

FOUR

A THOUGHT EXPERIMENT¹

IMAGINE THAT YOU HAVE BEEN retained as the public's copyright lawyer. One morning, your client, the public, walks into your office to consult you about a deal that it has been offered. It seems that all of the industries with substantial economic stakes in copyright have gotten together and written up a proposal. Here it is: the 1976 copyright statute. It's well over one hundred pages long, and, frankly, it's a little hard to decipher.² Your client stayed up all night to read it, and can't seem to make head or tail of it. In any event, your client drops this heavy tome on your desk.

Client: "So, whaddya think? Should I sign it? Is it a good deal?"

You (temporizing): "It depends. What sort of a bargain do you want?"

Client: "Look; I'm not out to get something for nothing. I understand that authors won't write stuff if they can't get paid. I want them to make new works and I'm willing to pay them to do so. I want to encourage authors to write as many new works as they can. As for me, I want to be able to read, see, hear, or download any work in captivity, and pay appropriate royalties for doing so.³ Will this proposal let me do that?"

Would you recommend that your client sign on the dotted line?

I would not. The text we're considering wasn't really written with your client's interests in mind. Most of it was drafted by the representatives of copyright-intensive businesses and institutions, who were chiefly concerned about their interaction with other copyright-intensive businesses and institutions. For that reason, there is much in the statute that speaks to the behavior of a public television station or a cable system operator with respect to the programming it might transmit,⁴ and very few words addressing the behavior of a consumer with respect to the programming she might watch or record. You can find a fair amount of language relevant

to the actions of a publisher bringing out an author's new novel, and the film producer who seeks to adapt the story for the screen,⁵ but not much about the actions of the police officer who buys and reads the book, rents and sees the film, and wishes the producer had not cast Tom Cruise in the leading role.⁶ The law has a specific provision for retail stores who play the radio for their customers, but no language that seems to contemplate fraternities who play loud music for their neighbors.⁷ Thus, the statute fails to discuss your client's ability or obligation to pay appropriate royalties in return for access, and there is no provision securing your client's opportunity to read, see, hear, or download copyrighted works.

One can draw different conclusions from the paucity of language speaking to the behavior of individuals who are consuming rather than exploiting copyrighted material. One conclusion commonly voiced is that the statute really doesn't address the legal obligations of individuals acting in their private capacities. An equally plausible interpretation, favored by copyright owners and copyright lawyers, is that the statute forbids private individuals, acting without permission, from invading the copyright owner's broad rights unless their behavior falls within an express statutory exception. Not many of these specific exceptions address individuals' private actions, which means that individuals are routinely prohibited from doing the sorts of things that businesses have statutory exemptions for unless they first secure the copyright owner's permission. For example, the statute permits record companies to create musical arrangements for songs in the course of recording them. Consumers, though, have no such privilege, and creating an unauthorized arrangement violates composers' rights to create "derivative works," regardless of whether the arrangement is publicly performed or commercially exploited.⁸ It follows that, if consumers are liable whenever they engage in behavior within the terms of the copyright owner's exclusive rights without an express exemption, you break the law when you play music by ear on the piano in your living room. Similarly, since the derivative work right contains no express exemption for six-year-olds, your children ought not to act out *Star Wars*. Either way, it doesn't seem as if the agreement on your desk is something you should advise your client to sign.

Content owners and copyright lawyers insist that ordinary people should look at unlicensed music, and unlicensed software, and unlicensed digital reading material the same way they see stolen personal property, and should treat them accordingly. Just as consumers believe that it is wrong to pocket a diamond ring without paying for it, they should under-

stand that it is equally wrong to play a song without paying for it.⁹ Yet as fiercely as some copyright owners embrace this principle, they seem oblivious of some of its important implications.

If ordinary people are to see copyrights as equivalent to tangible property, and accord copyright rules the respect they give to other property rules, then we would need, at a minimum, to teach them the rules that govern intellectual property when we teach them the rules that govern other personal property, which is to say in elementary school. The problem, though, is that our current copyright statute could not be taught in elementary school, because elementary school students couldn't understand it. Indeed, their teachers couldn't understand it. Copyright lawyers don't understand it.¹⁰ If we are going to teach the copyright law to schoolchildren, then we need the law to be sensible, intuitive, and short enough that schoolchildren can hold its essential provisions in their heads. What we have now is not even close.

It is unrealistic to imagine that we could make members of the public conduct their daily affairs under rules thought up by and for major players in copyright-affected industries simply by announcing that they must. If the public is to play by copyright rules, then those rules must be designed with the public's interests in mind.

Let's return to my thought experiment. The public has hired you to act as its copyright lawyer. Acting in your new role, you review the current statute, and you chat with your client about where to go from here:

You: Look. I think the copyright concept is a good one, but I'm not happy with the details. There are a bunch of places where I think the language is unfortunate, and not in your long-term best interest. Let me take it home and see if I can draft up a counter-proposal that'll meet your needs, here.

Client: Gee. That's great; that's what I hoped you'd say. But, this time, when you're writing it up, could you make it real short? I don't read so fast, and this is important to me. I want to understand what it says.

So, you have yourself a drafting project. Your job is to construct a copyright law that affords members of the public the opportunity to read, see, hear, and otherwise experience, download, buy, borrow, and keep copies of all, or at least most, of the works that are out there, while according ample compensation to the authors and publishers of copyrighted works, and

encouraging them to produce and disseminate as many copyrighted works as they are able to. The law should be about three pages long, should strike more folks than not as more fair than not, and should be sufficiently intuitive to appeal to schoolchildren.

Imagine now that, after a couple of hours of concentrated work, you come up with some language that meets these specifications. For the purposes of the thought experiment it isn't important what the language actually says. Let's simply imagine that you manage to come up with something short, clear, and fair. Your client reads it, understands it, and approves it. You take it over to Congress. Or maybe you send it to the newspapers. Perhaps you sign on to the Internet and post it for all to read. You have only one final problem: Congress isn't going to enact it.

As the previous chapter made clear, the only way that copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and hash out all of the details among themselves. In the past, this process has produced laws that are unworkable from the vantage point of people who were not among the negotiating parties, and it won't generate any better results this time. Whatever the strengths of the negotiated legislation approach to an area as complex as copyright, the statutes that result from the process are long, complex, and counterintuitive. The dynamics inherent in the negotiation process discourage brevity and intuitive appeal. Lawyers representing affected interests respond to the issues raised by new technology by ratifying all of the "accidents" that favor their clients and repudiating the "accidents" that work to their disadvantage. The time-honored approach is to claim that the first sort of accident is no accident at all but part of Congress's grand design, while the second sort of accident is a completely unintended, unexpected "loophole." If interested parties disagree on which accidents are which, there is a predictable negotiated solution. Negotiating stakeholders have always resolved differences through specificity and detail. By the time we're done, the new statute is even worse than the old one. And while it is easy to claim that the interplay among all of the interests affected by copyright provides a proxy for the public interest, the statutes that this interplay produces demonstrate that it isn't so.

Our current copyright law is a descendent of the copyright laws in force a century ago, which were designed to bring order to the interaction among affected industries. Because affected industries, and their lawyers, were invited to draft those rules themselves, the law became so technical, detailed, and counterintuitive that those industries now need to bring their

copyright lawyers along to tell them how to play. If the law is intended to govern only the behavior of players with substantial economic stakes in copyright-affected matters, there is not much wrong with that degree of complexity. As soon, however, as the law is claimed to control the ordinary behavior of ordinary members of the public going about their ordinary daily business, then that species of law will no longer serve. No solution will seriously address the public's interests unless the public sits at the negotiating table and insists that it do so.

That is supposed to be Congress's job, of course. Congress is the public's copyright lawyer. Yet, as I've discussed, Congress lacks the interest, expertise, and institutional memory to represent the public on this particular project, and has found significant political benefits in deferring to the interests the legislation affects. Thus, what Congress has done more often than not is delegate the job of coming up with legislation to interested private parties, which is how the statute got so long and convoluted in the first place.

Congress, of course, has its *own* copyright lawyer, who is in some sense charged with the responsibilities Congress has abdicated. That is the Copyright Office's job. The Copyright Office has both expertise and institutional memory; it has functioned as Congress's copyright lawyer and copyright expert for almost a century. Unfortunately, the Copyright Office has tended to view copyright owners as its real constituency, and has spent the past ten years moving firmly into the content industry's pocket. The reasons are unexceptional: The office has a limited budget, and relies on the goodwill of its regular clients. Copyright Office policy staff often come from and return to law firms that regularly represent copyright owners. Perhaps most importantly, the Copyright Office relies on the copyright bar to protect it from budget cuts and incursions on its turf. When Sen. Orrin Hatch introduced a bill that would have transferred the Register's copyright policy-making authority to a new administrative agency,¹¹ for example, the copyright bar rallied in opposition to the change.¹² Thus, it is unsurprising that the Register has routinely given positions advanced by the content industry her enthusiastic endorsement.

That leaves the public's interest essentially unrepresented in the copyright legislative process. But this is only a thought experiment. The public has no copyright lawyer, and none of the lawyers involved in making copyright laws can afford to view the public's interests as sufficiently compelling to override the immediate pressing needs of their various clients. The resulting legislation shows it.

NOTES

1. Portions of this chapter are adapted from an article published as *The Exclusive Right to Read*, at 13 *Cardozo Arts & Entertainment Law Journal* 29 (1994).

2. The 1909 Copyright Act occupied twelve pages of the United States Code. As originally enacted, the 1976 Copyright Act was sixty-one pages long. By 1995, a variety of amendments had expanded its length to 142 pages. Today it is 205 pages long.

3. I've appropriated the turns of phrase from Dani Zweig, who, in another life, posted reviews of science-fiction books to Usenet news. Dr. Zweig spent some years as a software-design professor before taking a software quality-control position in the private sector.

4. See 17 U.S.C. §§ 111, 118.

5. See, e.g., 17 U.S.C. §§ 106, 201, 203.

6. See *Anne Rice Jabs Stake into Cruise*, USA Today, May 23, 1994, at 2D. In theory, the police officer who succumbs to temptation and imagines the film as it might have looked if Daniel Day Lewis had been cast in Tom Cruise's role may be violating the copyright owners' exclusive rights under 17 U.S.C. § 106 (2) to prepare derivative works, since the right to prepare derivative works is violated by any adaptation involving originality on the adapter's part, even if it is never embodied in tangible form. See H.R. Rep. 1476, 94th Cong., 2d sess. 62 (1976); see also chapter 2, note 1, in this book.

7. Playing loud music for your neighbors is performing it publicly. Public performances of copyrighted works are copyright infringement unless privileged by sections 107–19. Section 110(5) contains a limited privilege to play radio or television programs. Section 110(5)(A) permits use in public of a single radio or television, so long as the program is not further transmitted. Section 110(5)(B) expressly privileges the use of televisions or radios (but not records, tapes, or discs) to play music (but not other works) in bars, restaurants, and small commercial establishments. No comparable provision exists for use of a boom box in public, or the playing of automotive stereo equipment in a car with its windows rolled down.

8. The privilege to make a new musical arrangement appears in the compulsory license provision for making records. See 17 U.S.C. § 115(a)(2). It is a limited privilege that comes into play only for songs that have already been released in recorded form, and that applies only where the purpose of the new arrangement is to make records, CDs, or tapes to be distributed to the public for private use. (There is no provision that gives musicians or composers such a privilege in connection with their work, although they routinely create arrangements before seeking the copyright owner's permission.) The right to create derivative works, in 17 U.S.C. § 106, purports to give copyright owners control over creative adaptations of their works, regardless of whether those adaptations are later commercially exploited. The deriv-

ative work has been described by federal judge Alex Kosinski as “hopelessly overbroad.” See *Micro Star, Inc. v. Formgen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998).

9. This completely ignores a crucial distinction between diamond rings and songs. Only one person may keep a particular diamond ring in his pocket at any given time, while an unlimited number of people can play a particular song at any given time.

10. I make this statement with no intention of being hyperbolic. Anyone with access to the Internet can join a number of online virtual communities in which copyright law is discussed by groups including experts and interested laypeople. One story I like to tell involves a debate that went on for a couple of months on a wonderful copyright mailing list that had more than one thousand subscribers, many of whom were prominent experts in the field. The debate was over whether one could dedicate one’s electronic postings to the public domain, and, if so, how might that be accomplished, and could one, having done that, attach any conditions to the further distribution of the contents of those posts? Participants were not sure that it was possible to dedicate works to the public domain anymore, after the Berne Implementation Act (Pub. L. No. 100-568, 102 Stat. 2853 (1988)); they were not sure how, if it were possible, one could accomplish it; they could not agree on what words to use. None of these folks were copyright naïfs; both the original inquirer and most of the posters offering views on this particular issue had substantial copyright backgrounds. But, if one thousand sophisticated people with enormous copyright expertise among them cannot over a two-month period resolve this simple a question, then the law has gotten way too complicated for any purpose; it surely cannot be taught to schoolchildren.

11. S.1961, 104th Cong., 2d sess. (1996). The new agency would have combined the Copyright Office with the Patent and Trademark Office under the leadership of then-Commissioner of Patents Bruce Lehman. We will see a great deal of Commissioner Lehman in chapter 6.

12. See *The Omnibus Patent Act of 1996: Hearing on S. 1961 Before the Senate Judiciary Committee*, 104th Cong., 2d sess (1996).