



“JUST SAY YES TO LICENSING!”¹

“I’m so glad I’m a Beta.”²

MOST INDIVIDUAL END USERS DO not observe copyright rules in their daily behavior. The phenomenon is not new. It has captured so much recent attention because networked digital communications threaten and promise to revolutionize the way people interact with information and works of authorship in ways that make the behavior of individual end users far more crucial than it has been in the past. Our copyright laws have, until now, focused primarily on the relationships among those who write works of authorship and disseminate those works to the public. The threat and promise of networked digital technology is that every individual with access to a computer will be able to perform the twenty-first-century equivalent of printing, reprinting, publishing, and vending. If the vast majority of them do not comply with the copyright law, then the copyright law is in danger of becoming irrelevant.

The Lehman Working Group addressed this problem in its White Paper Report in three different ways. First, if the root of the problem was that individual end users didn’t bother with extant copyright rules because they believed that the copyright rules in the statute don’t apply to them, the White Paper offered a solution: it advanced an interpretation of the current statute under which all of the current rules apply with full force to individual end users. Second, if the reason that individual end users didn’t bother with extant copyright rules was that they realized that those rules were difficult to enforce against them, the White Paper suggested a variety of measures to beef up enforcement, ranging from enhanced penalties to new legal protection for technological anticopying tools. Finally, if individual end users didn’t bother with extant copyright rules because they didn’t understand them, the White Paper argued that an ambitious education program modeled around the theme “just say *yes*” (to licensing) would bring the American public around.³

Whether those proposals are likely to work depends on why it is that the public believes that extant copyright rules don't apply to individual end users; why it might be that the public thinks the rules are, or should be, unenforceable; why the public might have some trouble understanding the way the current rules work. The answers to these questions must influence the determination whether the good old rules should be the rules we devise to govern the behavior of individual end users, or whether we ought instead to try to fashion a legal regime that the general public finds more hospitable.

I have complained more than once in this book that the copyright law is complicated, arcane, and counterintuitive, and the upshot of that is that people don't believe the copyright law says what it does say. People do seem to buy into copyright norms, but they don't translate those norms into the rules that the copyright statute does; they find it very hard to believe that there's really a law out there that says the stuff the copyright law says.

Of course we have lots of laws that people don't seem to believe in. Think of the laws prohibiting consensual sodomy, for instance.⁴ I learned about those laws from my father, and I had a tough time believing that he wasn't making them up. Think about the late national 55-mile-an-hour speed limit law. These are laws that people don't believe actually say what they do say. And, since people don't think that familiar sexual activities, or driving at 70 miles an hour, are really against the law, they don't refrain from doing those things just because some law on the books says they can't.

People don't obey laws that they don't believe in. I'm not claiming that they behave lawlessly, or that they'll steal whatever they can steal if they think they can get away with it. Most people try to comply, at least substantially, with what they believe the law to say. If they don't believe the law says what it in fact does say, though, they won't obey it—not because they are protesting its provisions, but because it doesn't stick in their heads. Governments stop enforcing laws that people don't believe in. Laws that people don't obey and that governments don't enforce get repealed, even if they are good laws in some other sense of the word. The national 55 miles-an-hour speed limit, for instance, (had it been followed) would have conserved fuel and saved lives, but it wasn't, so it didn't, and now it's history. Congress repealed it.⁵

People are nonetheless attached to the symbolic significance of some of these laws. "They're good," people say, "because they make a statement. They express the norms of civilized society." You hear that sort of thing a lot when people talk about the war on drugs. Many people agree that the

laws against drugs aren't working, indeed, are doing as much harm as good, but they are unwilling to give up the symbolic force of the prohibitions. That's one good reason to keep a law around even though nobody seems to be obeying it. It can be very expensive to cling to a law that is unenforced and unenforceable, but sometimes, with some laws, some people feel that it is worth the price for the symbolism.

But laws that we keep around for their symbolic power can only exercise that power to the extent that people know what the laws say. If nobody knew that we had a law against selling cocaine, it wouldn't be serving much of a symbolic function. (To go back to the laws against consensual sodomy for a moment, they stopped performing whatever symbolic function they were supposed to perform once people stopped believing that there were real laws out there that made things like that illegal.) The reason people don't believe in the copyright law, I would argue, is that people persist in believing that laws make sense, and the copyright laws don't seem to them to make sense, because they don't make sense, especially from the vantage point of the individual end user.

We know quite a bit about the problems that inhere in educating the public about copyright law, because copyright owners have been expending huge sums of energy, time, and money with that goal in mind. The music-performing rights societies have been trying to educate a recalcitrant public for the past eighty-five years, and the effort has hardly made a dent in the psyches of their customers or the people who patronize them. Restaurateurs wouldn't think of selling their patrons stolen food, or sitting them in stolen chairs, but they think nothing of selling them stolen music; many of those who buy performing rights licenses from ASCAP, BMI, and SESAC say that they do so only because they're afraid of the copyright police.⁶

The performing rights situation is straightforward: if you run an establishment open to the public, you need to buy a license to perform music unless your performances fit into one of the exceptions.⁷ Licenses are sold relatively cheaply, but compliance is grudging at best.⁸ People perceive the law to be grossly unfair, partly because enforcement is incomplete and uneven, so there's no guarantee that the business down the street is licensed, and who wants to be a chump? Then there are all of the exceptions in the statute, which don't make any sense. Copyright lawyers might understand that the reason for various privileges is that particular lobbyists insisted on them, but there is nothing intuitively appealing about the statutory distinctions. Some prospective licensees fail to buy licenses because they

believe the law could not possibly have been intended to apply to their situations; others find its complex provisions arbitrary, and incomprehensible, and therefore unfair. And, every single year, despite the fact that the liability of unlicensed commercial establishments is well settled, people choose to litigate rather than pay up. And, of course, they lose. Their lawyers could have told them they would lose at the beginning, but they go through the painful and expensive litigation process anyway.

The moral of the story: some things are easier to teach than others. The current copyright statute has proved to be remarkably education-resistant. One part of the problem is that many people persist in believing that laws make sense. If someone claims that a law provides such and such, but such and such seems to make no sense, then perhaps that isn't really the law, or wasn't intended to be the way the law worked, or was the law at one time but not today, or is one of those laws, like the sodomy law, that it is okay to ignore. Our current copyright statute has more than merely a provision or two or three or ten that don't make a lot of sense; it's chock-full of them.

The current crisis has been precipitated by the widespread adoption of new digital technology, which enables members of the general public to print, reprint, publish, and vend, and communicate with a vast audience without resorting to publishers, record companies, motion picture studios, or television networks. By the summer of 1998, estimates pegged the number of Internet users in the United States at about 70 million people, and those numbers keep growing.⁹ By November of 1999, the total number of U.S. Internet users had reached 110 million; the world total was estimated at 259 million.¹⁰ By June of 2000, the United States had an estimated 137 million Internet users.¹¹ If 137 million members of the general public copy, save, transmit, and distribute content without paying attention to the written copyright rules, those rules are in danger of becoming irrelevant.

Current stakeholders, who are used to the current rules, would of course prefer that the rules that apply to the general public engaging in these activities be the current rules, or ones that work as much like them as possible.¹² They have been seeking ways to maintain what they see as the appropriate balance in the law, by reinvigorating and extending their version of the current rules.

I have urged that this version of the copyright balance is ahistorical. Copyright law never gave copyright owners rights as expansive as those that they have recently argued were their due. I would surely argue that my claim to defend the old balance is the more authentic one. But, the truth is,

we *all* need to give it up. That balance is gone. Whatever approach we choose, we will need to find a different balance. The new players whom we are trying to account for—hundreds of millions of consumers of networked digital technology who dwarf the current stakeholders on the basis of numbers alone—are too big an elephant to travel the length of a boa constrictor without permanently distorting its shape.¹³

In a spectrum of possible strategies, the solution supported by current stakeholders is at one extreme: let's first reinterpret the current statute to define as an actionable copy every appearance of a work in the temporary memory of any computer anywhere. Then, let's make the good old rules (as reinterpreted) apply with full force to these 259 million new printers, reprinters, publishers, and vendors, essentially by fiat. We'll simply say it does, and then we'll try to ensure that *they* see it that way by teaching them to “just say yes” in elementary school, by encouraging the widespread use of technological controls that compel them to comply with whatever terms copyright holders elect to impose, and by pursuing a subtle but decided shift toward criminal enforcement of extant copyright rules.¹⁴

The trouble with the plan is that the only people who appear to actually believe that the current copyright rules apply as written to every person on the planet are members of the copyright bar.¹⁵ Representatives of current stakeholders, talking among themselves, have persuaded one another that it must be true, but that's a far cry from persuading the 137 million new printers and reprinters. The good old rules were not written with the millions of new digital publishers in mind, and they don't fit very well with the way end users interact with copyrighted works. If you say to an end user, “You either need permission or a statutory privilege for each appearance, however fleeting, of any work you look at in any computer anywhere,” she'll say, “But there can't really be a law that says that. That would be silly.” Even copyright lawyers, who have invested years in getting used to the ways the copyright law seems arbitrary, have had to engage in several pretzels' worth of logical contortions to articulate how the good old rules do and should apply to end users without any further exemptions or privileges.

Instead of polling the old guard for its version of good rules to constrain the individual end users who, after all, are now threatening to compete as well as consume, and then foisting those rules on the public in a “just say yes—to licensing” campaign, it might be worthwhile to take a step back. I take it that a law that folks complied with voluntarily would be superior on many counts to one that required reeducation campaigns, that

depended on technological agents to be our copyright police, and that relied on felony convictions to be our deterrents. Nobody has proposed a law that might meet this description because the members of the copyright bar have all looked around and concluded that consumers will not voluntarily comply with the current collection of copyright rules. Stop and think about it for a minute. We can't rely on voluntary compliance because the great mass of mankind will not comply voluntarily with the current rules.

Well, why not? Is it that consumers are lawless, or ignorant? Is it, in other words, the consumers' fault? Or might there instead be some defect in the current rules—at least from the consumers' standpoint? To recast the question, can we look at the dilemma from the opposite direction? Are there rules that we believe consumers would comply with voluntarily? Do those rules potentially supply sufficient incentives to authors and their printers, publishers, and vendors to create new works and put them on the Global Information Infrastructure, and, if not, can we tweak them so that they do?

More than ever before, our copyright policy is becoming our information policy. As technology has transformed the nature of copyright so that it now applies to everybody's everyday behavior, it has become more important, not less, that our copyright rules embody a bargain that the public would assent to. The most important reason why we devised and continue to rely on a copyright legislative process whereby the copyright rules are devised by representatives of affected industries to govern interactions among them is that it produced rules that those industries could live with. Now that it is no longer merely the eight major movie studios, or the four television networks, or the six thousand radio stations, or the two-hundred-some book publishers, or the fifty-seven thousand libraries in this country¹⁶ who need to concern themselves about whether what they are doing will result in the creation of a "material object . . . in which a work is fixed by any method," but hundreds of millions of ordinary citizens, it is crucial that the rules governing what counts as such an object, and what the implications are of making one, be rules that those citizens can live with.

The Lehman Working Group's White Paper suggested that we invest in citizen reeducation to persuade everyone that the current copyright rules are right, true, and just. I am less distressed by this suggestion than I might be if I thought it were likely to work. There's something profoundly un-American about the campaign, at least as the White Paper described it.¹⁷ But, instead of trying to change the minds of millions of people, instead of trying to persuade them that a long, complicated, counterintuitive, and

often arbitrary code written by a bunch of copyright lawyers is sensible and fair, why don't we just replace this code with a set of new rules that more people than not think *are* sensible and fair?

Of course, that approach would force us to confront the knotty question of how we figure out what set of rules more people than not would think were sensible and fair. I don't want to minimize the difficulties of the problem, but let me suggest that a plausible first step might be to ask people. There is very little survey evidence to tell us what the general public thinks about copyright matters, but the survey evidence that's out there is intriguing.¹⁸ It accords with anecdotal evidence: members of the general public seem to attach quite a bit of significance to intellectual property, but they also seem to believe very firmly in a “free use zone,”¹⁹ or an area of use for which individual users don't need to ask permission. That makes a great deal of sense, even to copyright lawyers, since U.S. copyright law has always had fairly substantial free use zones. On the other hand, it's less easy to account for this: according to more than one study conducted for the Office of Technology Assessment (back when we still had an Office of Technology Assessment²⁰), most people seem to believe that the copyright law draws a distinction between exploitation of a work for commercial purposes and consumption of a work for personal purposes, and makes the first actionable and the second privileged.²¹ People believe this despite the fact that that's never been the law, and despite eighty-five years of concerted educational efforts by ASCAP, and a somewhat shorter, if more intense, educational campaign by the Software Publishers Association.²²

It may be that we can come up with a copyright law that incorporates that principle without doing too much damage to copyright incentives. I think we could, and I explore one such proposal in chapter 12, but I know there are a lot of people out there who disagree. If we are committed to the course of applying a single set of rules to both commercial film studios and high school students, though, we can't assess the feasibility of doing so merely by asking what the commercial film studios think of the idea—there are, after all, far more high school students than film studios out there.

With all of the pollsters pounding the streets these days to try to find out who the American public wants to elect as its next president, it's difficult to argue that asking the public what *it* thinks is somehow not feasible. We just haven't committed the resources to it before, because the answers to the questions didn't strike many people as very important. Let me suggest that today they are very important.

NOTES

1. Portions of this chapter are adapted from an essay published as *Copyright Noncompliance (or Why We Can't "Just Say Yes" to Licensing)*, in *Symposium: The Culture and Economics of Participation in an International Intellectual Property Regime*, 1–2 *New York University Journal of International Law and Politics* 29 (1997).

2. Aldous Huxley, *Brave New World* 18 (Bantam Classic 1958) (emphasis in original).

3. See Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 203–10 (1995) [hereinafter White Paper]. I am not making this up. The Working Group was concerned that “copyright education should not be a series of ‘thou shall nots.’ Instead, education should carry a ‘just say yes’ message. . . .” *Ibid.* at 208. The White Paper suggested that the “just say yes” copyright awareness campaign should focus on the minimal difficulties associated with seeking permission before gaining access to or making use of a work. *Ibid.*

4. See, e.g., Ark. Stat. § 5-14-122 (1995); Kentucky Rev. Stat. § 510.00 (Michie 1995).

5. Pub. L. 104-59, Title II § 205(d)(1)(B), 109 Stat. 577 (1995). Traffic deaths have apparently increased substantially in the years since the law was repealed.

Another example is provided by the law that requires household employers to pay Social Security taxes for babysitters, housekeepers, and other in-home employees. Until 1994, the law required Social Security taxes to be paid on behalf of any employee who earned more than \$50 in any quarter of the year, and was apparently widely ignored. In 1992, President Bill Clinton’s first nominee for the office of Attorney General disclosed that she had failed to pay taxes for her son’s babysitter; her nomination was withdrawn. An official White House policy requiring nominees to have complied with the law soon foundered when it turned out that a significant number of nominees had failed to pay the required FICA taxes. See Ruth Morris, *Clinton Delays Announcement on Court Choice; Breyer Tax Issue Disclosed*, *Washington Post*, June 13, 1993, at A1. The White House settled on a modified policy requiring high-level appointees to tender back taxes and penalties to the IRS and say they were sorry. See Editorial: *Again the Social Security Taxes*, *Washington Post*, December 22, 1993, at A20. Two years later, Congress amended the law to ease its requirements. See Editorial, *Nanny Tax Change, Not Repeal*, *Washington Post*, October 8, 1994, at A18.

6. In 1994, the House held oversight hearings on the performing rights societies. Restaurateurs, bar owners, and the proprietors of small businesses complained bitterly about the unfairness of the societies’ royalty demands, and insisted that the law simply couldn’t say what ASCAP, BMI, and SESAC said it did. See generally *Music Licensing Practices of Performing Rights Societies: Oversight Hearing Before*

the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, 103d Cong., 2d sess. (February 23–24, 1994) [Hereinafter Music Licensing Hearing]; Ralph Oman, *Source Licensing: The Latest Skirmish in an Old Battle*, 11 Columbia-VLA Journal of Law and Arts 251 (1987).

7. The statute has a variety of limited exceptions that apply in specified circumstances, including privileges that permit some public performances in connection with classroom teaching, distance education, religious services, agricultural fairs, record stores, and consumer appliance stores. The law also permits reception of radio or television broadcasts on the premises of restaurants, bars, and small retail businesses. See 17 U.S.C. § 110. Some of the privileges are not entirely logical. Section 110(7) of the statute, for instance, permits stores selling televisions to perform musical works on their in-store televisions to permit television sales. The exemption, however, does not extend to showing any pictures on those televisions. Presumably, therefore, the stores infringe the copyrights in the visual portions of the programming they play, but not in the accompanying music.

In addition to the exemptions, the law has a number of complicated statutory licenses, including those covering cable and satellite television.

8. The music performing rights situation is exemplary; I choose it because of the long-standing campaigns waged by ASCAP, BMI, and SESAC to educate the public. Organizations like the Software Publishers' Association have been in the public education business for far fewer years, with no more success. On compliance with the copyright law as it concerns software, John Perry Barlow wrote:

The laws regarding unlicensed reproduction of commercial software are clear and stern. . . and rarely observed. Software piracy laws are so practically unenforceable and breaking them has become so socially acceptable that only a thin minority appears compelled, either by fear or by conscience, to obey them. When I give speeches on this subject, I always ask how many people in the audience can honestly claim to have no unauthorized software on their hard disk. I've never seen more than 10 percent of the hands go up.

Whenever there is such profound divergence between law and social practice, it is not society that adapts. Against the swift tide of custom, the software publishers' current practice of hanging a few visible scapegoats is so obviously capricious as to only further diminish respect for the law.

John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know about Intellectual Property Is Wrong)*, *Wired*, March, 1994, at 84, 88.

9. See, e.g., *The Commercenet/Neilsen Internet Survey*, URL: <<http://www.commerce.net/nielsen/index.html>>.

10. See *Computer Industry Almanac, U.S. Tops 100 Million Internet Users According to Computer Industry Almanac* (November 4, 1999), at URL: <<http://www.c-i-a.com/199911iu.htm>>.

11. Nielsen/Netratings, *Average Web Usage-Month of June 2000, U.S.*, at URL: <<http://209.249.142.27/nnpm/owa/NRpublicreports.usagemonthly>>.

12. Indeed, they're happy to say so on the record. See, e.g., *Copyright Protection on the Internet: Hearing Before the Courts and Intellectual Property Subcommittee of the House Committee on the Judiciary*, 104th Cong., 2d sess. (February 7, 1996) (testimony of Jack Valenti, MPAA); *ibid.* (testimony of Gary McDaniels, Software Publishers Association).

13. See Antoine de Saint-Exupery, *The Little Prince* 8 (New York: Harcourt Brace & Co., 1943). Saint-Exupery begins the book with the tale of how, as a little boy, he had seen an illustration of a boa constrictor swallowing a rodent and had been inspired to draw a picture of a boa constrictor which had swallowed and was trying to digest an elephant.

14. See White Paper, above at note 3, at 177–200, 203–208, 228–36.

15. I mean to include, here, copyright lawyers in government and academia as well as those in private practice or in corporate positions. My argument is that we who live with and interpret copyright rules every day have simply forgotten how counterintuitive those rules are to people who don't. We frequently neglect to factor that aspect of reality into our constructions of the meaning of copyright rules.

16. The sources of the numbers in text are World Wide Web pages published by industry trade association. The number of major movie studios comes from the Motion Picture Association of America, see URL: <<http://www.mpa.org>>. The book publishers count comes from the Association of American Publishers, see URL: <<http://www.publishers.org>>. The number of radio stations comes from the Web page of the National Association of Broadcasters, see URL: <<http://www.smpte.org/sustain/nab.html>>; and the number of libraries is derived from the Web page of the American Library Association, see URL: <<http://www.ala.org>>.

17. The White Paper outlined a "Copyright Awareness Campaign," see White Paper, above at note 3, at 201–10, that emphasized the excellence of intellectual property ownership at every opportunity and left no room for contradiction. It is reminiscent of nothing so much as the sort of educational propaganda campaigns one can read about in older science fiction novels about totalitarian states.

18. See Office of Technology Assessment, U.S. Congress, *Copyright & Home Copying: Technology Challenges the Law* 163–65 (1989); Office of Technology Assessment, U.S. Congress, *Intellectual Property Rights in an Age of Electronics and Information* 121–23, 208–209 (1986).

19. The phrase is Professor Marci Hamilton's. See Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 3 *Vanderbilt Journal of Transnational Law* 613 (1996).

20. Congress established the Office of Technology Assessment (OTA) in 1972, to provide nonpartisan, in depth technical analysis of legislative and policy questions implicating science and technology. The OTA prepared reports for Congress on subjects ranging from environmental and health issues to military and space issues, and included evaluations of the effectiveness of government science and technology policy in connection with particular questions. During the twenty-three years it operated, the OTA proved unusually resistant to political and industry pressure. Congress abolished it in 1995.

21. See *Copyright & Home Copying*, above at note 18, at 163–65; *Intellectual Property Rights in an Age of Electronics and Information*, above at note 18, at 121–23, 208–209; The Policy Planning Group, Yankelovich, Skelly & White, Inc., *Public Perceptions of the “Intellectual Property Rights” Issue* (1985) (OTA Contractor Report).

22. Until recently, however, the public’s impression was not a bad approximation of the scope of copyright rights likely, in practice, to be enforced. If copyright owners insisted, as sometimes they did, that copyright gave them broad rights to control their works in any manner and all forms, the practical costs of enforcing those rights against individual consumers dissuaded them from testing their claims in court. See, e.g., *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). In a small number of recent cases, copyright owners joined allegedly representative individuals as nominal parties defendant to lawsuits challenging the sale of goods or services said to facilitate infringement, but neither sought nor received relief against them. See, e.g., *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429 (C.D. Cal. 1979), *aff’d in part, rev’d in part*, 659 F.2d 963 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984); Edwin McDowell, *Ideas and Trends: College “Copy Mills” Grind Quickly, So Publishers Sue*, *New York Times*, December 19, 1982, §4, at 18, col. 1; but cf. *Demetriades v. Kaufmann*, 690 F. Supp. 289 (SDNY 1988) (individual home buyers sued for hiring builder to construct look-alike house).