals to gain access in order to make fair use of a work is said to be unproblematic. Why should fair use be a defense for the act of gaining unauthorized access?

By recasting traditional limitations on the scope of copyright as loopholes, proponents of stronger protection have managed to put the champions of limited protection on the defensive. Why, after all, should undesirable loopholes not now be plugged? Instead of being viewed as altruists seeking to assert the public's side of the copyright bargain, library organi-

zations, for example, are said to be giving aid and comfort to pirates. Instead of being able to claim that broad prohibitions on technological devices are bad technological policy, opponents of the copyright-as-control model are painted as folks who believe that it ought to be okay to steal books rather than to buy them. And when educators have argued that everyone is losing sight of the rights that the law gives the public, they have met the response that the copyright law has never asked authors to subsidize education by donating their literary property.

Then there's the remarkable expansion of what we call piracy. Piracy used to be about folks who made and sold large numbers of counterfeit copies. Today, the term "piracy" seems to describe *any* unlicensed activity—especially if the person engaging in it is a teenager. The content industry calls some behavior piracy despite the fact that it is unquestionably legal. When a consumer makes a noncommercial recording of music by, for example, taping a CD she has purchased or borrowed from a friend, her copying comes squarely within the privilege established by the Audio Home Recording Act. The record companies persist in calling that copying piracy even though the statute deems it lawful.[29]

People on the content owners' side of this divide explain that it is technology that has changed penny-ante unauthorized users into pirates, but that's not really it at all. These "pirates" are doing the same sort of things unlicensed users have always done—making copies of things for their own personal use, sharing their copies with their friends, or reverse-engineering the works embodied on the copies to figure out how they work. What's changed is the epithet we apply to them.

If we untangle the claim that technology has turned Johnny Teenager into a pirate, what turns out to be fueling it is the idea that *if* Johnny Teenager were to decide to share his unauthorized copy with two million of his closest friends, the *effect* on a record company would be pretty similar to the effect of some counterfeit CD factory's creating two million CDs and selling them cheap. Copyright owners are worried, and with good reason. But, in response to their worry, they've succeeded in persuading a lot of people that any behavior that has the same effect as piracy must *be* piracy, and must therefore reflect the same moral turpitude we attach to piracy, even if it is the same behavior that we all called legitimate before. Worse, any behavior that *could potentially cause the same effect* as piracy, even if it doesn't, must also be piracy. Because an unauthorized digital copy of something *could* be uploaded to the Internet, where it *could* be downloaded by two million people, even making the digital copy is piracy.

Because an unauthorized digital copy of something could be used in a way that could cause all that damage, making a tool that makes it *possible* to make an unauthorized digital copy, even if nobody ever actually makes one, is itself piracy, regardless of the reasons one might have for making this tool. And what could possibly be wrong with a law designed to prevent piracy?

My argument, here, is that this evolution in metaphors conceals immense sleight of hand. We as a society never actually sat down and discussed in policy terms whether, now that we had grown from a copyright-importing nation to a copyright-exporting nation, we wanted to recreate copyright as a more expansive sort of control. Instead, by changing metaphors, we somehow got snookered into believing that copyright had always been intended to offer content owners extensive control, only, before now, we didn't have the means to enforce it.

Notes

1. *Copyright Term Extension Act: Hearing on H.R. 989 Before the Subcommittee On Courts and Intellectual Property of the House Committee on the Judicary*, 104th Cong., 1st sess. (June 1, 1995) (testimony of Jack Valenti, Motion Picture Association of America).

2. *See* Jessica Litman, *The Public Domain*, 39 Emory Law Journal 965, 977–92 (1990).

3. *See, e.g., London v. Biograph*, 231 F. 696 (1916); *Stone & McCarrick v. Dugan Piano*, 210 F. 399 (ED La 1914).

4. I'm indebted to Professor Niva Elkin-Koren for this insight. See Niva Elkin-Koren, *It's All About Control: Copyright and Market Power in the Information Society* (7/00 draft).

5. *See, e.g., U.S. Library of Congress Copyright Office, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 6, 21–36 (1961).

6. *See, e.g., Chaffee, Reflections on the Law of Copyright*, 45 Columbia Law Review 503 (1945); Report of the Register of Copyrights, note 5 above, at 6.

7. Economists would say that the authorship of a new work creates a benefit that exceeds the costs of authoring it. That is the reason why the public benefits when authors create new works. The excess benefit is a surplus. It falls to the law to determine how that surplus should be allocated. Classically, copyright law accorded the author a portion of the surplus thought to be necessary to provide an incentive to create the work, and reserved the remaining benefit to the public.

8. *See, e.g.*, Jane C. Ginsburg, *Authors and Users in Copyright*, 45 Journal of the Copyright Society of the USA 1 (1997).

9. *See* Benjamin Kaplan, *An Unhurried View of Copyright* 120–22 (Columbia University Press, 1967); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 Harvard Law Review 281 (1970).

10. One series of writings explored the possibility of characterizing copyright as a

natural right, on the theory that works of authorship emanated from and embodied author's individual personalities. *See, e.g.,* Edward J. Damich, *The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors,* 23 Georgia Law Review 1 (1988); Justin Hughes, *The Philosophy of Intellectual Property,* 77 Georgetown Law Journal 287 (1988); John M. Kernochan, *Imperatives for Enforcing Authors' Rights,* 11 Columbia-VLA Journal of Law &. the Arts 587 (1987). Ignoring for the moment that, at least in the United States, the overwhelming majority of registered copyrights were corporately owned, these thinkers posited the model of author who creates all works from nothing. The parent/progeny metaphor was popular here—authors were compared with mothers or fathers; their works were their children. Therefore, the argument went, they were morally entitled to plenary control over their works as they would be over their children.

11. *See, e.g.,* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright,* 30 Journal of the Copyright Society 209 (1982); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors,* 82 Columbia Law Review 1600 (1982); William M. Landes and Richard Posner, An *Economic Analysis of Copyright,* 18 Journal of Legal Studies 325 (1989).

12. *See, e.g.,* Dennis Karjala, *Copyright in Electronic Maps,* 35 Jurimetrics Journal 395 (1995); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law,* 62 University of Colorado Law Review 1173 (1991).

13. *See* Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship,* 57 University of Chicago Law Review 1009, 1032–49 (1990); Litman, note 2 above, at 1007–12.

14. Again, I'm indebted to Professor Elkin-Koren for the taxonomy. *See* Elkin-Koren, note 4 above.

15. I have told that story in some detail in Jessica Litman, *Copyright and Information Policy,* 55 Law & Contemporary Problems (Spring 1992), at 185.

16. *See* 17 USCA § 109; see generally John M. Kernochan, *The Distribution Right in the United States of America: Review and Reflections,* 42 Vanderbilt Law Review 1407 (1989).

17. Record Rental Amendment of 1984, Pub. L No 98–450, 98 Stat 1727 (1984) (codified as amended at 17 USCA §§ 109, 115).

18. *See* Pamela Samuelson, *Modifying Copyrighted Software: Adjusting Copyright Doctrine to Accommodate a Technology,* 28 Jurimetrics Journal 179, 188–89 (1988).

19. In *Vault Corp. v. Quaid Software, Ltd.,* 847 F2d 255 (5th Cir 1988), the court rejected such a license and the state law purporting to enforce it because the court found it to be inconsistent with federal copyright law, which gives purchasers of copies of computer programs the rights that the shrink-wrap license attempted to withhold.

20. Computer Software Rental Amendments Act of 1990, Pub. L. No. 101–650, 104 Stat 5089, 5134 § § 801–804 (codified at 17 USC § 109). Like the Record Rental Act, the CSRA prohibits commercial software rental, but not resale, gift, or loan.

21. *See* S. 33, 98th Cong, 1st sess. (January 25, 1983), in 129 Congo Rec. 590 (January 26, 1983); H.R. 1029, 98th Cong., 1st sess. (January 26, 1983), in 129 Congo Rec. H201 (January 27, 1983); Home Video Recording, Hearing Before the Senate Committee on the Judiciary, 99th Cong, 2d sess. (1987).

22. *See* Jane C. Ginsburg, *Essay: From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law,* in Hugh Hansen, ed., *U.S. Intellectual Property: Law and Policy* (Sweet &. Maxwell, 2000).

23. As enacted, access-control amendments prohibit individuals from circumventing any technological devices designed to restrict access to a work, and make it illegal to make or distribute any tool or service designed to facilitate circumvention. *See* 17 U.S.C. § 1201. The law imposes substantial civil and criminal penalties for violations. *See* 17 U.S.C. §§ 1203, 1204.

24. *See, e.g.,* Alan Latman, *Study # 14: Fair Use 6–7* (1958), reprinted in 2 Studies on Copyright, Studies on Copyright 778, 784–85 (Arthur Fisher Memorial Edition 1963).

25. *See Folsom v. Marsh,* 9 Fed Cas. 342 (1841); H. Ball, The Law of Copyright and Literary Property 260 (Bender, 1944); L. Ray Patterson, *Understanding Fair Use,* 55 Law and Contemporary Problems (Spring 1992), at 249.

26. *See generally* Latman, note 24 above at 7–14, 2 Studies on Copyright at 785–92; Lloyd Weinreb, *Commentary: Fair's Fair: A Comment on the Fair Use Doctrine,* 105 Harvard Law Review 1137 (1990).

27. *See, e.g.,* Jane C. Ginsburg, note 8 above, at 11–20 (1997); *American Geophysical Union v. Texaco,* 60 F.3d 913 (2d Cir. 1995).

28. *See, e.g.,* Tom W. Bell, *Fared Use V. Fair Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine,* 76 N. Carolina Law Review 101 (1998).

29. *See, e.g., Music on the Internet: Is There an Upside to Downloading? Hearing Before the Senate Judiciary Committee,* 106th Cong., 2d sess. (July 11, 2000) (remarks of Hilary Rosen, RIAA).

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