
DIGITAL
COPYRIGHT

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Protecting intellectual property on the Internet © The Digital Millennium Copyright Act © Copyright lobbyists conquer the Internet © Pay per view . . . pay per listen . . . pay per use © What the major players stand to gain © What the public stands to lose

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For Ari

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INTRODUCTION

American ideas of freedom are bound up with a vision of information policy that counts information as social wealth owned by all. We believe we are entitled to say what we think, to think what we want, and to learn whatever we're willing to explore. Part of the information ethos in the United States is that facts and ideas cannot be owned, suppressed, censored, or regulated; they are meant to be found, studied, passed along, and freely traded in the "marketplace of ideas."

In fact, information is regulated in this country as in others. We have an enormously complex collection of information law prescribing terms and conditions for a variety of different providers of information. Broadcasters are the most obvious example of regulated speakers, but we also have rules about what schools may teach and where protesters may demonstrate. The rules about how and when citizens can get information from the government are complex and arcane. Despite the web of regulation that surrounds some regions of free-speech law, however, the underlying concept holds true more often than not. In the United States, at least for the most part, we may say what we think, think what we want, and learn whatever we are willing to explore.

There are other corollaries, and we've gotten accustomed to them. We've been able to do our reading, viewing, and exploring privately and anonymously, and have come to view the ability to do so as a natural right. A world in which each word we read or image we view is monitored and

recorded seems like the stuff of science fiction: unimaginable and, in any event, impossible in America.

The Internet has been hailed as the most revolutionary social development since the printing press. In many ways its astonishing growth has outstripped any historical analogy we can unearth. What has fueled much of that growth has been the explosion of new possibilities for connections—among people, among different formerly discrete packages of information, among ideas. It isn't that anyone would prefer to use a unix box (or even a Windows tcp/ip client) to find out what one can more easily read in the paper. Rather, one can interact with other people, and with the information one seeks, and do so directly at previously unthinkable speeds. Digital media and network connections, it is said, are the most democratic of media, promoting free expression and access to information wherever a computer can be hooked up to a telephone line.

In this celebration of new possibilities, we tend to emphasize the many things that become feasible when people have ready access to information sources and to other people not practicably available before. The scope and the speed of interconnected digital networks make conversations easy that before were unimaginable. The almost utopian vision of a wired future seems to assume that the legal infrastructure of our information policy will continue to encourage us to speak, think, and learn as we will.

But the technological marvel that makes this interconnection possible has other potential as well. Digital technology makes it possible to monitor, record, and restrict what people look at, listen to, read, and hear.

Why, in the United States, would one want to do such a thing? To get paid. If someone, let's call him Fred, keeps track of what we see and hear, that enables Fred to ensure that we pay for our sights and sounds. Once information is valuable, an overwhelming temptation arises to appropriate that value, to turn it into cash. If the means of transforming information into a marketable and marketed commodity require a little invasion of privacy, a smidgen of information rationing, or a dollop of surveillance, well, that's the price of progress.

Perhaps it is; further, perhaps it's a price that many citizens would be more than willing to pay in order to preserve the current world dominance of American information and entertainment industries. Citizens are not, however, being asked, and their elected representatives turn out to be in no position to evaluate that bargain on their behalf. Meanwhile, the people who argue that the nation's prosperity requires a legal regime that enables information to be tightly controlled seem likely to prevail.

One of the most important devices being used to effect this transformation, ironically enough, is copyright law. No wonder so few people are paying attention. Copyright law has a well-earned reputation as a discipline both marginal and arcane. Copyright law questions can make delightful cocktail-party small talk, but copyright law answers tend to make eyes glaze over everywhere. Still, to the extent that the public considers copyright law at all, it appears to think that the law is designed to benefit authors for creating new works and thus to promote the progress of knowledge and art.

And, that's certainly the theory. The premise is that we want authors to have enough control over their works to enable them to extract some of the commercial value of those works—that's what lets them make a living creating works of authorship. At the same time, the purpose of the system is to benefit the public at large, and that works best when the rest of the value of the work can be enjoyed by the public at large. United States copyright law has until now divided up the value that inheres in works of authorship to permit authors (and their employers and publishers) to control and therefore profit from some uses of their works, while forbidding them from controlling others. Authors are given enough control to enable them to exploit their creations, while not so much that consumers and later authors are unable to benefit from the protected works. To take a simple example, copyright owners are entitled to prohibit others from making copies of their works, but copyright law gives them no rights to control whether or when people read them or use them.

Why the lines have been drawn where they are is a matter of some controversy. Some people insist that copyright owners are entitled to just enough control to provide an economic incentive for their creation, since the broad purpose of copyright is to promote knowledge by encouraging authors to create and disseminate their works. Others argue that the only uses of a work that are properly excluded from the copyright owner's control are the ones that have no significant economic value.

Technology now permits copyright owners of works in digital format to monitor and meter the consumption of their works. The ubiquity of digital technology in the information and entertainment industries and the rapid penetration of the Internet into Americans' lives have enabled the dissemination of an increasing amount of information on a pay-per-view basis. In the current milieu, the policy arguments over the rationale for copyright owners' imperfect control have taken on immense practical significance. If the reason that authors' and their publishers' control over uses of their works has been narrowly confined is to enable consumers and future authors to make the broadest

possible use of protected creations that is consistent with the copyright system's encouragement of authorship, then digital technology changes very little. The fact that technology enables copyright owners to exercise more complete control is no reason to modify the copyright law to facilitate it. If, in contrast, the goal of copyright law is to place all feasible control over works of authorship firmly in the hands of copyright owners, new digital technology offers us the opportunity for the first time to come very close to perfecting the system.

The controversy over which view of the law is more nearly true is no longer academic. Over the past ten years, many have come around to the view that, in a networked digital world, limitations on copyright owners' control of their works are no longer desirable. Congress has added more than one hundred pages to the copyright statute, almost all of them billed as loophole-closers.[1] We've also seen the emergence of a new way of thinking about copyright: Copyright is now seen as a tool for copyright owners to use to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner's control.

In 1998, copyright owners persuaded Congress to enhance their rights with a sheaf of new legal and technological controls. Armed with those copyright improvements, copyright lawyers began a concerted campaign to remodel cyberspace into a digital multiplex and shopping mall for copyright-protected material. The outcome of that effort is still uncertain. If current trends continue unabated, however, we are likely to experience a violent collision between our expectations of freedom of expression and the enhanced copyright law. I wish I could be confident that copyright law would be the loser in such a fight.

NOTE

1. *See* Intellectual Property and Communications Omnibus Reform Act of 1999, Public L. 106-113 (1999); Digital Theft and Copyright Damages Improvement Act, Public L. 106-160 (1999); Digital Millennium Copyright Act, Public L. 105-204 (1998); No Electronic Theft (NET) Act, Public L. 105-147, 111 Stat. 2678 (1997); Anticounterfeiting Consumer Protection Act , Public L. 104-153, 110 Stat. 1386, 1388 (1996); Digital Performance Right in Sound Recordings Act, Public L. 104-39, 109 Stat. 336 (1995); Audio Home Recording Act, Public L. 102-563, 106 Stat. 4237 (1992); Copyright Renewal Act, Public L. 102-307, 106 Stat. 264 (1992); Computer Software Rental Amendments, Public L. 101-650, 104 Stat. 5089, 5134 (1990); Copyright Remedy Clarification Act, Public L. 101-553, 104 Stat. 287 (1990).