

COPYRIGHT IS NOT A SLAM DUNK!

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Tonight I want to suggest to my colleagues on the CCC Board of Directors that “copyright” is not a slam dunk. I want to explain why I think everybody is wrong about copyright, and why I think we would all be better off if we could talk more openly about what our broader goals and interests are. And, begging the pardon of my legal colleagues, I want to say that I think the quasi-legal terminology of the debate over digital intellectual property is making an already difficult situation worse. The lawyers among us may feel better, however, if I also say that the legislators make lawyers look good.

I have asked Joe to make this an after-dinner talk so that you will not throw food at me, for I want to get several things off my chest that have been nagging me for nearly two decades. So bear with me while I try to explain. But, lest you lock me out of the room tomorrow, let me make a declaration of faith. Despite what I have just said, *credo in unum deum et credo in legus copyrightibus* – if you take my meaning. I also believe in *e pluribus unum*, but I will leave that for another talk. I am myself a creator of copyrighted works from which I cheerfully derive small sums of money. I work for a University that patents and copyrights its creations, and I think it should be able to profit from and protect those creations. I use the CCC website to secure permission (and pay for) photocopies of materials in my coursepack. And, perhaps most importantly, I once

sued a very large communications conglomerate for violation of my nonprofit organization's intellectual property in an \$11 million publishing venture. We settled that suit, and although the settlement does not permit me to say that we won, my lawyers tell me that I can say that there was no such prohibition to our opponents' claim of victory. However, in the question period, I will be happy to explain to you why I believe both sides lost that very expensive litigation (in which Bruce Rich represented neither side!).

Most of all, I want to say that I think that the role played by the CCC is indisputably in everyone's interest. I am proud to be on the Board of an organization that serves the public interest by facilitating the clearance of copyright in way that benefits authors, publishers and users. We have done so successfully for photocopies for a very long time, and we have begun to be as useful in the digital publishing environment.

But my argument tonight is that the existing law of copyright is a frighteningly fragile vessel in a digital sea, and my fear is that it may serve no one adequately in the longer run. Most of you know a great deal more of about these matters than I do, but I hope that a modest historical perspective on copyright and technology will help us to locate the problem areas – though it cannot provide solutions.

My argument is that the fundamental problem lies in technology and economics, not law. Consider four items that have appeared recently in the news. The first was flagged for us by Beth Loker on October 25, when she sent along a news release from the

Copyright Office announcing that an online service for “pre-registering” works in the process of creation. We were then told that the new process is needed because:

The entertainment industry had lobbied for such a service, claiming that it needs protection against Internet piracy for works like music albums and motion pictures, which are often leaked while still in the production process. To be eligible, the creator of the unfinished work “must certify that the work is being prepared for commercial distribution and that he or she has a reasonable expectation that the work will be commercially distributed to the public.

The second item was in *The New York Times* on November 9, in a story reporting the creation of a new agency in the CIA to be called the “Open Source Center.” Now, apart from the irony of an “open source” center in a clandestine agency, and a statement by a General that “Just because information is stolen, that doesn’t make it more useful,” the conception is really interesting, for the Center will “gather and analyze information from the Web, broadcasts, newspapers and other unclassified sources around the world.” This is to be, clearly, a massive effort to data-mine digitized material – much of it inevitably proprietary information.

The third item appeared in the November 8 *Chronicle of Higher Education*. This is about patents rather than copyright, but it is of course all “intellectual property.” The article is headlined “Colleges are Building a ‘War Chest’ to Oppose a Company Claiming Patents on Streaming Media.” It describes efforts led by the general counsel of

the American Council of Education to build a fund of several hundred thousand dollars from colleges to fight the Acacia Research Corporation, which claims to hold a patent on the technology behind the streaming audios and videos that educational institutions use to distribute and sometimes to market copies of on-campus events. Acacia is proposing to lease the technology to the colleges on a fee scale that slides according to the size of the institution. Acacia contends that its licensing offer “was crafted to benefit small colleges made nervous by the threat of costly patent lawsuits.” The colleges think they are being ripped off. Sound familiar to anyone here?

The fourth item is of course Google Print, which I will to come back to later, since it currently poses the single most visibly contentious issue in copyright, and since this board has been discussing the matter online. The point I want to make about these items is that none of the activities they describe could have occurred twenty years ago. These are all instances of the creation, manipulation and appropriation of intellectual property in digital form. Therein lies our dilemma. We treat these activities legally as precisely analogous to the analog activities they mimic, but my argument is that the digisphere is fundamentally different from the environment of Gutenberg technology, and that we do not serve society well by pretending that they are simply two aspects of the same thing. We treat them all as instances of intellectual *property*, using a legal concept that I think was problematic even in the Gutenberg era, and that I feel sure is more problematic now. The question I want to raise is whether statutory and common law are keeping up with technology and economics?

Domestic law is of course an expression of national culture and the history of the United States has been a long dialog between culture and technology. Culture is sometimes opposed to technological development, but in the United States law has almost always favored the commercial development of technology. Indeed, the quickest and most sweeping development of technology has been a national cultural and legislative priority from the early nineteenth century through the twentieth century – think of the legal innovations and governmental subsidies that made possible the development of the national canal system, the railroads and the interstate highway system.. To put the question in a more pointed form, are subsidies to Walt Disney analogous to those in the 19th century for the Southern Pacific Railroad?

Ironically, the most important restraint on technological development has been the law of intellectual property, which legalizes rightsholder time-limited monopolies in the name of creativity. For two hundred years we Americans have learned how to subsidize technological and economic development within the constraints of trademark, patent and copyright law, a law that favors creator and producer interests over those of consumers, the presumptive beneficiaries of the consequent gains in creativity. This, arguably, was as true in the knowledge industries as it was elsewhere in the economy – on this, please read my colleague Paul Starr’s magnificent history, *The Creation of the Media : Political Origins of Modern Communications* (New York : Basic Books, 2004).

But the twin revolutions in telecommunications and information technology over the last third of the twentieth century have vastly expanded the scope and have

transformed the nature of the production, manipulation and transmission of information. The digital universe is larger, more flexible and more universal than the Gutenberg universe it is supplanting. One development in particular, the Internet, has swiftly created a more genuinely simultaneous global environment than exists in any other sector for something both qualitatively and quantitatively new is taking place in the knowledge world.

In principle, there is however no reason why the technologies of telecommunications and information should have changed the long-term American pattern of norms and behaviors in the law of intellectual property. We are, after all, still working from the same constitutional text, in Article I, Section 8 of the Constitution of the United States, which gives the federal legislature authority “To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” A series of statutes and court decisions have settled the general parameters of limited monopolies intended to stimulate artistic and intellectual creativity, and in so doing to set the policies under which creators could profit from this right.

Should it matter that modes of dissemination of information are increasingly digital rather than analog? The explicit policy of the late twentieth century revision of the U.S. federal law of intellectual property (the Digital Millennium Copyright Act of 1998) was that the law of intellectual property should apply without respect to changes in technology – and indeed this was also the theory of the previous legislative revision of IP law in 1976. There is a strong body of opinion, especially in the commercial sector, that

vehemently supports this position, contending that the issue is still (and simply) the protection of creativity, though simultaneously contending that “minor” accommodations to the old system (anti-circumvention rules, for instance) are necessary, and consistent with the traditional IP system.

But others, largely in the user/consumer community, argue that “intellectual property” is no longer an adequate metaphor to describe the realities of the era of digital information. Their view is that the new mechanisms in the DMCA, along with other changes in the marketing of digital cultural objects, constitute an essentially new IP system, one in which rightsholder prerogatives have been dramatically strengthened at the expense of the interests of the consumers of culture – to the public interest, they would say. Perhaps the best example of a structural change consumers find threatening is the transition from sales to licensing in the marketing of digital culture. Purchasers clearly have stronger rights and greater control of their interests than licensees, and the practical implications for users are profound, and not only in increased costs.

The non-profit cultural sector has almost universally taken such a position with respect to the DCMA. The for-profit cultural sector, which now sometimes describes itself as the “creative industries,” has been firmly in the rightsholder intellectual property camp. What is so interesting to an observer is that this must be the source of much of the rightsholder animus against Google – the Judas in our midst. But of course there are many creators in the nonprofit cultural camp, and there are also many creators in the for-profit sector who feel that they do not sufficiently benefit from the legal position of the

firms who produce and distribute their products. The cultural property world is as messy as any other. But the politics of the debate over networked digital culture are generally polarized bilaterally and asymmetrically, with user nonprofits set against producer/distributor for-profits.

I am unhappy about the state of debate about these matters in our communities – if the bilateral shouting matches can be dignified with the term “debates.” I believe that we must reconceptualize the genuine dilemmas) that have preoccupied all of us interested in the creation and dissemination of digital information for more than a decade. My fear, frankly, is that we have not moved much beyond the deadlocks of the CONFU negotiations. From my perspective, rightsholders are claiming more, and many cultural institutions are trying to join the rightsholder camp while simultaneously trying to take advantage of copyright exceptions such as “fair use.” It is an IP jungle out there.

I do not argue, and am not arguing here, for an open access/public domain world. I believe that rights of creators should be respected, and that creativity should be rewarded economically. But I do hold with those who believe that the laws of IP currently reflect a hardening of rightsholder dominance in a manner that is not based on the original constitutional principle of offering limited protection to creators. The examples are too numerous and obvious for me to mention, but suffice it to say that I think that rightsholders, afraid of giving up more than they intend, are restricting access to information that is crucial to the cultural heritage – recent works of literature and music, artistic images, and much more. We will see, for instance, whether the current

discussion with the Copyright Office about “orphaned works” leads to a thoughtful resolution of a key cultural access question.

The refusal to sell digital information and the unwillingness to archive it reliably constitutes another important range of problems. The funding necessary to digitize, archive and transmit the cultural heritage is an increasing problem for the nonprofit sector. But things change, and the intriguing question is whether the rapid expansion of the commercial exploitation of the dissemination of digital information is not simultaneously transforming conceptions of what constitutes “public good.” My hunch is that the leading edge of this wave is recorded music, an arena in which yesterday’s pirate is today’s consumer.

With that thought in mind, let’s come back to Google Print. Think about what is involved here. Google is attempting to digitize large quantities of proprietary information and is offering publishers the opportunity to withhold consent for “snippets” to be displayed (along with links to publishers’ online sales portals); publishers say that permission must be granted before display. They imply that rights-observance must take precedence over efficiency in the utilization of information. The point I want to make is that, whatever one’s view of the legal concepts and principles involved, this is a dispute that simply could not have occurred at any earlier point in U.S. history. What is new is that a leading technology firm thinks that it can profit hugely by making information available without charge. The publishers are really contending that the cost is being shifted to the “rightsholders.” Perhaps. But the traditional legal framework (and for that matter the adversary character of the Anglo-American legal system) have channeled the

discussion in such a way that we cannot focus on policy solutions that might simultaneously protect the interests of the creators/distributors of knowledge and those of users/consumers and the public interest. We are trapped in old legal categories, “law-think,” but we need to find a way to engage in “society-think.” Not to worry, however, Adam Smith was not wrong, and in a strongly capitalist society like ours the market will have its way as each of us pursues his own interest – but remember that Smith was talking about the interests of individuals, not firms.

We have all read Sandy’s fine presentation to NACUA for which Joe Alen has conferred a J.D. upon him. Bravo! But frankly what really interested me about Sandy’s elegant argument was that it could have been written by the lawyers for Elsevier, John Wiley or any major commercial publisher. But consider, though Sandy does not mention it, the nature and size of the economic stake involved. Many of Sandy’s books sell only one or two hundred copies – and God bless him for publishing them. I wonder, however, whether Sandy represents the larger views of his university on matters of intellectual property? Or, to put it more kindly, does his university have interests in intellectual property that are more those of users? I think Penn State does have such interests, and for me the significant fact is that many players in the Google dispute have a multiplicity of interests, and thus cannot be pigeon-holed in the dualism that law of intellectual property creates in the digisphere.

And I am no happier with the other side of the Google dispute. Larry Lessig, writing in *Wired* on November 11, contends that

. . . if the AAP is right, it's not Google Print that's illegal. The outlaw is Google itself – and Yahoo!, and MSN Search, and the Internet Archive, and every other technology that makes knowledge useful in a digital age.

Think about Google's core business: It copies whatever content it finds on the Web and puts that content in an index. It doesn't ask the copyright owner first, though it does exclude content if asked. Thus Google want to do for books exactly what it has always done for the Web. Why should one be illegal and the other different?

Google creates value – a lot of it – by indexing content. . . . never in the history of copyright law would anyone have thought that you needed permission from a publisher to index a book's content. Imagine if a library needed consent to create a card catalog. But Google indexes by "copying." And since 1909, US copyright law has given copyright owners the exclusive right to control copies of their works. . . . but [that] Congress didn't have Google Print in mind. Buy copy, Congress meant the sort of act that would be in competition with the incentives that copyright law was (fittingly) meant to establish for authors. Nothing in what Google wants to do affects those incentives to creativity.

OK. Lessig's views will surprise no one in this room.

But my point is that what is really interesting and important is not whether or not Google Print violates the principles of "fair use" (whatever those might be), but rather that technology has changed the world and our legal tools are not up to dealing with the change. I agree with Lessig on his non-legal point, which is that the important change involved in Google Print is the promethean transformation of the capacity for and the opportunities created by digital indexing. If we are truly concerned about promoting creativity, we ought to be fighting to make new forms of indexing more efficient and more readily available to the society at large, without destroying the commercial environment in which so much knowledge is created and disseminated. But we are not likely to do that if we continue to act as though we live in a Manichean, zero-sum, world made up exclusively of rightsholders and users. I think we can do better – and I think

that this organization, the CCC, is uniquely situated to be part of the solution rather than part of the problem.