

COPYRIGHT LAWYERS SET OUT TO COLONIZE CYBERSPACE

IN 1992, THE “INFORMATION SUPERHIGHWAY” suddenly sprang into the news and became a media darling. Introduced as part of the election campaign, the Superhighway, it was promised, would usher in a new era of American competitiveness and economic power by enabling us all to harness digital technology to access a new, twenty-first-century technological marvel that would supersede conventional media.

If one were currently a dominant player in what has suddenly been dubbed a “conventional” medium, one might find this possibility threatening. Some entrepreneurs saw the Information Superhighway as a new expanse of undiscovered geography to be annexed and colonized. Other stakeholders, though, viewed the uncharted contours of this new information space as a frightening and lawless frontier to be tamed and subdued. Policy makers, lobbyists, and journalists of both persuasions began to sit down with one another to figure out what this new beast would look like and how it could best be turned to American and industry advantage.

What happened next was a failure of imagination. Most of the high-level policy makers and lobbyists, and most of the reporters they spoke with, were completely innocent of the Internet and only slightly more conversant with computers. For some, computers were infuriating boxes that sat on their secretaries’ desks, and could be operated only by people young enough to know how to program a VCR. For others, computers were wonderful automatic typewriters and calculators that ran word processing and spreadsheet software, and perhaps a virtual solitaire game as well. In 1992, after all, only about five million people were connected to the Internet.

In any event, the dominant early model of the Information Superhighway-to-be was some fantasy digital network that would provide Americans everywhere with access to five hundred television channels, 480 or so of which would allow them to view endless variations of pretty much the same programs they were already watching. The other channels might be

“interactive”: these were commonly envisioned as next-generation home shopping channels that would permit one to engage in one-stop impulse purchasing merely by pressing a few buttons on the remote control.

With their imaginations thus constrained, well-meaning policy makers fell into an understandable fallacy. If America were to retain (or regain) economic world dominance through the deployment of this Information Superhighway, the infrastructure would need to be built and funded by American private industry, who were unlikely to invest in it unless it looked likely to be profitable. Profitability would require a large potential customer base seeking to buy the things the Information Superhighway could offer them and the equipment and service required to use it. But consumers weren't likely to spend their dollars on five hundred television channels, and a newfangled sort of computer-television-box to watch them with, unless there were shows playing on the channels. So a first, and absolutely necessary, step to promoting the new technological and economic miracle was to find a way to induce the private sector to develop content for the new medium in sufficient quantity to make it attractive to potential subscribers, equipment manufacturers, and Information Superhighway subscription services.

Shortly after President Clinton's inauguration, the White House rechristened the clichéd Information Superhighway as the more bureaucratic “National Information Infrastructure” and appointed an “Information Infrastructure Task Force” to formulate government policy related to the whatever-it-was. The task force split itself into committees and working groups, and appointed advisory bodies and councils from the private sector.¹ Content issues were delegated to the Information Policy Committee, which appointed a Working Group on Intellectual Property chaired by Patent Commissioner Bruce Lehman. Lehman had represented the computer software industry on copyright issues before his appointment to the Patent Office; his senior staff included former copyright lobbyists for the computer and music recording industries. They maintained extensive informal communication with private-sector copyright lobbyists as they geared up to formulate administration copyright policy. The actual membership of the working group was drawn from government agencies and departments across the executive branch. Members complained privately, however, that they were figureheads: all decisions were made and all documents were drafted by the commissioner and his senior staff without any consultation.

In November of 1993, the Lehman Working Group held a public

hearing for the purpose of getting on the record what it was that current market leaders in the information and entertainment industries wanted—and didn't want—if they were to invest in the National Information Infrastructure.² What most of them said they wanted, indeed needed, was extensive control of all uses of their works and minimal government interference.³ To all appearances, the Working Group staff then set out to secure it for them.

In July 1994, the Lehman Working Group issued a draft "Green Paper" report, containing its preliminary analysis of copyright issues affecting and affected by the Information Infrastructure, and its suggestions for copyright revision.⁴ Many of its suggestions echoed those made by industry representatives in the public hearing. The draft report recommended what it characterized as minor clarifications of well-settled principles, and modest alterations to better secure copyright owners' control over works they produce. The minor changes it recommended, however, appeared to many interested observers to attempt a radical recalibration of the intellectual property balance.

The Green Paper predicated its legal analysis on the assertion that one reproduces a work every time one reads it into a computer's random-access memory. Although the report cited no authority for its position, in fact a handful of cases in the early 1990s had considered loading software into random-access memory to create an actionable copy.⁵ What may have been the watershed moment in the transition from an incentive model of copyright to a control model came when a customer service manager for a computer company named MAI Systems quit his job and went to work for a business that maintained and repaired computer systems designed by other companies, including his original employer. MAI sued him and his new employer on a slew of different grounds. The judge apparently decided that this guy was scum, and he handed down one of those unfortunate opinions where the plaintiff prevails on every single claim and the defendant's every argument is wrong.⁶ To get to the conclusion that the plaintiff was entitled to an injunction for willful copyright infringement, though, the court had to get past the fact that turning on someone's computer to service it would not normally be seen as infringing the copyright in the software. So, the court held that every time the employee or his new business turned on a customer's computer, the operating system software was loaded into random-access memory, which created an unauthorized copy.

As the Lehman Working Group put the finishing touches on its Green

Paper, a couple of other courts adopted the MAI court's holding in cases involving competing computer service businesses.⁷ If every time something is loaded into random-access memory without the copyright owner's express permission, an actionable copy is made, that analysis could apply to text files, or digital music files, or any other file in digital form. So, we have this crazy but brilliant theory under which every unlicensed use of any work in digital form is potentially an infringement. For all works encoded in digital form, any act of reading or viewing the work would require the use of a computer (or a digital processor in a CD, digital audio or digital video player), and would, under this interpretation, involve an actionable reproduction. The Lehman Working Group urged the view that that copyright does, and should, assure the right to control each of those reproductions to the copyright owner.⁸

The next issue that the Green Paper addressed related to *transmissions* of copies of protected works. There, the Green Paper found the state of the law regarding copyright owners' control to be less than clear. The statute assimilated transmissions to performances, and gave copyright owners the exclusive right to authorize transmissions that resulted in public performances or displays, but no rights over transmissions that resulted in only private performances or displays. (Singing Metallica's hits to your friends or playing your Metallica CD over the telephone is a private performance and poses no copyright problems.) Most transmissions, the Working Group insisted, should be deemed public performances or displays. If one-to-one transmissions of works were considered to be private performances, extant copyright law would exclude them from the copyright owner's control, even though such transmissions might substitute for the purchase of copies. The Green Paper therefore recommended amending the law to enhance copyright holders' legal rights to control transmissions of their works. The Lehman Working Group suggested that instead of, or in addition to, considering transmissions to be performances, the law should treat them as distributions of copies, thus plugging the potential loophole.⁹

In addition, the Working Group complained, "if a transaction by which a user obtains a 'copy' of a work is characterized as a 'distribution,' then, under the current law, the user may be entitled to make a like distribution without the copyright owner's permission (and without liability for infringement)."¹⁰ That was because the first sale doctrine allowed the owner of a lawfully made copy to sell, loan, rent, or otherwise pass that copy along. The Working Group therefore suggested that the statute be amended

to provide that the first sale doctrine not apply to any transmission. Noting the difficulty of enforcing copyright rights against individual consumers, the Lehman Working Group endorsed copyright owners' use of copy-protection technology to prevent individuals from committing infringement. Because technology can be hacked, however, the Working Group concluded that the law should be amended to prohibit any circumvention of anticopying systems, and forbid the creation or sale of any device or service intended to defeat such systems. Instead of merely making unauthorized reproduction illegal, the proposal sought to make it as close to impossible as the law could bring it.

The release of the Green Paper inspired great enthusiasm among the motion picture, recording, and computer software industries, and dismay among libraries, composers, writers, online service providers like America Online® and Compuserve®, and the makers of consumer electronic devices and computer hardware. The Lehman Working Group held public hearings on the Green Paper, and made the hearing transcripts available for a brief period over the Internet. They solicited public comment via email. They put together a not-so-informal multilateral negotiation among representatives of copyright owners and representatives of schools and libraries to try to reach an agreement on the scope of fair use in the digital environment. Commissioner Lehman would later tell Congress that there had never been a more open process than the Working Group's consideration of the issues before it.¹¹

At the same time, Commissioner Lehman demonstrated a firm idea of what it was the Working Group would eventually conclude, and a willingness to manipulate the process to cause the record to better support the recommendations he expected to reach. The official members of the Lehman Working Group were kept in the dark about the conclusions they would be reported to have reached until the last minute. When a large number of comments on the Green Paper turned out to be negative, Commissioner Lehman insisted that the naysayers didn't understand what they were talking about.

The Lehman Working Group predicated its arguments about the need for enhanced copyright protection in the context of the National Information Infrastructure (NII) on the assertion that, unless copyright owners were given expansive rights over the material they made available, no material would be made available. The NII was depicted as a collection of empty pipes, waiting to be filled with content. By 1994, the only explanation for

that depiction was the one that turned out to be true: most of the people involved in formulating the substance of the Lehman Working Group Green Paper were unacquainted with the Internet, and had no opportunity to compare their imaginary NII of the future with the flourishing Internet that was already out there. The Lehman Working Group continued to view its charge as defining rules that would supply sufficient incentives to inspire the private sector to build a new global information infrastructure so that they could fill it with proprietary content. They failed to see the digital network already in use that grew larger every day.

The Working Group's final report, first promised for the early spring of 1995, was delayed until May, until June, and finally until September. The Working Group staffers had received written and e-mailed comments from 150 different people and organizations, listened to five days of public testimony, and had innumerable meetings with private groups. The Working Group's response to all of the public comments turned out to be largely stylistic. The rhetoric of the final report was more balanced than the language of the Green Paper. The substantive recommendations, though, were essentially unchanged.

The final report was not the florid endorsement of enhanced copyright protection that its predecessor draft report was. The Green Paper's approach had been twofold: the draft contained revisionary interpretations of current law that enhanced copyright owners' control over their works, and suggestions for further fortifying that control. The Working Group's White Paper spent most of its ink on the revisionary interpretation leg of the strategy: it asserted that most of the enhanced protection copyright owners might want was *already available* under current law, at least so long as that law was properly interpreted, and it contained a long exegesis of what the properly interpreted copyright law should be read to provide.¹² The difference was largely one of style rather than substance, as the White Paper ended up adopting most of the recommendations tentatively included in the Green Paper, but instead of characterizing them as desirable amendments, it depicted them as well-settled and uncontroversial interpretations of the current law.

Thus, the White Paper concluded that so long as the meaning of the current copyright law, and the way that law should be read to apply to new technology, were clarified, then the current law was "fundamentally adequate and effective."¹³ The White Paper, therefore, took on the task of interpreting current law to resolve any ambiguities that might arise in the con-

text of new technology. Using the tools that good lawyers use when engaged in such tasks,¹⁴ the White Paper carefully explained that just about every ambiguity one could imagine, properly understood, should under the best view of current law be resolved in favor of the copyright holder.

That approach enabled the authors of the White Paper to come to conclusions that would strike anybody but a copyright lawyer as extravagant. Most notably, since any use of a computer to view, read, reread, hear, or otherwise experience a work in digital form would require reproducing that work in a computer's memory, and since the copyright statute gives the copyright holder exclusive control over reproductions,¹⁵ everybody would need to have either a statutory privilege or the copyright holder's permission to view, read, reread, hear, or otherwise experience a digital work, each time she did so.¹⁶ The purchaser of an e-book would need permission each time she read any part of that e-book; the owner of a compact disc would need a license every time she listened to the music on the disc. Someone catching sight of an image posted on the World Wide Web would need the permission of the owner of the copyright in that image (who might not be the person who posted the image) each time it appeared on her computer screen. Not only individuals, but their Internet service providers and the proprietors of any computers that assisted in the transfer of files were, and should be, liable for copyright infringement in these cases, regardless of whether they knew someone's intellectual property rights were being invaded, or even what content was moving through their equipment. Once it was understood that current copyright law in fact so provided, the White Paper argued, there was little need to amend it to make express provision for new technology; only minor adjustments would be required. Thus, the White Paper neatly avoided addressing the policy question of whether copyright *should* be defined in terms that convert individual users' reading of files into potentially infringing acts, by insisting that Congress chose to set it up this way when it enacted the current law in 1976.

The Lehman Working Group's White Paper suggested that only modest improvements would be necessary to secure to copyright owners the expansive rights Congress had granted them twenty years earlier. Of a number of purportedly minor amendments, two were key. First, the Working Group repeated its earlier recommendation in the Green Paper that Congress amend the statute to recognize that unauthorized transmissions violate the copyright owner's distribution right as well as the reproduction, performance, and display rights. (There was no need, the White Paper assured its

readers, to amend the first sale doctrine since it was clear that it had no application to transmissions.) Second, the Working Group recommended an amendment to prohibit any device or service intended to circumvent copyright owners' technological protection mechanisms.¹⁷

Copyright advocacy has evolved its own tactical conventions over the years. The arguments that were deployed in this effort didn't look very different from the shape of very similar arguments that were raised in the 1980s, when the gods invented personal computers; or in the 1970s, when they invented videocassette recorders; or the 1960s, when they invented cable television; or the 1920s, when they invented commercial broadcasting and talkies. Arguing that Congress already considered a question, and resolved it in one's favor then, is a common tactic in the history of copyright lobbying, because it bypasses the problem of persuading Congress to consider the question and resolve it in one's favor today.¹⁸ Sometimes it works; other times it fails. In evaluating these claims, it is always useful to inject a note of realism: would Congress have adopted such-and-such language if it believed at the time the legislation was enacted that this language would be interpreted to mean what is now being claimed? Whether a platonic Congress would have made that call or not, in view of what we now know about how the world has evolved, is that choice a good one, in policy terms? People are going to differ on the answers to both of these questions, but at least their differences are on the table; we aren't making information policy by sleight of hand.

The Lehman Working Group's characterization of extant law was dubious, and the majority of copyright scholars criticized it as skewed.¹⁹ Even if it were not, however, its endorsement of what it presented as well-settled law deserves examination. If a bargain between the public and the authors and producers of copyrighted works were negotiated at arm's length and drafted up today, it might include a reproduction right, but it surely wouldn't include a "reading" right. It might include a performance right but not a "listening" right; it might have a display right, but it wouldn't have a "viewing" right. From the public's vantage point, the fact that copyright owners are now in a position to claim exclusive "reading," "listening," and "viewing" rights is an accident of drafting: when Congress awarded authors an exclusive reproduction right, it did not then mean what it may mean today.

NOTES

1. The president's task force was charged to come up with "comprehensive telecommunications and information policies aimed at articulating and implementing the administration's vision for the NII." See 58 Fed. Reg. 53917 (October 19, 1993). With the exception of the Working Group on Intellectual Property, however, the various working groups issued documents suggesting, in essence, that there was no need for precipitous government action. Thus, the task force's ultimate position on privacy was that privacy was a good thing, and proprietors of databases collecting private information should be reminded that members of the public preferred respect for privacy over the alternative. See Information Infrastructure Task Force Information Policy Committee Privacy Working Group, *Privacy and the Information Infrastructure: Principles for Providing and Using Personal Information* (June 6, 1995), URL: <http://www.iitf.nist.gov/ipc/ipc/ipc-pubs/niiprivprin_final.html>; National Telecommunications and Information Administration, *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* (1995), available at URL: <<http://www.nita.doc.gov/ntiahome/privwhitepaper.html>>. The task force's ultimate position on technical standards came down to an assertion that interoperability was good, and private industry, acting in accord with private firms' business plans, might choose to adopt interoperable technology to some degree. See, e.g., IITF Committee on Applications and Technology Working Group on Technology Policy Charter, URL: <http://nii.nist.gov/cat/tp/tpwg_charter.html>. Most documents emanating from the IITF cautioned against undue haste, suggesting that the value of permitting the private sector to thrash things out and work toward consensus could not be overemphasized.

2. See United States Department of Commerce U. S. Patent & Trademark Office, National Information Infrastructure Task Force Working Group on Intellectual Property, *Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative* (Thursday, November 18, 1993); see also *Request for Comments on Intellectual Property Issues Involved in the National Information Infrastructure Initiative*, 58 Fed. Reg. 53917 (October 19, 1993).

3. See, e.g., United States Department of Commerce U. S. Patent & Trademark Office, *National Information Infrastructure Task Force Working Group on Intellectual Property, Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative 14* (Testimony of Steven J. Metalitz for Information Industry Association); *ibid.* at 201 (Testimony of Mark Traphagen for Software Publishers Association).

4. Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (1994) [Hereinafter Lehman Working Group Green Paper].

5. See *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Triad*

Systems Corp. v. Southeastern Express Co., 1994 U.S. Dist. LEXIS 5390 (N.D. Cal. 1994); *Advanced Computer Services v. MAI Systems Corp.*, 845 F. Supp. 356 (E.D.Va 1994).

6. See *Mai Systems v. Peak Computer*, 1992 US Dist. LEXIS 21829 (C.D. Cal. 1992), *aff'd*, 991 F.2d 511 (9th Cir. 1993).

7. See *Triad Systems Corp. v. Southeastern Express*, 31 U.S.P.Q. 2d (BNA) 1239 (N.D. Cal. 1994); *Advanced Computer Services v. MAI Systems Corp.*, 854 F. Supp. 356 (E.D. Va 1994). Congress overruled this reading of the law, as applied to computer maintenance and repair services, in 1998. See Digital Millennium Copyright Act, P.L. 105-304, Title III, § 302, 112 Stat. 2887 (1998) (codified at 17 U.S.C. § 117(c)).

8. See Lehman Working Group Green Paper, above at note 4, at 35–37.

9. The Lehman Working Group recommended that an amendment “reflect that copies of a work can be distributed to the public by transmission, and such transmissions fall within the exclusive distribution right of the copyright owner.” Lehman Working Group Green Paper, above at note 4, at 121. This recommendation drew the ire of composers, who typically retain control over music public performance rights. Composers’ performing rights societies were looking forward to collecting performance royalties for digital transmissions and weren’t at all happy to see the potential income transferred to music publishers, who typically control the exercise of distribution rights.

10. See Lehman working Group Green Paper, above at note 4, at 39.

11. See NII Copyright Protection Act of 1995: *Joint Hearing on H.R. 2441 and S. 1284 Before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee and the Senate Judiciary Committee*, 104th Cong., 1st sess. (November 15, 1995) (testimony of Bruce Lehman, Commissioner of Patents):

Since I’ve been in this government job, I’ve had to realize, and go through what all of you have to go through. And that is, it’s simply humanly impossible to please everybody in a society of 250 million people. It’s hard to please 500,000 constituents in a congressional district. It’s impossible to please 250 million people. I think we did the best job we could. We listened to everybody. There’s never been a more open process than this.

12. See Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 19–130 (1995) [hereinafter White Paper].

13. White Paper, above at note 12, at 212.

14. I am both a lawyer and a law professor. These tools are my stock in trade, and I make my living teaching them to my students. I have no quarrel with lawyers’ tools, used responsibly. Because their primary purpose is to make arguments more persuasive, however, some skepticism may be appropriate. In particular, it is useful to recognize the work that lawyers’ tools are doing. When convenient for its argu-

ment, for example, the White Paper relied on the expressed intent of congressional committees to buttress its analysis of current copyright law, *see, e.g.*, White Paper, above at note 12, at 226; when express language in the congressional Committee Reports was less convenient, the White Paper ignored it, *see, e.g.*, *ibid.* at 65, or characterized it as irrelevant, *see ibid.* at 72 note 226. Similarly, the report was highly selective in its citation of case authority. Some of the more egregious examples are detailed in James Boyle, *Overregulating the Internet*, Washington Times, November 14, 1995, at A17, and Pamela Samuelson, *The Copyright Grab*, Wired, January, 1996, at 137–38.

15. 17 U.S.C. § 106(1) (1994):

. . . the owner of copyright . . . has the exclusive right to do or authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords

“Copies” are defined in 17 U.S.C. § 101 as

material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

“Fixed” is also defined in section 101:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or a phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. . . .

16. White Paper, above at note 12, at 64–66. This particular piece of revisionist interpretation is irresponsible. The legislative materials accompanying the 1976 Copyright Act make it clear that Congress intended to assimilate the appearance of a work (or portions of a work) in a computer’s random-access memory to unfixed, evanescent images rather than “copies.” *See* H.R. Rep. No. 1476, 94th Cong., 2d sess. 52–53, 62 (1976); Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Entertainment Law Journal 29 (1994); Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, 37 Communications of the ACM (December 1994): 12.

17. White Paper, above at note 12, at 230–34. The Working Group dismissed any objection predicated on fair use:

It has been suggested that the prohibition is incompatible with fair use. First, the fair use doctrine does not require a copyright owner to allow or to facilitate unauthorized access or use of a work. Otherwise, copyright owners could not withhold works from publication; movie theatres could

not charge admission or prevent audio or video recording; museums could not require entry fees or prohibit the taking of photographs. Indeed, if the provision of access and the ability to make fair use of copyrighted works were required of copyright owners—or an affirmative right of the public—even passwords for access to computer databases would be considered illegal.

Ibid. at 231.

18. See Jessica Litman, *Copyright Legislation and Technological Change*, 78 Oregon Law Review 275, 353–54 (1989); see, e.g., *Home Video Recording: Hearings Before the Senate Judiciary Committee*, 99th Cong., 2d sess. 3 (1987) (testimony of Jack Valenti, Motion Picture Association of America); *ibid.* at 84–94 (statement of Charlie Ferris, Home Recording Rights Coalition); *Home Audio Recording Act: Hearing on S. 1739 before the Senate Committee on the Judiciary*, 99th Cong., 1st and 2d sess. (1986).

19. The crux of the criticism was that the Working Group had exaggerated the scope of copyright owners' rights while minimizing users' rights and privileges, and ignoring or mischaracterizing judicial opinions that undermined the Working Group's analysis. See, e.g., James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* 135–39 (Harvard University Press, 1996); Leslie A. Kurtz, *Copyright and the National Information Infrastructure in the United States*, 18 European Intelligence Prop. Review 120 (1996); Pamela Samuelson, *The Copyright Grab*, *Wired* 4.01 (January 1996): 134, 137; Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 Annual Survey of American Law 403.