

# WE REVISING COPYRIGHT LAW FOR THE INFORMATION AGE<sup>1</sup>

WHEN WE EXAMINE THE QUESTION whether copyright needs redesign to stretch it around digital technology, we can look at the issues from a number of different vantage points. First, there is the viewpoint of current copyright stakeholders: today's market leaders in copyright-affected industries. Their businesses are grounded on current copyright practice; their income streams rely on current copyright rules. Most of them would prefer that the new copyright rules for new copyright-affecting technologies be designed to enable current stakeholders to retain their dominance in the marketplace.<sup>2</sup>

One way to do that is to make the new rules as much like the old rules as possible. Current copyright holders and the industries they do business with are already set up to operate under those rules: they have form agreements and licensing agencies and customary royalties in place. There are other advantages in using old rules: if we treat the hypertext version of the *New York Times* as if it were a print newspaper, then we have about two hundred years' worth of rules to tell us how to handle it. We can avoid the problems that accompany writing new rules, or teaching them to the people (copyright lawyers, judges, newspaper publishers) who need to learn them.

Using old rules, however, has the obvious disadvantage that the rules will not necessarily fit the current situation very well. Where the new sorts of works behave differently from the old sorts of works, we need to figure out some sort of fix. Here's a simple example: Newsstands turn out to be an effective way of marketing newspapers and magazines in part because it is difficult as a practical matter to make and distribute additional copies of newspapers and magazines that one buys from the newsstand. If one "buys" a newspaper by downloading it from the World Wide Web, on the other hand, it is pretty easy to make as many copies as one wants. The old rules, customs, and practices, therefore, will not work very well unless we can come up with a way to prevent most of those copies from getting made.

Relying on old rules encourages us to solve the problem that the World Wide Web is not like a newsstand by disabling some of its non-newsstand-like qualities. We could enact rules requiring the proprietors of Web pages to set them up to behave much more like newsstands; we could demand that they insert code in each of their documents that would prevent downloading or would degrade any downloaded copies; we could require modem manufacturers to install chips that disabled the transfer of digital data unless some credit card were charged first.

But why would we want to do that? Adopting rules that disable new technology is unlikely to work in the long term, and unlikely to be a good policy choice if it does work. We have tried before to enact laws that erect barriers to emerging technology in order, for policy reasons, to protect existing technology. The FCC did precisely that when it regulated cable television to the point of strangulation in order to preserve free broadcast TV. That particular exercise didn't work for very long.<sup>3</sup> Others have been more successful. Direct broadcast satellite television subscriptions still lag far behind cable television subscriptions in the United States, and no small part of the reason is that our current legal infrastructure makes it much more difficult for direct satellite broadcasters than for cable operators or conventional broadcasters.<sup>4</sup>

If our goal in reforming current law were to make things more difficult for emerging technology, in order to protect current market leaders against potential competition from purveyors of new media, then cleaving to old rules would be a satisfactory, if temporary, solution. Adhering to old rules might distort the marketplace for new technology for at least the short term (since that, after all, would be one of its purposes), which might influence how that technology developed in the longer term, which, in turn, might influence whether and how the affected industries would compete in the markets for those technologies in the future. It would probably delay the moment at which the current generation of dominant players in information and entertainment markets were succeeded by a new generation of dominant players in different information and entertainment markets.

If instead of looking at the situation from the vantage point of current market leaders, we imagined the viewpoint of a hypothetical benevolent despot with the goal of promoting new technology, we might reach an entirely different answer to the question. Such a being might look at history and recognize that copyright shelters and exemptions have, historically, encouraged rapid investment and growth in new media of expression.

As I described in chapter 7, player pianos took a large bite out of the markets for conventional pianos and sheet music after courts ruled that making and selling piano rolls infringed no copyrights; phonograph records supplanted both piano rolls and sheet music with the aid of the compulsory license for mechanical reproductions; the jukebox industry was created to exploit the 1909 act's copyright exemption accorded to the "reproduction or rendition of a musical composition by or upon coin-operated machines." Radio broadcasting invaded everyone's living rooms before it was clear whether unauthorized broadcasts were copyright infringement; television took over our lives while it still seemed unlikely that most television programs could be protected by copyright. Videotape rental stores sprang up across the country shielded from copyright liability by the first sale doctrine. Cable television gained its initial foothold with the aid of a copyright exemption, and displaced broadcast television while sheltered by the cable compulsory license.<sup>5</sup>

Why would a copyright exemption promote development? Conventional wisdom tells us that, without the incentives provided by copyright, entrepreneurs will refuse to invest in new media. History tells us that they do invest without paying attention to conventional wisdom. A variety of new media flourished and became remunerative when people invested in producing and distributing them first, and sorted out how they were going to protect their intellectual property rights only after they had found their markets. Apparently, many entrepreneurs conclude that if something is valuable, a way will be found to charge for it, so they concentrate on getting market share first, and worry about profits—and the rules for making them—later. The sort of marketplace that grows up in the shelter of a copyright exemption can be vibrant, competitive, and sometimes brutal. Some prospectors will seek to develop market share on a hunch; others from conviction. Still others may aim only to generate modestly valuable assets that will inspire some bigger fish out there to eat them. In any event, new products may be imagined, created, tested, and introduced, and new media may be explored. Fierce competition is not very comfortable, but it can promote the progress of science nonetheless.

In addition, by freeing content providers from well-established rules and customary practices, a copyright shelter allows new players to enter the game. The new players have no vested interest—yet—so they are willing to take more risks in the hope of procuring one. They end up exploring different ways of charging for value. Radio and television broadcast signals are

given to their recipients for free; broadcasters have figured out that they can collect money based on the number and demographics of their audiences. Many valuable software programs obtained their awesome market share by being passed on to consumers at no extra cost (like Microsoft Windows®), or deliberately given away as freeware (like AOL® or Netscape®). Other software programs may well have achieved their dominant market position in part by being illicitly copied by unlicensed users. Indeed, industry observers agree that at least half of all of the copies of software out there are unauthorized, yet the software market is booming; it is the pride of the U.S. Commerce Department. Perhaps all of the unauthorized copies are part of the reason.

Our hypothetical benevolent despot, then, might propose a temporary period during which the Internet could be a copyright-free zone. Nobody seems to be making that sort of proposal these days, so perhaps I am mistaken about what a wise ruler would view as good policy. Or perhaps all the benevolent despots in the neighborhood are off duty, on vacation, or just simply hiding. Perhaps they've sought alternate employment.

A number of other viewpoints are possible. I'd like to focus on a third: the classic formulation of copyright as a bargain between the public and copyright holders.<sup>6</sup> In the efforts to enact the Digital Millennium Copyright Act, stakeholders focused almost exclusively on the copyright holders' side of that bargain. Copyright owners, however, have never been entitled to control all uses of their works. Instead, Congress has accorded copyright owners some exclusive rights, and reserved other rights to the general public. Commonly, copyright theorists assess the copyright bargain by asking whether it provides sufficient incentives to prospective copyright owners.<sup>7</sup> Yet, economists tell us that, at the margin, there is always an author who will be persuaded by a slight additional incentive to create another work, or who will be deterred from creating a particular work by a diminution in the copyright bundle of rights. If we rely on the simple economic model, we are led to the conclusion that every enhancement of the rights in the copyright bundle is necessary to encourage the creation of *some* work of authorship.

Asking "What should copyright holders receive from this bargain? What do they need? What do they want? What do they deserve?" then, may be less than helpful. We might instead look at the other side of the equation, and ask "What is it the public should get from the copyright bargain? What does the public need, want, or deserve?" The public should expect the

creation of more works, of course, but what is it that we want the public to be able to do with those works?

The constitutional language from which Congress's copyright enactments flow describes copyright's purpose as "[t]o promote the Progress of Science and useful Arts." We can begin with the assertion that the public is entitled to expect *access* to the works that copyright inspires. That assertion turns out to be controversial. Public access is surely not necessary to the progress of science. Scientists can build on each others' achievements in relative secrecy. Literature may flourish when authors have the words of other authors to fertilize their own imaginations, but literature may thrive as well when each author needs to devise her own way of wording. If we measure the progress of science by the profits of scientists, secrecy may greatly enhance the achievements we find.

Still, if valuable works of authorship were optimally to be kept secret, there would be no need for incentives in the copyright mold of exclusive rights. Authors could rely on self-help to maintain exclusive control of their works. Copyright makes sense as an incentive if its purpose is to encourage the dissemination of works, in order to promote public access to them. It trades a property-like set of rights precisely to encourage the holders of protectable works to forgo access restrictions in aid of self-help. For much of this country's history, public dissemination was, except in very limited circumstances, a condition of copyright protection.<sup>8</sup> While no longer a condition, it is still fair to describe it as a goal of copyright protection.<sup>9</sup>

But why is it that we want to encourage dissemination? What is it we want the public to be able to do with these works that we are bribing authors to create and make publicly available? We want the public to be able to read them, view them, and listen to them. We want members of the public to be able to learn from them: to extract facts and ideas from them, to make them their own, and to be able to build on them. That answer leads us to this question: how can we define the compensable units in which we reckon copyright protection to provide incentives (and, since the question of how much incentive turns out to be circular, let's not worry about that for now) for creation and dissemination, while preserving the public's opportunities to read, view, listen to, learn from, and build on copyrighted works?

In 1790, Congress struck this balance by limiting the compensable events within the copyright owner's bundle of rights to printing, reprinting, publishing, and vending copyrighted works.<sup>10</sup> (That translates, in current lingo, into an exclusive right to make, distribute, and sell "copies."<sup>11</sup>)

Public performances, translations, adaptations, and displays were all beyond the copyright owner's control. Courts' constructions of the statute supplied further limitations on the copyright owner's rights. The statutory right to vend was limited by the first sale doctrine.<sup>12</sup> The statutory right to print and reprint did not apply to translations and adaptations,<sup>13</sup> did not prevent others from using the ideas, methods, or systems expressed in the protected works,<sup>14</sup> and, in any event, yielded to a privilege to make fair use of copyrighted works.<sup>15</sup>

Congress, over the years, expanded the duration and scope of copyright to encompass a wider ambit of reproduction, as well as translation and adaptation, public for-profit performance, and then public performance and display. It balanced the new rights with new privileges: Jukebox operators, for example, enjoyed an exemption from liability for public performance for more than fifty years, and were the beneficiaries of a compulsory license for another decade after that.<sup>16</sup> Other compulsory licenses went to record companies, cable television systems, satellite carriers, and noncommercial television.<sup>17</sup> Broadcasters received exemptions permitting them to make "ephemeral recordings" of material to facilitate its broadcast; manufacturers of useful articles embodying copyrighted works received a flat exemption from the reproduction and distribution rights to permit them to advertise their wares. Libraries received the benefit of extensive privileges to duplicate copyrighted works in particular situations. Schools got an express privilege to perform copyrighted works publicly in class; music stores got an express privilege to perform music publicly in their stores; and small restaurants got an express privilege to perform broadcasts publicly in their restaurants.<sup>18</sup> Congress did not incorporate specific exemptions for the general population in most of these enactments because nobody showed up to ask for them.<sup>19</sup> At no time, however, until the enactment of the access-control anticircumvention provisions of the DMCA, did Congress or the courts cede to copyright owners control over looking at, listening to, learning from, or *using* copyrighted works.

The right "to reproduce the copyrighted work"<sup>20</sup> is commonly termed the fundamental copyright right. The control over the making of copies is, after all, why this species of intellectual property is called a *copyright*. So it is tempting, and easy, to view the proliferation of copying technology as threatening copyright at its core. However we revise the copyright law, many argue, we need to ensure that the copyright owner's control over the making of every single copy of the work remains secure. This is especially

true, the argument continues, where the copies are digitally created and therefore potentially perfect substitutes for the original.<sup>21</sup>

Copyright holders have long sought to back up their legal control of reproduction with functional control. In the 1970s, copyright owners sought without success to prohibit the sale of videocassette recorders.<sup>22</sup> In the 1980s, copyright owners succeeded in securing a legal prohibition on rental of records or computer software to forestall, it was said, the unauthorized copying that such rental was likely to inspire.<sup>23</sup> In the 1990s, copyright owners and users groups compromised on the adoption of the Audio Home Recording Act,<sup>24</sup> which, for the first time, required that recording devices be technologically equipped to prevent serial copying. The Digital Millennium Copyright Act incorporated language prohibiting *any* devices or services designed to circumvent technological protection. Supporters of the anticircumvention provisions insisted that technological protection was the only feasible way to prevent widespread, anonymous digital copying.<sup>25</sup> The popular justification for giving copyright owners the legal right to control access to their works is that unauthorized access can lead to a ruinous proliferation of unauthorized copies. The underlying premise of the anticircumvention approach appears to be the notion that the right to make copies is central to the integrity of the copyright system, and must be protected by any available means.

The right to make copies, though, is not fundamental to copyright in any sense other than the historical one. When the old copyright laws fixed on reproduction as the compensable (or actionable) unit, it was not because there is something fundamentally invasive of an author's rights about making a copy of something. Rather, it was because, at the time, copies were easy to find and easy to count, so they were a useful benchmark for deciding when a copyright owner's rights had been unlawfully invaded. Unauthorized reproductions could be prohibited without curtailing the public's opportunities to purchase, read, view, hear, or use copyrighted works. They are less useful measures today. Unauthorized copies have become difficult to find and difficult to count. In addition, now that copyright owners' opportunities to exploit their works are as often as not unconnected with the number of reproductions, finding and counting illicit copies is a poor approximation of the copyright owners' injury.

The reasons that copyright owners might have for wanting to treat reproduction as a fundamental copyright right are obvious. By happenstance (at least from the vantage point of 1790, or 1870, or even 1909 or

1976), control over reproduction could potentially allow copyright owners control over every use of digital technology in connection with their protected works. This is not what the Congresses in 1790, 1870, 1909, and 1976 meant to accomplish when they awarded copyright owners exclusive reproduction rights. The photocopy machine was not invented until the baby boom. Printing presses used to be expensive. Multiple reproduction was, until very recently, a chiefly commercial act. Pegging authors' compensation to reproduction, therefore, allowed past Congresses to set up a system that encouraged authors to create and disclose new works while ensuring the public's opportunities to read, view, or listen to them; learn from them; share them; improve on them; and, ultimately, reuse them. Today, making digital reproductions is an unavoidable incident of reading, viewing, listening to, learning from, sharing, improving, and reusing works embodied in digital media. The centrality of copying to use of digital technology is precisely why reproduction is no longer an appropriate way to measure infringement.

As recently as the 1976 general copyright revision, the then-current state of technology permitted Congress to continue its reliance on the exclusive reproduction right by enacting a lot of arcane, hypertechnical rules and exceptions, at the behest of all of the stakeholders who argued that they required special treatment. That did not pose major problems because very few people needed to understand what the rules were, and many if not most of them could afford to hire lawyers. Unauthorized reproduction was illegal, said the rules, unless you were a "library or archives," a "transmitting organization entitled to transmit to the public a performance or display of a work," a "government body or other nonprofit organization," or a "public broadcasting entity"; or unless you were advertising "useful articles that have been offered for sale," "making and distributing phonorecords," or making pictures of a building "ordinarily visible from a public place."<sup>26</sup> Those entitled to exemptions knew who they were and knew what limitations their privileges entailed.

We no longer live in that kind of world. Both the threat and promise of new technology centers on the ability it gives many, many people to perform the twenty-first-century equivalents of printing, reprinting, publishing, and vending. Copyright owners all over want the new, improved rules to govern the behavior of all citizens, not just major players in the copyright-affected businesses. And, since anyone who watches citizen behavior carefully to detect copyright violations can easily find enough to

fill up her dance card in an afternoon, copyright owners have taken to the argument that citizens must be *compelled* to obey the rules, by installing technology that makes rule breaking impossible for the casual user and difficult for the expert hacker. Otherwise, they've argued, there's no hope of everyone's obeying the law.

Well of course not. How could they? They don't understand it, and how could we blame them? It isn't a particularly easy set of rules to understand, and even when you understand it, it's very hard to argue that the rules make any sense—or made any sense, for that matter, when they were written. What nobody has tried, or even proposed, is that we either scrap the old set of rules, or declare the general citizenry immune from them, and instead devise a set of rules that, first, preserve some incentives for copyright holders (although not necessarily the precise incentives they currently enjoy); second, make some sense from the viewpoint of individuals; third, are easy to learn; and fourth, seem sensible and just to the people we are asking to obey them.

The first task, then, in revising copyright law for the new era, requires a very basic choice about the sort of law we want. We can continue to write copyright laws that only copyright lawyers can decipher, and accept that only commercial and institutional actors will be likely to comply with them, or we can contrive a legal structure that ordinary individuals can learn, understand, and even regard as fair. The first alternative will take of itself: The legislative proposal accompanying the White Paper inspired precisely the sort of logrolling that has achieved detailed and technical legislation in the past,<sup>27</sup> and culminated in the swollen DMCA. The second alternative is more difficult. How do we define a copyright law that is short, simple, and fair?

If our goal is to write rules that individual members of the public will comply with, we need to begin by asking what the universe looks like from their vantage point. Members of the public, after all, are the folks we want to persuade that copyright is just and good and will promote the progress of science. They are unlikely to think highly of the Lehman Working Group's argument that they need to secure permission for each act of viewing or listening to a work captured in digital form. They are unlikely to appreciate the relentless logic involved in concluding that, while copyright law permits the owner of a copy to transfer that copy freely, the privilege does not extend to any transfer by electronic transmission.<sup>28</sup> They are unlikely to be persuaded that the crucial distinction between lawful and

unlawful activity should turn on whether something has been reproduced in the memory of some computer somewhere.

If we are determined to apply the copyright law to the activities of everyone, everywhere, then I suggest that the basic reproductive unit no longer serves our needs, and we should jettison it completely.<sup>29</sup> That proposal is radical: if we stop defining copyright in terms of reproduction, we will have to rethink it completely. Indeed, we will need a new name for it, since *copyright* will no longer describe it. What manner of incentive could we devise to replace reproduction as the essential compensable unit?

The public appears to believe that the copyright law incorporates a distinction between commercial and noncommercial behavior. Ask non-lawyers, and many of them will tell you that making money using other people's works is copyright infringement, while noncommercial uses are all okay (or, at least, okay unless they do terrible things to the commercial market for the work).<sup>30</sup> Now, that has never, ever been the rule but, as rules go, it isn't a bad start. It isn't very far from the way, in practice, the rules have actually worked out. Noncommercial users rarely get sued and, when they do, tend to have powerful fair use arguments on their side. Moreover, if it is a rule that more people than not would actually obey because it struck them as just, we would be a long way toward coming up with a copyright law that would actually work. So why not start by recasting copyright as an exclusive right of commercial exploitation? Making money (or trying to) from someone else's work without permission would be infringement, as would large-scale interference with the copyright holders' opportunities to do so. That means that we would get rid of our current bundle-of-rights way of thinking about copyright infringement. We would stop asking whether somebody's actions resulted in the creation of a "material object . . . in which a work is fixed by any method now known or later developed,"<sup>31</sup> and ask instead what effect those actions had on the copyright holder's opportunities for commercial exploitation.<sup>32</sup>

Such a standard is easy to articulate and hard to disagree with in principle. The difficulty lies in predicting how it would work out in practice. Routine free use of educational materials by educational institutions seems like a good example of the sort of noncommercial use that should be classed as "large-scale interference" with copyright holders' commercial opportunities. On the other hand, the fact that a particular individual's viewing or copying of a digital work might itself supplant the sale of a license to view or copy if such licenses were legally required should count

neither as making money nor as large-scale interference with commercial opportunities.<sup>33</sup> Under this standard, individual trading of MP3 files would not be actionable, but Napster's activities would be, despite the fact that Napster collects no money for its service or software. Other uses, though, would need at least initially to be evaluated individually. So general a rule would necessarily rely on case-by-case adjudication for embroidery. One significant drawback of this sort of standard, then, is that it would replace the detailed bright lines in the current statute with uncertainty.<sup>34</sup> But the bright lines Congress gave us embody at least as much uncertainty, although it is uncertainty of a different sort. The detailed bright lines have evolved, through accident of technological change, into all-inclusive categories of infringers with tiny pockmarks of express exemptions and privileges, and undefined and largely unacknowledged free zones of people-who-are-technically-infringing-but-will-never-get-sued, like your next-door neighbor who duplicates his wife's authorized copy of Windows 98® rather than buying his own. The brightness of the current lines is illusory.

Giving copyright holders the sole right to exploit commercially or authorize the commercial exploitation of their works is a more constrained grant than the current capacious statutory language. It removes vexing (if rarely litigated) everyday infringements, like your neighbor's bootleg copy of Windows 98®, from the picture entirely. Is surgery that radical necessary? Probably not. It would, however, have some significant advantages.

First, to the extent that current constructions of the reproduction right have shown a rapacious tendency, their proponents commonly defend them on the ground that a single isolated unauthorized digital copy can devastate the market for copyrighted works by enabling an endless string of identical illegal copies. Sometimes they explain that a single harmless copy would never give rise to a lawsuit. If that's so, copyright owners lose nothing of value by trading in their reproduction rights for exclusive control over commercial exploitation. If the danger of an unauthorized copy is that it might ripen into a significant burden on the commercial market, then defining that harm as an actionable wrong will address the danger without being overinclusive.

Moreover, the common-law interpretive process we would necessarily rely on to explicate a general standard unencumbered by all of the detailed exceptions in the current statute is better set up to articulate privileges and limitations of general application than our copyright legislative process has proved to be. While judicial lawmaking may not succeed very well, very

often, at arriving at sensible solutions, the process constrains it to try to draw lines that make sense. The public is more likely to accept lines drawn by drafters who are attempting to make sense. And the public's involvement, as jurors, in drawing these lines just might allow us to incorporate emerging social copyright norms into the rules we apply.

Finally, once we abolished the detailed, specific exemptions in the current law, the industries that have been able to rely on them would need to seek shelter within the same general limitations on which the rest of us depend. It is common for large copyright-intensive businesses to insist that they are *both* copyright owners and copyright users, and that they are therefore interested in a balanced copyright law.<sup>35</sup> They typically fail to mention that unlike the vast majority of copyright users, and unlike new start-up copyright-affected businesses, they were able to negotiate the enactment of detailed copyright privileges. In most cases, those privileges both gave them what they believed at the time they would need, and also, if they were clever or lucky, were drafted with enough specificity to prove unhelpful to new, competing media that might crawl out of the woodwork in the future. Eliminating current stakeholders' structural advantages from the copyright law would do much to restore a more durable balance.

In addition to separating copyright owners from a useful tool for overreaching, abandoning the reproduction right in favor of a right of commercial exploitation would have the benefit of conforming the law more closely to popular expectations. That would ease enforcement, and make mass education about the benefits of intellectual property law more appealing.

I don't suggest for a minute that limiting copyright's exclusive rights to a general right of dissemination for commercial gain will solve all of the problems I have raised for the public's side of the copyright bargain. Most obviously, copyright holders will rely, as they have in the past, on mechanisms outside of the copyright law to enhance their control over their works. The technological controls reified by the Digital Millennium Copyright Act are one such mechanism.<sup>36</sup> Adhesion contracts purporting to restrict users' rights as part of a license are another.<sup>37</sup> Indeed, one of the most important items on the content industry's continuing agenda seems to be the reinforcement of efforts to find contract law work-arounds for privileges that current copyright law accords to users.<sup>38</sup> Even if the copyright grant is narrowed in scope, the public will need some of *its* rights made explicit.

For example, the public has had, under traditional copyright law, and should have, a right to read. Until recently this wasn't even questionable. Copyright owners' rights did not extend to reading, listening, or viewing any more than they extended to private performances. The Lehman Working Group, though, seized on the exclusive reproduction right as a catch-all right that captures every appearance of any digital work in the memory of a computer. The White Paper insisted that it applied to private individuals as well as commercial actors.<sup>39</sup> The recording industry's recent litigation strategy reflects that view. Invocation of the fair use privilege to exempt private, temporary copying from the reach of the current statute is not much help, because one needs a hideously expensive trial to prove that one's actions come within the fair use shelter. More importantly, content owners are increasingly enclosing their works within technological copy protection, and have thus far succeeded in arguing that fair use can never be a defense to suits for circumvention.<sup>40</sup> Recasting copyright as a right of commercial exploitation will do much to solve that problem since consumptive or incidental use would almost never come within the scope of the redefined right. Still, principles are important, and it is easy to argue that facilitating individual consumptive uses significantly interferes with the copyright owner's opportunities to charge individuals for each incident of use. The public needs and should have a right to engage in copying or other uses incidental to a licensed or legally privileged use. So, let's make the right explicit. If temporary copies are an unavoidable incident of reading, we should extend a privilege to make temporary copies to all.

Further, the public has always had, and should have, a right to cite. Referring to a copyrighted work without authorization has been and should be legal. Referring to an infringing work is similarly legitimate. This was well settled until the world encountered hypertext linking. As I discussed in chapter 10, the fear that hypertext links enabled people to find and copy unauthorized copies inspired lawsuits claiming that linking to infringing works was itself piracy. Drawing a map showing where an infringing object may be found or dropping a footnote that cites it invades no province the copyright owner is entitled to protect even if the object is blatantly pirated from a copyrighted work. Posting a hypertext link should be no different. If the only way to offer effective protection for works of authorship is to prevent people from talking about infringing them, then we're finished before we even start.

Moreover, until the enactment of the DMCA, the public had, and the

public should have, an affirmative right to gain access to, extract, use, and reuse the ideas, facts, information, and other public domain material embodied in protected works. That affirmative right should include a limited privilege to circumvent any technological access controls for that purpose, and a privilege to reproduce, adapt, transmit, perform, or display so much of the protected expression as is required in order to gain access to the unprotected elements.<sup>41</sup> Again, both long copyright tradition and case law<sup>42</sup> recognize this right, but the new prohibitions on circumvention of technological access protection threaten to defeat it. Copyright owners have no legitimate claim to fence off the public domain material that they have incorporated in their copyrighted works from the public from whom they borrowed it, so why not make the *public's* rights to the public domain explicit?

Finally, the remarkable plasticity of digital media has introduced a new sort of obstacle to public dissemination: Works can be altered, undetectably, and there is no way for an author to insure that the work being distributed over her name is the version she wrote. My proposal to reconfigure copyright as a right of commercial exploitation would certainly not solve this problem; indeed, it would exacerbate it. Authors of works adapted, altered, misattributed, or distorted in noncommercial contexts would have only limited recourse under a commercial exploitation right.<sup>43</sup> The fear of rampant alteration has inspired some representatives of authors and publishers to insist that the law give copyright holders more control over their digital documents, over access to those documents, and over any reproduction or distribution of them. Only then, they argue, will their ability to prevent alterations give them the security they need to distribute their works in digital form. That solution is excessive; as framed in current proposals, it would give copyright holders the means to prohibit access to or use of the contents of their works for any reason whatsoever. As sympathetic as we may find creators' interest in preserving their works from distortion, that interest is not so weighty that it impels us to sacrifice long-standing principles ensuring public access. Fortunately, there is a more measured alternative.

Most countries that belong to the Berne Union protect authors' interests in assuring the integrity of the works they create. American lawmakers have always found the notion hard to swallow. Although the United States, as a signatory to Berne, has undertaken the obligation to protect authors' interests in assuring the continuing integrity of their works,<sup>44</sup> it has followed up only in token ways.<sup>45</sup> Some copyright owners view integrity rights

as a dangerous opportunity for individual authors to interfere with the exploitation of works by the copyright owners and licensees. Some copyright experts view integrity rights as yet another way that authors exert unwarranted control over the uses of their works.

The United States, however, could address the distinct problems posed by digital media while avoiding these concerns. We could adopt a narrowly tailored safeguard that framed the integrity right to meet the particular threats posed by digital technology. Authors have a legitimate concern, and that concern is often shared by the public. Finding the authentic version of whatever document you are seeking can in many cases be vitally important. Moreover, while traditional Berne integrity rights include the ability to prohibit mutilations and distortions, digital media gives us the opportunity to devise a gentler solution: any adaptation, licensed or not, commercial or not, should be accompanied by a truthful disclaimer and a citation (or hypertext link) to an unaltered and readily accessible copy of the original. That suffices to safeguard the work's integrity, and protects our cultural heritage, but it gives copyright owners no leverage to restrict access to public domain materials by adding value and claiming copyright protection for the mixture.

The most compelling advantage of encouraging copyright industries to work out the details of the copyright law among themselves, before passing the finished product on to a compliant Congress for enactment, has been that it produced copyright laws that the relevant players could live with, because they wrote them. If we intend the law to apply to individual end users' everyday interaction with copyrighted material, however, we will need to take a different approach. Direct negotiation among industry representatives and a few hundred million end users would be unwieldy (even by copyright legislation standards). Imposing the choices of the current stakeholders on a few hundred million individuals is unlikely to result in rules that the new majority of relevant players find workable. They will not, after all, have written them.

If the overwhelming majority of actors regulated by the copyright law are ordinary end users, it makes no sense to insist that each of them retain copyright counsel in order to fit herself within niches created to suit businesses and institutions, nor is it wise to draw the lines where the representatives of today's current stakeholders insist they would prefer to draw them. Extending the prescriptions and proscriptions of the current copyright law to govern the everyday acts of noncommercial, noninstitutional users is a

fundamental change. To do so without effecting a drastic shift in the copyright balance will require a comparably fundamental change in the copyright statutory scheme. If we are to devise a copyright law that meets the public's needs, we might most profitably abandon the copyright law's traditional reliance on reproduction, and refashion our measure of unlawful use to better incorporate the public's understanding of the copyright bargain.

## NOTES

1. This chapter is adapted from a paper presented at the 24th Annual Telecommunications Policy Research Conference in 1995 and originally published at 17 *Oregon Law Review* 19 (1996).

2. Note, here, that we are talking not only about author-stakeholders, or publisher-stakeholders, but also about collecting-agency-stakeholders. The Green Paper report issued in 1994 initially suggested that an electronic transmission of a musical recording should be treated as a distribution of a copy of that recording rather than as a performance of the recording. That recommendation proved to be the single most controversial proposal among conventional copyright-affected stakeholders. On one side of the dispute were the record companies and the Harry Fox Agency, which collects composers' royalties for the sale of recordings. On the other side were ASCAP, BMI, and SESAC, which collect composers' royalties for the public performance of music. The composer would have gotten the royalties either way, but the collecting entity's cut would have gone to a different stakeholder. See *Public Hearing at Andrew Mellon Auditorium Before the Information Infrastructure Task Force Working Group on Intellectual Property Rights*, September 23, 1994, at 19–22 (testimony of Stu Gardner, composer); *ibid.* at 25–28 (testimony of Michael Pollock, Sony Music Entertainment); *ibid.* at 28–31 (testimony of Marilyn Bergman, ASCAP); *ibid.* at 31–33 (testimony of Hillary Rosen, Recording Industry Association of America); *ibid.* at 33–38 (testimony of Frances Preston, BMI); *ibid.* at 38–43 (testimony of Edward Murphy, National Music Publishers' Association).

3. See Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 *Buffalo Law Review* 615, 694–700 (1991).

4. See Jessica Litman, *Copyright Legislation and Technological Change*, 78 *Oregon Law Review* 275, 342–46 (1989); *Hearing Regarding Copyright Licensing Regimes Covering Retransmission of Broadcast Signals Before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee*, 105th Cong., 1st sess. (October 17, 1997).

5. See above chapter 7 at pages 106–107.

6. See, e.g., *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 429

and n.10 (1984) (quoting H.R. Rep. No. 2222, 60th Cong., 2d sess. [1909]). I discussed the model of copyright as bargain in chapter 3.

7. See, e.g., Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 University of Chicago Law Review 590 (1987); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Columbia Law Review 1865, 1907–16 (1990); 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); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 Duke Law Journal 1532 (1989).

8. The 1976 Copyright Act extended federal statutory copyright to unpublished works. Before that, copyright protection was available for published works and for works, such as lectures or paintings, that were typically publicly exploited without being reproduced in copies. See generally 1 William F. Patry, *Copyright Law and Practice* 414–21 (1994).

9. See L. Ray Patterson, *Copyright and the “Exclusive Right” of Authors*, 1 Journal of Intellectual Property Law 1, 37 (1993).

10. Act of May 31, 1990, ch. 15, § 1, 1 Stat. 124.

11. See 17 U.S.C. § 106(1), (3) (1994).

12. *Bobbs Merrill v. Strauss*, 210 US 339 (1908); *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894). The first sale doctrine allows the owner of any lawful copy of a work to dispose of that copy as she pleases.

13. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa 1853) (No 13,514); *Kennedy v. McTammany*, 33 F. 584 (C.C.D. Mass. 1888).

14. *Baker v. Selden*, 101 U.S. 99 (1879).

15. See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass 1841)(No. 4,901).

16. See 2 Patry, above at note 8, at 971–87.

17. See 17 U.S.C. §§ 111, 115, 118, 119 (1994).

18. See *ibid.* §§ 108, 110 (1), 110(5), 110(7), 112, 113(c).

19. There is one, sort of. Section 1008 includes a provision, enacted as part of the Audio Home Recording Act of 1992, that bars infringement suits “based on the noncommercial use by a consumer” of an audio-recording device for making “musical recordings.” 17 U.S.C. § 1008 (1994). See chapter 3, above at 59–70. The provision carefully omits any statement that such recordings are not infringement, and was demanded by the consumer electronics industry as a condition for supporting the Audio Home Recording Act.

20. 17 U.S.C. § 106(1).

21. 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).

22. See *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417 (1984); *Home Recording of Copyrighted Works: Hearings Before the Subcommittee on*

*Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee*, 97th Cong., 2d sess. (1982).

23. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98th Cong., 2d sess., 98 Stat. 1727 (1984); Computer Software Rental Amendments of 1990, Pub. L. No. 101-650, 101st Cong., 2d sess., 104 Stat. 5089, 5134-37 (1990) (codified at 17 U.S.C. § 109 [1994]). *See generally* 2 Patry, above at note 8, at 842–62.

24. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 102d Cong., 2d sess., 106 Stat. 4237 (1992). *See Audio Home Recording Act of 1991: Hearing on H.R. 3204 Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 102d Cong., 2d sess. (1993).

25. *See, e.g., NII Copyright Protection Act of 1995: Hearing on H.R. 2441 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 104th Cong., 1st sess. (November 15, 1995) (testimony of Marybeth Peters, Register of Copyrights):

The Copyright Office supports the concept of outlawing devices or services that defeat copyright protection systems. One of the most serious challenges to effective enforcement of copyright in the digital environment is the ease, speed, and accuracy of copying at multiple, anonymous locations. In order to meet this challenge, copyright owners must rely on technology to protect their works against widespread infringement. But every technological device that can be devised for this purpose can in turn be defeated by someone else's ingenuity. Meaningful protection for copyrighted works must therefore proceed on two fronts: the property rights themselves, supplemented by legal assurances that those rights can be technologically safeguarded.

26. *See* 17 U.S.C. §§ 108, 112(a), 112(b), 113(c), 115, 118, 120.

27. *Compare* S. 1121, 104th Cong., 1st sess. (1995) with S. 2037, 105th Cong., 2d sess. (1998).

28. The White Paper's explanation of why this should be so seems particularly unpersuasive:

Some argue that the first sale doctrine should also apply to transmissions, as long as the transmitter destroys or deletes from his computer the original copy from which the reproduction in the receiving computer was made. The proponents of this view argue that at the completion of the activity, only one copy would exist between the original owner who transmitted the copy and the person who received it—the same number of copies at the beginning. However, this zero sum gaming analysis misses the point. The question is not whether there exist the same number of

copies at the completion of the transmission or not. The question is whether the transaction when viewed as a whole violates one or more of the exclusive rights, and there is no applicable exception from liability. In this case, without any doubt, a reproduction of the work takes place in the receiving computer. To apply the first sale doctrine in such a case would vitiate the reproduction right.

Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 93–94 (1995) [hereinafter White Paper].

29. The discussion in this chapter completely omits the immense practical difficulties in getting such a proposal enacted into law, over the presumed antagonism of current copyright stakeholders, and in apparent derogation of our obligations under international copyright treaties. Other copyright lawyers who have gone along with my argument thus far are invited to leave the bus at this station.

30. See, e.g., Office of Technology Assessment, U.S. Congress, *Intellectual Property Rights in an Age of Electronics and Information* 121–23, 209 (1986); see generally The Policy Planning Group, Yankelovich, Skelly & White, Inc., *Public Perceptions of the "Intellectual Property Rights" Issue* (1985) (OTA Contractor Report). That ethos seems to be behind the public's ambivalent attitude toward Napster: sharing music files is cool, but the sheer scale of Napster has persuaded many that its operation must be illegitimate. See, e.g., Catherine Greenman, *Taking Sides in the Napster War*, *New York Times*, August 31, 2000, at D1.

31. 17 U.S.C. § 101 (1994).

32. As an illustration, consider the case of Robert LaMacchia. Mr. LaMacchia was unsuccessfully prosecuted under the wire-fraud statute for providing a computer bulletin board where users uploaded and downloaded unauthorized copies of commercially published software. See *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). *LaMacchia* had no commercial motive and gained no commercial advantage by this activity, but his bulletin board made it possible for some number of people who might otherwise have purchased authorized copies of software to obtain unauthorized copies for free. Congress has amended the copyright law to ensure that people like Robert LaMacchia can be successfully prosecuted for criminal copyright infringement from now on. See *No Electronic Theft (NET) Act*, Public L. 105-147, 111 Stat. 2678 (1997). Under the standard I propose, that activity would be infringement only if copyright holders demonstrated to the trier of fact that LaMacchia's BBS worked a large-scale interference with their marketing opportunities. Merely proving that if such activities were to become widespread (because of the similar activities of lots of individuals like LaMacchia) they would have potentially devastating marketing effects, on the other hand, would not satisfy the standard.

33. For a contrary view, see Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters and Copyrights in Cyberspace*, 95 *Columbia Law Review* 1466, 1478–79 (1995). Professor Ginsburg argues that because the private copying market has supplanted traditional distribution, even temporary individual copying in cyberspace will impair the copyright owner's rights, although she concedes that fully enforcing those rights may be impractical. *Ibid.* That copyright holders have recently begun to exploit the market for licenses to make individual copies, however, tells us little about the scope of their entitlement to demand such licenses under current law, and even less about whether a revised law should extend to such claims. See *Michigan Document Services v. Princeton University Press*, 74 F.3d 1512, 1523 (6th Cir. 1996) ("It is circular to argue that a use is unfair, and a fee therefore required, on the basis that the publisher is therefore deprived of a fee"), *vacated en banc*, 74 F.3d 1528 (6th Cir. 1996).

34. There is a substantial literature on the relative merits of rules and standards. See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 *California Law Review* 1110 (1993).

35. See, e.g., *Public Hearing at University of California Los Angeles Before the Information Infrastructure Task Force Working Group on Intellectual Property*, September 16, 1994, at 22 (testimony of William Barwell, Times Mirror Company).

36. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 *Berkeley Technology Law Journal* 519 (1999).

37. See, e.g., Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 *Southern California Law Review* 1239 (1995); Steven Metalitz, *The National Information Infrastructure*, 13 *Cardozo Arts & Entertainment Law Journal* 465, 469–72 (1995); Pamela Samuelson, *Legally Speaking: Software Compatibility and the Law*, 38 *Communications of the ACM*, August 1995, at 15, 20. The National Conference of Commissioners on Uniform State Laws has proposed that every state adopt a complicated uniform law to assist sellers of digital information products by permitting them to bind purchasers to the terms of form licenses that have, up until now, been deemed by many courts to be unenforceable. The Uniform Computer Information Transactions Act (UCITA) would make it possible for content owners to restrict consumers' uses of both copyright-protected and uncopyrightable material contained in digital works by denominating transactions related to those works as "licenses." Supporters of UCITA explain that it would make users' rights under copyright irrelevant by permitting sellers to require a waiver of those rights as a condition of access. See generally Symposium: *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 13 *Berkeley Technology Law Journal* 809 (1998) and 87 *California Law Review* 1 (1999).

38. See White Paper, above at note 28, at 49–59.

39. See *ibid.* at 64–66.
40. See *Universal Studios v. Reimerdes*, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000); *Universal Studios v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000).
41. See, e.g., Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 Berkeley Technology Law Journal 1089 (1998).
42. *Baker v. Selden*, 101 U.S. 99 (1879); *Sony v. Connectix*, 203 F. 3d 596 (9th Cir. 2000); *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993); *Atari Games, Inc. v. Nintendo of America*, 975 F. 2d 832 (Fed. Cir. 1992).
43. Such noncommercial alteration would be actionable only if it worked a large-scale interference with the author's ability to exploit the work commercially. Authors of works are not intended for commercial distribution that are commercially distributed without authorization would, of course, be able to recover, but authors whose works are adapted, misattributed, or altered for personal, private, or limited noncommercial consumption would not.
44. "Integrity right" is a term of art for an author's right to object to or prevent mutilation or gross distortions of protected works. See generally 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, 15–23 (1988). The Berne Convention, a treaty the United States ratified in 1989, requires its members to protect authors' moral rights, including integrity rights. The United States has relied chiefly on the Lanham Trademark Act, 15 U.S.C. §§ 1051–1127 (1994), to fulfill those obligations. The integrity right I propose is probably more consonant with the Lanham act's approach to trademark issues than the Copyright act's approach to authorship rights in any event. For a different spin on integrity rights and the Internet, see Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 Journal of Online Law, art. 2.
45. See Visual Artists Rights Act, codified at 17 U.S.C. § 106A.