Cites & Insights

Crawford at Large

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Special Issue: Catching Up with Copyright

This special issue appears because I needed to catch up on copyright-related items from the past few months. The most recent special issue was *also* copyright-related (the Broadcast Flag issue), but that's the way things go.

First, however, a few housekeeping items.

Another issue, July 2004, will almost certainly appear before the ALA Annual Conference in Orlando. I'll try to get it out by June 21. It will include items that relate to the conference and will certainly be more varied than this issue.

Based on early feedback on last issue's lead essay, *Cites & Insights* is now accepting voluntary donations. The home page, cites.boisestate.edu, has PayPal and Amazon Honor System links. This is a *voluntary* donation. The track record for donations may influence my decision-making on the future of *Cites & Insights*; I'll discuss that in later issues.

I am *very* interested in feedback on value-added services, more specifically two forms of print-on-demand perfect-bound books: *Cites & Insights* volumes, this page size, probably costing $30 to $35 for a complete volume; and thematic volumes (5x8 or 6x9) that might include material from my other publishing outlets as well as past *C&I* material and that would certainly include additional comments and updates, probably costing $25 to $30 depending on the number of pages. (I'm sure I can turn volume 4 of *Cites & Insights* into a PoD volume, and I'm pretty sure that's true of volume 3. Format changes from earlier volumes might cause problems.) If you or your library is interested in these possibilities, *let me know*: username wcc, domain notes.rlg.org

Copyright Currents

While I'm probably missing more than I catch here, most copyright-related threads continue to be active. Still no real action on any copyright-related legislative front—including any attempt to reverse the FCC's abysmal broadcast flag ruling—but at least there have been hearings on one possible corrective bill, the DMCRA. This mass of stuff, organized by general topic and chronologically within topic, may gain coherence in the reading—or it may not.

In This Issue

Big Media and Peer-to-Peer

Anderson, Chris, "Memo to the new head of the MPAA," *Wired* 12:01 (January 2004).

This brief piece takes off from Jack Valenti's coming retirement (after *37 years*!) to suggest that the movie industry can avoid "the implosion of the music industry" by avoiding the RIAA's "history of ham-handed industry actions and executives in denial." Anderson calls the long-standing copy protection in videocassettes and DVDs an "advantage" in the piracy wars (even as it denies citizens with what might otherwise be fair-use rights) and notes that, "unlike music labels, movie studios are not hated by consumer and artist alike." Well, yes, except that I'd guess *most* music lovers don't "hate" the big labels—and, let's face it, there's a fair amount of overlap between MPAA and RIAA members. I agree with Anderson's comment that DVDs, with bonus material and moderate prices, are perceived as offering better value than CDs and that "**Customers who feel they're getting their money's worth are less likely to turn into pirates.**" [Emphasis in original.]

He notes that high compression on downloadable movies means that, "unlike an MP3, the quality usually sucks." (So do many MP3s, but you never

hear that from journalists outside the audio field.) And, lastly, most people don't watch a movie as often as they listen to a song—and watching movies "is not an offhand activity." But, Anderson continues, the MPAA is at risk of alienating customers just like the music industry, given moves like the broadcast flag. Further, he claims, online file-trading will soon get much worse, citing BitTorrent as "the Napster for movies." He says studios should accept that new technology means a new way of doing business, allow people to use digital media however they choose, and "think $5 for a downloadable film—unlimited use."

Is the MPAA likely to listen? I doubt it. And there's one crucial weakness to the whole argument: Turns out that CD *sales* (as opposed to CD shipments) have been rising in recent quarters, which makes "the implosion of the music industry" a suspect basis for changing a business model.

Peer-to-Peer software and the Betamax decision

Just a brief February 4 AP item on a hearing in a federal appeals court. In April 2003, U.S. District Judge Stephen Wilson said Grokster and StreamCast Networks are not legally responsible for the swapping of copyright content—they just provide the software. The appeals court was hearing an appeal of that decision. Russ Frackman, arguing to overturn the decision, cited the Betamax decision—an odd citation, given that the Betamax decision (which found that, since VCRs have legitimate uses and their manufacturers couldn't control uses, manufacturers couldn't be held liable for copyright violations) would seem to back Wilson's decision.

Why is peer-to-peer different? Because, Frackman claims, 90% of content flowing through the networks is illegal. Judge John Noonen noted that 10 percent non-infringing use "sounds like a lot of non-infringing files to me." (I don't believe Frackman *can* back that 90% claim, since there is no plausible way to measure all P2P usage and determine which files are truly infringing. This is in line with the assertion, during the same hearing, that P2P providers can and must *prevent* exchange of copyright files, which the providers claim is not possible.)

Fred von Lohmann of EFF noted that millions of swapped files represent authorized distributions, including live music by bands that encourage such distribution.

Collective licensing: A voluntary approach?

Last year there was much discussion of proposed compulsory licenses to make P2P sharing legal, by imposing a monthly charge on internet connections. I thought then that it was a terrible idea, and continue to think so: It forces every U.S. internet user—including those of us who don't find downloaded music interesting—to subsidize both the music industry and those who download music actively.

Now EFF has an alternative, one behind the "let the music play" ad campaign that I found disturbing (as it seemed to celebrate infringement). The white paper (downloaded February 26) advocates *voluntary* collective licensing, suggesting $5 per month to allow as much P2P file-sharing as you want with no threat of infringement lawsuits. The $5 per month would be divided among "rights-holders" (or, later, "artists and rights-holders") based on the popularity of music within file-sharing networks.

The premises are stated bluntly: Artists and copyright holders deserve fair compensation; "File sharing is here to stay"; fans do a better job making music available than do legitimate stores such as iTunes; solutions should minimize government interference. The proposal carries with it the *explicit* assertion that fans are going to keep sharing music no matter what the labels do, stated in a manner that strikes me as dismissive of ethical concerns.

Later, the white paper posits a $3 billion annual revenue stream of "pure profit"—based on the concept that 100% of the 60 million Americans who have, at one time or another, used file sharing software *for any purpose* will instantly sign up for this deal and continue using it indefinitely. That's one heck of an assumption—as is the claim that this is all pure profit, since there are "no CDs to ship, no online retailers to cut in on the deal, no payola to radio conglomerates"—and, presumably, since it costs nothing to acquire the artists and produce the wonderful new music that will keep this money-making "evergreen revenue stream" going forever. A bit later, we hear that payment will come from those who want to download music "only so long as they are interested in downloading." So, for someone like me who would primarily like to fill in the spaces in my collection of music from the 60s, 70s, and early 80s, it would seem to make sense to pay $5 a month for one or two months, download everything possible with full legal immunity, then stop.

What about existing CD sales? "The music industry is still a long way from *admitting* that its existing business models are obsolete." [Emphasis added.] That paragraph goes on to mention "sliding revenues" and to offer another stick: If the publishers continue their "war against the Internet" it may be time for "Congress to take steps to force their hand"—by enacting compulsory licensing. I'll admit that I never thought of 300 or even 3,000 infringement suits as a "war against the Internet" (or, for that matter, that file-sharing was the only real use of

the internet)—and I'm guessing that EFF knows good and well that the chances of getting Congress to come down on the side of known copyright infringers and against the RIAA is roughly equal to the chances of getting Congress to outlaw DVD copy protection.

How do we know that file sharers will pay up? Because the EFF says so: "The vast majority of file sharers are willing to pay a reasonable fee for the freedom to download whatever they like, using whatever software suits them." That would seem a prime candidate for a footnote citing one or more surveys, as you'd expect in a white paper—but supporting evidence is not provided.

A February 26 *Wired News* item by Katie Dean provides followup with notes from a Hastings College of the Law music law conference. Fred von Lohmann raised the suggestion. David Sutphen from RIAA "pooh-poohed the idea," although the notes also suggest that he didn't understand it. A law professor liked the idea and added a twist: To take care of people who still share music illegally, we'll just add "a small surcharge" on products such as CD burners, just as they do in Canada. Sutphen called this idea "pie in the sky." Apparently, nobody noted that there's *already* a surcharge on audio CD-Rs that's supposed to take care of questionable copying—or that Canada's surcharges (none of which have yet reached recording artists) make CD-Rs *far* more expensive in Canada. For those of us who burn a lot of CD-Rs, all of them legitimate, this is another "tax everyone to take care of the violators" idea.

In some ways, I dislike poking holes in EFF's proposal and my growing distrust of EFF itself. I think the voluntary licensing proposition has some merit, but I believe that the white paper overstates the likely revenue, uses threats that are unlikely to have much merit, and has an unfortunate "they're going to steal anyway, so deal with it" attitude.

Audible Magic

A March 3 story at news.com discusses Audible Magic's supposed technology that can sit at an ISP, monitor data traffic, and *prevent* complete file transfers for copyrighted songs. Naturally, the RIAA loves the idea. How does it work? By identifying "psychoacoustical" properties of songs, "listening" to each file, comparing it to a huge database of copyrighted material (none of which, presumably, can be shared under any circumstances?), and shutting down the file transfer once it's found a match, "usually about a third to half of the file."

Would it actually work on a widespread basis? Unproven. It can't handle encrypted files at all, it probably wouldn't be hard to bypass through hacks. Even if it does work, it would almost require legislation to *force* use of the system by all ISPs, regardless of privacy, legitimacy, and other issues, and that would enshrine one particular solution as the only way to handle things.

Oberholzer, Felix, and Koleman Strumpf, "The effect of file sharing on record sales: An empirical analysis," March 2004.

It's PDF, so I don't have the address, but it should be easy to find. This 25-page paper (with an extensive bibliography and another 20+ pages of appendices) comes to a crucially important conclusion, given all the brouhaha over P2P and CD sales:

> Downloads have an effect on sales which is statistically indistinguishable from zero, despite rather precise estimates.

Oberholzer is at the Harvard Business School; Strumpf at the University of North Carolina, Chapel Hill. The study used a dataset containing "0.01% of the world's downloads" and matched it to U.S. sales data for a large number of albums.

This is an important study, one that tends to contradict both the claims of RIAA and its allies (that downloads are ruining CD sales) and the claims of some P2P advocates that downloading is a wonderful sales tool for CDs. That said, this is also a statistically deep paper; after reading it, I feel wholly unqualified to provide intelligent commentary. My sense is that the authors know what they're doing and that this may be a landmark paper, but about all I can do is suggest that you read it yourself. Maybe you'll understand it better than I did.

Edward Felten discussed this study and another study, Eric Boorstin's senior thesis at Princeton. That study approaches downloading and CD sales from a very different angle. You'll find his comments and "Grand Unified Theory of Filesharing" in the freedom-to-tinker archives, 000573 and 000574 (April 9 and April 12) respectively, along with a number of comment son each one. The Grand Unified Theory suggests that there are two categories of filesharers: Freeriders, who are generally young, have few moral qualms, and use filesharing to accumulate libraries rather than buying CDs, and Samplers, generally older, morally conflicted, and more likely to download songs they can't buy—and who buy more CDs because they find more music they like. The overall net effect on CD sales could be roughly zero, as the Oberholzer and Strumpf paper suggests.

"Speaking of music piracy"

That's the title on an April 8 AP story about pricing for legally-downloaded music. $0.99 per tune, $9.99 per album, right?

Wrong. *Fly or Die* by N.E.R.D. costs $16.99 at iTunes, $13.99 via Napster—and $13.49 at Amazon for totally uncompressed "files" delivered on a handy 12cm disc with jewel box, cover art, liner notes, and no limitations on copying to portable media—the CD itself. That's not unique. One Sony album costs $13.99 on iTunes and averages $10.88 with all the audio-CD extras in a music store.

The story says all five major music outfits want to *boost* the price of single song downloads: $0.99 isn't enough. Maybe $1.25, maybe $2.50. Or, hey, why not force people to buy a bunch of songs they don't want so they can download the one they want? Hasn't that worked so well for CDs?

Most of these wonderful user-friendly pricing initiatives charge more for brand-new cuts. That makes sense in some ways: After all, you can typically buy rereleases of older albums at considerably lower price points and compilation CDs tend to offer 20 or more songs—frequently the "good ones" from four or five albums—for less than a typical new-CD cost. (My favorite cases, from good old "all sides of the issue" Sony, are the "essential" series: two very full CDs of well-chosen tracks from an artist's or group's career, typically 33 to 40+ cuts, selling for $12 to $13 at Target.)

But when it comes to pure unbridled greed, the big record companies get philosophical. Here's the last sentence in the story:

> Some executives, for example, believe they should be charging a premium for the online versions of older tracks because consumers may be willing to pay more for harder-to-find material.

DMCA Fallout and Related Cases

Hirtle, Peter, "The impact of the Librarian of Congress's rulemaking on the Digital Millennium Copyright Act," *RLG DigiNews* 7:6 (December 15, 2003). (www.rlg.org/preserv/diginews/diginews7-6.html)

You may find other belated notes from this issue of *RLG DigNews* in THE LIBRARY STUFF, some day, but this one's worth mentioning here. It's another in the first-rate "FAQ" series in *RLG DigiNews.* Hirtle, Director of Instruction and Learning and Intellectual Property Officer at Cornell University Library, concentrates on the impact of DMCA and contemporary rulemaking on preservation of digital information, specifically digital information subject to access control. The third of four exemptions to DMCA's provisions addresses preservation: It allows circumvention of copy-protection provisions for "computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access." The exemption was proposed by the Internet Archive.

As Hirtle notes, Section 108(c) authorizes migration of digital works for the purposes of preservation in some circumstances—but that doesn't help if the digital works will function only when the original medium or a hardware device is present. "Creating non-functioning software copies is not preservation." The exemption means software access control mechanisms can be bypassed legally in such cases—*if* the original format is obsolete.

What's obsolete? Well, an 8" diskette almost certainly is—but what about 5.25" minidiskettes? The Register of Copyrights left that open: "it would be a matter of proof" as to whether 5.25" drives are considered obsolete.

Hirtle also focuses on how limited this exemption really is. The Internet Archive wanted a similar exemption for literary and audiovisual works, but the Register of Copyrights wasn't satisfied that access control mechanisms are significant problems for ebooks and the like—an interesting finding, given that so many ebook files are locked down so tightly.

There's much more here, including a recommendation that librarians and archivists continue to challenge the Librarian of Congress's narrow interpretation of his authority in providing exemptions to DMCA. **Well worth reading**, as usual.

DVDs, DeCSS and DMCA: Win one…

On February 27, 2004, California's Sixth Appellate District Court of Appeals issued a ruling in the case of DVD Copy Control Association (DVD CCA) vs. Andrew Bunner. DVD CCA sued Bunner and others to *prevent* them from using or publishing DeCSS, using trade secret law as the basis for the suit. The trial court granted the preliminary injunction. Bunner appeared, claiming that the injunction infringed his free speech rights. The appeals court agreed and reversed the injunction. On further appeal, the California Supreme Court held that the preliminary injunction did *not* violate free speech clauses of the California and U.S. Constitution, "*assuming* the trial court properly issued the injunction under California's trade secret law," and remanded the case to the appeals court.

This ruling concludes that the evidence does not support factual findings for the preliminary injunction. I suspect the DVD CCA saw this one coming: They filed a dismissal after the case had been remanded and asked that the appeal be dismissed as moot—which the court rejected, "concluding that

the appeal presents important issues that could arise again and yet evade review."

What did Andrew Bunner, a Linux enthusiast, do? He didn't crack DeCSS; he became aware of it and posted the information on his website. He claims that, at the time, he had "no information to suggest that the program contained any trade secrets or that it involved the misappropriation of trade secrets." DeCSS first appeared on October 6, 1999 (according to DVD CCA), with source available around October 25. Beginning November 4, 1999, DVD CCA started sending letters to ISPs and website operators demanding that pages be taken down—66 of them between November 3 and November 23, none addressed to Bunner. "About 25 of the 66 sites were taken down." The suite was filed December 27—at which point at least 93 websites still contained DeCSS information. (The opinion, written by Judge William J. Elfving, is good reading and includes a good summary history of CSS and DeCSS, from which this information is extracted.)

The findings turn out to be fairly straightforward. DVD CCA did not provide evidence as to when Bunner posted DeCSS information, so there was no way to expressly find that the proprietary information was not generally known at that point. "DVD CCA urges us, in effect, to ignore the fact that the allegedly propriety information may have been distributed to a worldwide audience of millions prior to Bunner's first posting." Basically, DVD CCA argued that if Bunner knew "or should have known" that the information was obtained improperly, general availability of that information is no defense. But was DeCSS created by improper means? "The evidence in this case is very sparse." Reverse engineering is not inherently improper.

Injunctions are normally granted when there's likelihood of immediate harm—when a trial would be too late. But if the trade secret was already generally known, then an injunction was pointless—"the secret would [already] have ceased to exist." It also gets messy because trade secret law is typically used to protect a company against competitors—and, of course, there *are* no "good faith competitors" for DVD CCA. It's a monopoly, plain and simple, a fact that doesn't seem to concern anybody.

Essentially, by the time the injunction was requested, it was too late: DeCSS was so widely available that trade secret law was no longer sufficient to claim immediate harm. The train had left the station. The injunction was "an unlawful prior restraint upon Bunner's right to free speech" and issuance was "an abuse of the trial court's discretion." Bunner is entitled to recover appellate costs.

…and lose one

Here's how Katie Dean put it in her February 20 *Wired News* story: "A federal judge ruled on Friday that 321 Studios, a software developer, must stop selling its DVD copying program, delivering a huge win for the entertainment industry." MPAA had sued; 321 Studios vowed to appeal based on fair use rights. As always, Jack Valenti had his mirror-universe spin on consumer-friendly outcomes: "Companies have a responsibility to develop products that operate within the letter of the law and that *do not expose their customers to illegal activities*." [Emphasis added.]

The ruling took a *long* time—the case was argued in May 2003—and involved CSS and DMCA, naturally. According to John Borland's story at news.com, Judge Susan Illston found that DMCA provisions override any legal right for consumers to make personal copies of movies they've purchased.

The ruling itself runs 28 pages as provided by FindLaw; "321 studios v. Metro Goldwyn Mayer Studios, Inc., et al," is No. C 02-1955 SI. It's interesting reading, if a little discouraging. Judge Illston relies on Universal City Studios, Inc. v. Corley (the DeCSS case involving the 2600 website) and United States v. Elcom LTD (the Adobe Acrobat eBook Reader case) in supporting DMCA provisions over such niceties as free speech and fair use.

As I read the decision, Illston is agreeing that buying a DVD does *not* give you any right to actually view it—those rights are still controlled entirely by the studios, through DVD CCA. In fact, *even if you're authorized to view the DVD you purchased*—that is, your PC's DVD software or hardware includes a CSS decryption key—Illston finds that you don't have the right to *use* that key to carry out fair-use rights, that is, to copy the DVD. Why? Because, although you purchased 321's program and you have a legitimate key, *321* doesn't have DVD CCA's authorization to use that key!

As for First Amendment issues—well, you know, Congress passed DMCA, so the courts should use a looser interpretation of the First Amendment, and… ("Congress shall only make those laws restricting freedom of speech that enable Big Media to restrict consumer behavior." My wording—another part of the New Bill of Corporate Rights—not part of the judgment.) And as for fair use, courts seem to conclude that you're only guaranteed the right to make *some* form of copy. Of course, Macrovision means that even an analog copy can probably be made only by pointing a camera at a screen, the most flawed method of copying: No commercial videocassette recorder will record output from a Macrovision-

encoded DVD. One of the earlier findings cited to support this case is particularly interesting, as it cites the truth that an art student does not have a valid constitutional claim to fair use of a painting by photographing it in a museum. But, of course, the student hasn't purchased the painting! If a museum was to claim that the purchaser of a legal print of a painting in that museum did not have the right to make a photographic copy of that print, it would be a comparable limitation on fair use. In any case, Congress said it could pass DMCA, so who are the courts to say otherwise?

As LawMeme noted on February 21, citing some of news.com's summary: "Jack Valenti is overjoyed."

In case you're wondering what right wing jurisdiction produced this judgment, that's easy: the U.S. District Court for the Northern District of California, in San Francisco.

DMCRA: The May 12 Hearing

The most citizen-friendly and library-friendly copyright legislation in some time is HR 107, the Digital Media Consumers' Rights Act, which—as Rep. Boucher's handout says—"restores the historical balance in copyright law and ensures the proper labeling of 'copy-protected compact discs.'" Not that DMCRA actually balances copyright law, but at least it would correct some major problems in DMCA—both the law and how it has been applied. Summarizing from the one-page handout (www.house.gov/boucher/docs/dmcrahandout.htm), DMCRA:

- Reaffirms fair use, by providing that it's not a DMCA violation to circumvent a technological measure to gain access or use if that access or use does not infringe copyright.
- Reestablishes the Betamax standard, by specifying that it's not a DMCA violation to make, distribute, or use hardware or software capable of significant non-infringing uses, even if that hardware or software may also have infringing uses.
- Restores valid scientific research by explicitly permitting researchers to produce software tools needed to carry out "scientific research into technological protection measures."
- Ensures proper labeling of "copy-protected compact discs"—and it's good to note that the handout appropriately uses quotes around that name, since copy-protected audio discs *cannot* be true Compact Discs, as they violate the CD licenses.

The House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on HR 107 on May 12, 2004. I didn't listen to the hearings via webcast, but did download the prepared testimony of witnesses (it's not hard to find). I've tried to avoid endless commentary—but it's difficult with this string of witnesses. Witnesses are cited alphabetically. (Gigi B. Sohn from Public Knowledge provided a prepared statement that appears essentially identical to that of Chris Murray from Consumers Union; I've omitted Sohn's version.)

I've made an effort to highlight interesting points the first time they appear and to be fair to both sides, but I may not be any more successful in that balancing act than DMCA is in balancing copyright and citizen rights. But then, those against HR 107 all acclaim the magnificent balance of DMCA, so I guess I'm being as fair to them as DMCA is to citizens and creators (as opposed to "copyright industries," that revealing catch-all for companies more interested in control than creation).

The fundamental division here can be stated in three ways:

- Either the DMCA is broken (and the balance between copyright holder and citizen rights has come undone) or it isn't. If it is, then DMCRA is at least a partial remedy. If it isn't, then DMCRA is pointless.
- Either it should normally be legal to produce products with substantial legal uses, even if they also can be used for illegal purposes, or the possibility of illegal use should be sufficient to outlaw products with legal uses: The Betamax issue. (I also think of this as the crowbar issue: How can it be legal to produce and purchase crowbars, when they are known to be used to enable breakins and other illegal acts? For that matter, people hit other people over the head with hammers: How can they be legal?)
- Either copyright offers a limited monopoly balanced by ordinary uses of purchased materials and fair use exceptions, or copyright does *and should* allow copyright holders to control uses of material in any manner and with any granularity they choose, ignoring all other legal issues. Another way to put this: If the potential for "piracy" overrides all other issues related to citizen rights, then all rights must necessarily adhere to the copyright holder, with the citizen and purchaser having no inherent rights.

Note that I say "citizen" rather than "consumer"—because the "pro-consumer" statements of RIAA and others make it clear that "consumer rights" consist of freedom to purchase or not purchase, possibly enhanced by a choice of more than one thing to pur-

chase. Consumer rights appear to end once the sales transaction takes place, given the general assumption of "copyright industries" that they should have complete control over what consumers do with the items they purchase.

Robert W. Holleyman II, Business Software Alliance

BSA claims that DMCA achieved a "balanced and effective" outcome and opposes HR 107. They oppose the labeling of "certain audio CDs" (a misnomer) because it touches on the broader issue of mandatory labeling: a "camel's nose" objection to the provision. As is typical in such corporate arguments, Holleyman argues "mandated labeling may well delay prompt action by companies to keep consumers informed." He also says—and I certainly agree—that "government mandates should be avoided as long as market forces are working." But as soon as music discs that can't be played on the full range of CD equipment, that restrict otherwise-ordinary uses of purchased music, and that don't fully inform potential buyers of those facts are on the market, *market forces have broken down.*

BSA doesn't like the research provision either: They call it "unnecessary and dangerously overbroad." After all, BSA members are "industry leaders in the business of secure computing"—*they* do the research. Who else needs to do it? Reading the testimony makes it clear that BSA regards any outside researchers as "bad actors." The only purpose of research into encryption that BSA recognizes as legitimate is research that advances the state of the art of encryption and other "protective" technologies—research into problems and dangers in "protective" technologies is not recognized as legitimate.

In discussing the other exemptions, Holleyman uses a phrase that turns up in more than one other statement (coincidentally, I'm sure!): the exemptions would "swallow the rule" and essentially nullify section 1201—and since Congress didn't provide for citizen rights in 1998, it shouldn't do so now.

As with other anti-DMCRA witnesses, Holleyman places great trust in the LC/Copyright Office triennial rulemaking process. He says it's "functioned exactly as Congress intended it to function," that it's a better mechanism for addressing noninfringing use than HR 107's exemption, that the *existence* of the process "renders a broad noninfringing use exception unnecessary," and that noninfringing use exceptions have been rejected earlier. Note what's being said here: Not that noninfringing uses—in other words, *legal* uses—are being prevented, but that Congress should not broadly exempt otherwise-legal uses!

Why? Because "removing the technological protections from a work in digital form, even if it's done for a noninfringing purpose, leaves the work vulnerable to infringing use." Edward Felten is quoted here and elsewhere on this point. Note the lack of balance here: Even if 90% of the use of a device is for otherwise-legal noninfringing purposes, it should be outlawed because it *could* be used to break the law.

Why not generalize this? Cars can exceed the speed limit and can be used for getaways from bank robberies. Outlaw them. Crowbars, of course, were outlawed long ago, as were knives longer than two inches and other weapons of personal destruction. And so on… Oh, that's right, "digital is different."

I love the specific "disincentive" in Holleyman's testimony: HR 107 would "create a huge disincentive for our industry to develop the technological protection measures that content providers need in order to make their intellectual property available in digital form on the Internet." Without complete control in the hands of copyright holders, the Internet will be stripped of content! Naturally, he goes on to refer to the "copyright industries" and to assert that broad access to circumvention tools will "lead to copyright piracy." As with every "copyright industry" witness. there is never a distinction between casual copying and legitimate personal use and "piracy"—RIAA's been smudging those distinctions for years, and BSA's right in there with them.

Peter Jaszi, Washington College of Law, American University, and Digital Future Coalition

Jaszi is a law professor but, in this case, speaking on behalf of DFC, a "coalition of 39 trade associations, non-governmental organizations and learned societies" organized around the time of the DMCA. DFC argues for a balance between "rightsholders' legitimate interests in strong protection and the public's interest in reasonable access to copyrighted works." Jaszi is one of those who doesn't put scare quotes around fair use; the DFC endorses HR 107.

Jaszi begins with five key points:

- HR 107 is "the best and possibly last clear chance—before it is too late—to reverse the unintended damage done to our copyright system by the enactment of Section 1201 of the DMCA."
- For more than 150 years, fair use of copyrighted materials has been essential to the growth of our society. "Without fair use, Disney could never have made all the great movies that draw on modern retellings of classic fairy tales… And without fair use and

other exceptions…none of us in this room would have had the chance to learn through the use of books and other materials made available in libraries, schools and universities throughout the nation."

- HR 107 would help to properly balance the rights of copyright owners and information users: "In a world of fair use and strong intellectual property protection, society as a whole will benefit."
- HR 107 "will ensure fairness to your constituents by guaranteeing their freedom to make lawful use of media products they own… When consumers can use these digital products more flexibly, they will place greater value in this new medium," expanding the market to the benefit of all parties.
- Post-9/11, our priorities must change. DMCA tipped the scales towards protection; now, we need to "eliminate obstacles to the research and testing so important to our collective security."

There's a lot of detail behind those five points. I'm not thrilled that Eldred v Ashcroft is now used to cite *limits* on copyright law, but that's a fine example of making lemonade. Jaszi discusses the centrality of fair use to U.S. copyright law (at least since 1841). He notes that the motion picture and computer software industries grew "not despite the fact that filmmakers and programmers were free to copy important elements of their predecessors' work, but because of it." He asserts that creativity and innovation "are fueled as much by the 'gaps' in [copyright] as they are by its strong protections."

He cites examples of important and otherwise-legal uses that can be prevented (in some digital cases) through DMCA: student inclusion of text or images to enhance a term paper; sale of used books for charity; mix CDs combining selections from personally-owned music collections; and, generally, the freedoms to use that enable "many consumers of copyrighted content to become producers—to move from absorbing and repeating the words, images and notes of others to making their own creative contributions to the general fund of cultural resources."

Jaszi asserts, based on the record, that DMCA was primarily intended to crack down on "black boxes," devices with no legitimate purposes—but notes that Congress did much more, whether intentionally or accidentally. "The anti-circumvention provisions of the DMCA are a blunt instrument." Known problems: Some DVDs require you to watch promotions for other movies before getting to the movie itself, even those that—as a parent—you consider inappropriate for your children. A child can't make a one-minute excerpt from a copy-protected electronic encyclopedia for a multimedia class project. If a professor of computer science worked with his class to test scrambling technology meant to block terrorists from accessing first-responder communications, he would violate DMCA.

"Rather than promoting long-term security for copyright owners, the DMCA has actually done the opposite. Its enactment has helped to trigger a disastrous public decline in the public respect for copyright on which the success of our system depends." This is a good and rarely-made point: The extreme unbalance created by DMCA makes it harder to convince people that they should behave ethically with regard to copyright material, when copyright industries are viewed as behaving unethically toward those same people.

Jaszi notes that most publicized uses of DMCA "have had nothing whatsoever to do with copyright piracy." He also notes that, based on the record, we can "only expect further excesses in the use of Sec. 1201"—naming as examples effectively preventing use of non-copyrighted facts through technological protections and rationing the availability of ebooks to young people in rural communities where print books are not readily available.

This is the first of several testimonies to claim that the triennial rulemaking has proven "wholly inadequate," partly because the Copyright Office has adopted an extreme standard for claiming harm. This should not be surprising: The Copyright Office exists to protect copyright holders. Jaszi also clarifies that a conduct-oriented approach to protection would be compatible with international treaties, undermining the assertion of other witnesses that DMCA in its strict form is needed for such treaties.

Lawrence Lessig, Stanford Law School

After affirming the necessary belief in copyright and asserting that *commercial* piracy is "an important threat that government rightly should address," Lessig notes that the law "must not lose sight of the crucial balance in copyright that has also been at the core of our tradition." He believes Congress's "zealous efforts to attack 'piracy' have had the unintended collateral effect of destroying a crucial balance in copyright law." He suggests copyright law is heading towards being "the IRS code of the creative class," directly burdening creative work. Who benefits? "Existing, highly concentrated, copyright industries, and lawyers." Who loses? "Creators and innovators, both commercial and noncommercial."

Lessig has a name for the assertion that stances such as his are arguments against copyright: "IP McCarthyism." As he notes, "The rhetoric from

both extremes makes it sound as if the only choices were between two extremes." But the "anti-copyright" extreme barely exists in the real world, at least within the U.S.

Lessig offers a thoughtful discussion of the historical balance of U.S. copyright that distinguishes between fair use and unregulated uses. Unregulated uses—reading a book, giving it to someone, lending it—are "independent of the regulation of copyright." Fair use is a *privileged* use that might otherwise infringe on copyright—"a copy that the user is privileged to make regardless of the desire of the copyright owner." Reading a book is an unregulated act; quoting a book in a critical review is fair use, since it *is* a form of copying but is protected under most readings of fair use.

> The traditional contours of copyright law thus secured to authors exclusive rights over just some uses of their creative work. But it secured to consumers and the public unregulated access to that creative work for most ordinary uses. And it privileged the public for some uses that would otherwise have infringed the exclusive right to copy.
>
> This traditional balance has been changed in the context of digital technologies. For it is in the nature of digital technologies that every use of a digital object produces a copy. Thus every use of a digital object is presumptively within the scope of copyright law's regulation. And that in turn means many ordinary uses must now either seek permission first, or rely upon the doctrine of "fair use" to excuse what would otherwise be an infringement.

Too bad about the quotes around fair use, which is law as well as doctrine, but Lessig goes on to discuss the inadequacy of fair use, with some interesting examples. More to the point, as he notes, "fair use is effectively erased by technical measures that block ordinary or fair uses of creative material"—and the DMCA prohibits any effort to evade those measures.

Fair use is a central aspect of *American* copyright law; Lessig notes that it's "less familiar within other legal traditions." He uses that difference as a possible excuse for the outrageous statements of people within trade associations—such as the RIAA, since every major label within the RIAA is now foreign-owned. He quotes a senior executive at one record label: "Fair use is the last refuge of scoundrels."

There's a lot more here. He notes that the ordinary use restricted by "CD" copy protection is *not* ordinarily a copyright infringement, and that copy protection technologies can actually damage a user's equipment. Without clear labeling, the mere existence of copy-protected "CDs" may reduce the demand for CDs by nervous users.

As regards circumvention, Lessig believes that Congress should regulate technologies only when there's an actual showing of harm from lack of regulation (not the case with DMCA) and should focus any such regulation.

> The question of harm is whether the existence of a technology (a) cannibalized a market (by enabling some to get the content without paying for it) more than it (b) expanded the market (by making the underlying content more valuable). That harm must then be discounted by the constitutionally required fair use enabled by that technology.

Lessig regards DMCRA as "just the first step in a series of actions that Congress should consider to assure that copyright law continues to function in the balanced way that is our tradition."

Robert Moore, 321 Studios

Moore notes that 321 sold more than a million copies of its DVD-copying software before it was enjoined from doing so, that the software "is designed with many anti-piracy features," and that, after growing to 400 jobs, he now represents fewer than 40 remaining employees, thanks to "a nightmarish 'Catch-22' created by the courts' incomplete reading of the 1998 [DMCA]." He offers 321's experience as "a surreal example among many of why H.R. 107…is such vital legislation."

Moore considers Americans in general to be "people, not pirates." He notes that 321's product is virtually impossible to use for *real* piracy (high-speed volume bootlegging and internet distribution). I think he overstates the case for "DVD rot," but he's right that DVDs are easily damaged. He lists the ways in which 321's software is designed to prevent actual piracy and offers this dramatic question (quote marks in the original):

> "If consumers can make a personal copy of an audio CD they've bought to put on their iPod or play in their car…
>
> "If consumers can use a VCR or TiVo to make a tape or digital copy of a movie on broadcast or cable TV…
>
> "If consumers can use conventional and digital photocopiers, and digital scanners, to reproduce pages from a book…
>
> "If consumers can make a backup copy of a computer program like Windows…
>
> "Then, how can it be that consumers are criminals for making a backup copy of a DVD they've bought and paid for and why is our company—indeed any technology company—criminal for selling them the digital tools that they must have to make their rights real?"

That litany is weakened only by one point: the "copyright industries" have every intention of preventing *at least* the first, second, and fourth of those uses—thus we have copy-protected pseudo-CDs, the

Broadcast Flag, and proposed ways to shut the "analog hole." 321 Studios may be this year's poster child for extreme copyright protection, but it won't be the last if Big Media have their way.

Chris Murray, Consumers Union

CU (and Public Knowledge, of which CU is part) strongly supports H.R. 107 as "a narrowly tailored bill that corrects some of the major imbalances in our copyright law that were unintentionally created by [DMCA]." CU is notoriously in favor of strong copyright, as their positions on other issues have made clear. This is the longest statement in the collection, and I'll note just a few points.

Murray asserts that Congress intended to protect fair use in DMCA, but that practice has proven this to be illusory—in part because the U.S. Copyright Office "has defied the express will of Congress" as it has applied the triennial review.

He predicts (correctly) that "this committee will inevitably be told that to permit a fair use exemption…is to undermine the effectiveness of the entire DMCA. This is simply not true… It ensures that the controls function solely as intended—to stop illegal activity and infringement."

Murray regards making a backup copy as a traditional fair use, just as excerpting for the purpose of critique and comment is *certainly* traditional fair use—but both are prohibited under DMCA. He cites three examples—inability to fast-forward through ads, inability to play European DVDs on an American player, inability to play DVDs *at all* on "increasingly popular computer platforms" [that is, Linux]—and notes: "None of these is a technical limitation of the DVD. None is associated with infringement. Instead, they are controls placed on consumers by the content providers, and the DMCA arguably makes it illegal to get around the controls." And, to be sure, the court in the 321 Studios case stated that the legal use of purchased copyright materials was *not* a defense against DMCA violation.

That case included the usual assertion that, well, you can make a copy using analog means. But Murray considers that "impractical and insufficient," both because analog media are disappearing and because of the industry push to close the analog hole.

> For the consumer, this means that fair use will end with analog distribution formats. In an all-digital world, there will be no way to legally exercise fair use. Because the software and hardware tools for fair use will be prohibited, access to the content will be prohibited as well.

There's extended discussion of the triennial Copyright Office review and how flawed it's been—so flawed that the Assistant Secretary of Commerce protested the methodology as "inconsistent with the opportunity that Congress intended to afford the user community." This is all summed up in the believable claim that the Copyright Office treats the review function as a way "to protect particular business models," in essence strongly favoring the *existing* copyright industries over any citizen or fair use rights. Can't play a DVD under Linux? The Register of Copyrights says that's "no more than an inconvenience"—and, after all, you can go out and buy the same DVD players or Windows PCs that anyone else can. Let them eat cake, indeed.

Miriam M. Nisbet, ALA

ALA's legislative counsel spoke on behalf of ALA, AALL, ARL, SLA, and the Medical Library Association, urging support of HR 107. This relatively brief discussion points out the needs of libraries for fair use, first sale, and special library exceptions—and the extent to which DMCA now undermines those provisions. Some of her examples:

- HR 107 would make it possible for libraries to go around copy protection to make preservation and archival copies. "Remember that libraries and archives must be able to make such preservation copies well into the future, as digital storage formats become obsolete. Preservation of knowledge is a core mission of libraries."
- The bill would permit foreign language teachers to use digital works purchased abroad (e.g., to subvert the region controls on DVDs).
- The bill would allow a university professor "to bypass a digital lock on an e-book so that she can perform a computerized content analysis on the text."
- And a librarian could unlock a technological measure to make a copy for a library patron, for interlibrary loan, or for electronic reserves.

> Significantly, each of the examples involves a copy paid for by a library and a use otherwise permitted by the Copyright Act… These examples demonstrate that H.R. 107 would allow taxpayers to receive the full benefit of their significant investment in copyrighted products.

Nisbet regards the current DMCA exemption for libraries and archives as "so narrow as to be meaningless," as it allows a library to circumvent access control "for the sole purpose of determining whether the library wants to acquire a copy of the work." That's not a problem; the exemption was not requested by libraries. "I suspect that it was inserted for the purpose of permitting certain proponents of

the DMCA to argue that library concerns had been addressed." As you can expect, Nisbet is no happier with the triennial review process than others.

> In sum, the DMCA is broken, and it needs to be fixed. Libraries fear that they are spending hundreds of millions of dollars a year for products that they might not be able to use. They worry that they may not be able to share those products fully with the millions of patrons for whom they were bought. They worry that they are unable, through restrictions in law and through technological measures, to make preservation copies of their digital resources. Moreover, some fear that the law combined with technological locks will lead to "pay per view" as the way of the future, that "metered use" will be imposed upon all digital materials, that the "digital divide" will widen even more. Such a scenario is not acceptable in a society such as ours, which is founded upon the principle that "information is the currency of democracy."

Think Big Media doesn't want a pay-per-use future? Think Big Media is fundamentally protective of the special place of libraries in our society? Think again.

Debra Rose, Entertainment Software Association

Here's an odd one, from a good revolving-door person (she served as counsel to a House subcommittee for seven years before jumping over to the private sector, and makes that clear). ESA is the video and computer game association—and not only do they oppose any circumvention of DMCA, they even oppose labeling of copy-protected pseudo-CDs. Why? That's not really clear from the statement, except on a camel's-nose basis.

What is clear is that, if the statement is to be believed ("piracy levels that reach as high as 80% and 95% in some markets"), DMCA must be a miserable failure and should simply be scrapped: With all the copy protection and other DRM tools built into game software, they don't seem to be stopping or even slowing down true piracy. Indeed, the explicit claim is that "billions of dollars" of pirated entertainment software is present—and that technological protection measures save ESA members "millions of dollars" per year. This is given as sufficient reason to forbid technologies *that do not result in copyright infringement*, according to ESA: So that their 0.1% prevention rate can be sustained. And, of course, DMCA is cited as "carefully balanced" legislation that is "well-designed rulemaking" and "is working." So says ESA.

Gary Shapiro, Consumer Electronics Association

CEA represents the "American technology industry"—and that might tell you where Shapiro comes down on DMCRA:

> This vital, bipartisan bill would restore some balance to a copyright system that has recently been tilted to elevate the interests of media giants over those of ordinary people.

Shapiro also represents the Home Recording Rights Coalition; there's certainly no conflict of interest. As he notes, for both HRRC and CEA, "Intellectual property is our lifeblood" and "We hate piracy, and we hate pirates. We are all in favor of the vigorous enforcement of fair and balanced intellectual property laws." Shapiro is representing big businesses here—in sum, probably bigger than Big Media (with some crossover, to be sure, Sony the most obvious case). This is no socialist hothead speaking.

> What has happened recently, however, is a radical departure from the balanced approach that our Constitution calls for and our public interest requires.
>
> Over the last few years, entertainment and media industry giants have persuaded Congress to restrict private and public use of books, music, and other material when it is in digital form.
>
> And now they are working through the Courts to change the laws and limit our freedoms even further.
>
> Many of these problems are a result of the 1998 enactment by Congress of [DMCA]…

Such as? I'll quote six of the eight bullet points to show the surprising breadth of Shapiro's testimony:

> Consumers buy new "copy-protected" Compact Discs unaware that they may not play in their PCs or automobile CD players.
>
> Venture capitalists refuse to fund legal and innovative technologies for fear of DMCA lawsuits.
>
> Scientists have been threatened with prosecution if they publish their research on digital encryption issues.
>
> Libraries and universities are unsure of whether or how they can archive and use the digital materials they have acquired.
>
> Viewers who own HDTV television receivers may lose their viewing and recording rights because of the unilateral use of "down resolution" and "Selectable Output Controls" by giant media companies.
>
> Americans' fundamental rights to buy legal products such as VCRs and digital video recorders are in jeopardy as media giants have declared war on the Supreme Court's landmark Betamax ruling.

Whew! If only Shapiro was overstating the case. He's not. He notes that Hollywood asked the Supreme Court to ban VCRs twenty years ago—and that VCRs have been enormously profitable for Hollywood, while also representing "a turning point in American cultural and economic life." In Shapiro's view, HR 107 is needed to enable innovation to continue. He also notes anti-competitive uses of DMCA, including the garage-door opener and inkjet cartridge cases. He anticipates "more abuse of the DMCA to forestall legitimate competition."

Shapiro speaks plainly:

> I understand that individuals representing the entertainment industry have told this Committee that H.R. 107 would somehow provide a haven for those who engage in piracy. That is absurd.
>
> H.R. 107 only authorizes consumers to circumvent a technological protection measure in those instances where they do not infringe a copyright. H.R. 107 takes away no intellectual property rights. It merely re-aligns the DMCA with historic copyright law by ensuring that there can be no DMCA liability without copyright infringement liability.
>
> …Twenty years ago, the same entertainment representatives told you that the VCR would mean the death of the American movie industry. They were spectacularly wrong.
>
> Now, they make the identical claim about the impact of H.R. 107. I believe history shows you have every good reason to be skeptical.

Cary Sherman, RIAA

After telling us how the RIAA comprises "the most vibrant national music industry in the world," *all of it foreign-owned* (but Sherman doesn't say that), and claiming that "music is the world's universal form of communication," Sherman makes an explicit equation between "intellectual property" rights and the "theft of physical goods." Then things get really strange. Sherman claims that 40% of recordings worldwide are pirate recordings and says that total optical disc manufacturing "greatly exceeds legitimate demand"—but never says what he considers "legitimate." I'm guessing mix CD-Rs don't enter into it. With this wholly useless figure, he proceeds:

> You can see why allowing the manufacture and distribution of machines that strip away copy protection and permit the making of unlimited copies poses risks for mass duplication that would make the piracy problem even worse.

How so? Virtually *no* audio CDs in the U.S., and a tiny percentage of those worldwide, *have* any copy protection. Under what circumstances could the situation be worse?

As with all extreme-copyright lobbyists, Sherman asserts that DMCA "went to great lengths to balance the interests of copyright owners and users of their works." He touts the triennial review process. He says that DMCA is responsible for legitimate downloading services. And, of course, he wants to outlaw hammers and crowbars, since you can't assure that circumvention tools *won't* be used for illegal purposes.

> While this bill is proposed under the banner of consumer rights, consumers will, in fact, be hurt if it were enacted. Members of the music community strive to provide consumers with many different ways of accessing our content. Allowing "free-riders" access to our music by enabling circumvention will raise the costs to honest consumers, and limit the incentive and ability of providers to invest in, and offer, new technology and digital media alternatives.

Don't you feel for RIAA members, who have been "striving" so diligently to give us choices? That's why they were so supportive of MusicMaker and other sites that would let you put together custom CDs at fairly high prices ($20 for 15 cuts). Oops, I forgot: the labels did nothing at all to help those services and seemed happy to see them disappear. Maybe that "striving" is why the legal download services have full access to the millions of songs in RIAA members' archives, at bargain rates for older songs. Oops, I forgot: The biggest inventory is a small fraction of what should be available—and RIAA members want to *raise* download prices even for the flawed downloadable files you get. But RIAA's on *your* side: Trust them.

Sherman mentions fair use but, of course, puts it in scare quotes. He asserts that "options" benefit consumers but that the ability to make copies does not. He calls H.R. 107 "a solution in search of a problem. He asserts that H.R. 107 promotes piracy—in so many words.

No surprises here.

Allan Swift, private citizen

Swift is another revolving-door case: He notes that he spent 16 "rewarding, and I hope productive years, serving on this Committee" as a Congressman. He's now a lobbyist, but the firm has no clients with stakes in this issue, apparently: He claims to speak as "an informed private citizen, with a background in communications."

He's done home recording for 54 years. Unlike me, he *has* given friends mix tapes, cassettes, and CDs—although never a straight copy.

> I respect our copyright laws. I do not believe that anyone should be allowed to use copyrighted material for profit without appropriate permission, license and payment. I think the industry is right to protect itself against piracy.
>
> But, one of the things I noticed serving in Congress on this Committee is that some people have a remarkable ability to carry a good idea to a bad extreme. Look at the history of the recording industries. They have always distrusted new technology. If Hollywood had been given its way the video tapes and DVDs, from which they now make a great percentage of their profits, would have been smothered in their bassinettes. This Committee reported out a perfectly absurd bill that—the industry claimed—was essential to prevent the Digital Audio Tape (DAT) machines from destroying the recording industry. Now you can hardly find a DAT machine—except for commercial purposes.

Surprise! This ex-Congressman isn't fond of copy restrictions. "When I buy a CD or a DVD, that content should be wholly mine to do with as I please as long as I am in no way selling its contents or profiting from it." He calls the bill "a sound and modest correction," while noting that he would be inclined to go further. "But this bill is no doubt more prudent than I would be and—in the long run—prudence usually produces better law."

Swift owns 3,000 CDs and notes:

> You do the math. You will find not only that my hobby spending is out of control. You will also find that I am—like other American consumers—a profit center for these businesses. It is about time they treated us with a little respect.

Jack Valenti, MPAA

WHY H.R. 107 IS A PRIME HAZARD TO THE FUTURE OF AMERICAN INTELLECTUAL PROPERTY

No pussyfooting here: That's Valenti's headline. H.R. 107 will "devastate the home sale market"—much as the Sony Betamax destroyed the motion picture industry (well, that's what Valenti claimed at the time). He echoes Sherman in citing entertainment as "America's greatest export prize," "more than five percent of the GDP," and asks "why is it in the national interest to put to risk this engine of economic growth? Why?"

He asserts that making backups of DVDs "is not legal, is not necessary, and allows 'hacking' of encrypted creative material, which in turn puts to peril the future home video market." He tells us that "an encrypted DVD is well-nigh indestructible," which will surprise a good many parents and librarians. Anyway, "if by some very rare happening a DVD should malfunction, another can be bought at ever-lowering prices." Can you play it on a Linux PC? Does Jack Valenti know what Linux is? Can he cite a law that says making personal backup copies is illegal when it comes to DVD? Why should he?

What's HR 107 about?

> This is not just about facilitating back-up copies, illegal and unnecessary though they may be. It's not even about enabling consumers to make their own extra copies, rather than to pay for them in the normal channels of commerce. It's about opening a Pandora's Box that our present technological capabilities are powerless to close.

Just how knowledgeable is Valenti? He calls Internet2 an "experiment." He says that an "uncompressed DVD-movie contains some 4.6 gigabytes"—which is wrong on two counts. Most Hollywood releases use double-layer discs, allowing for up to 9 gigabytes—and there's no such thing as a commercial "uncompressed DVD movie," since DVDs use MPEG-2, which has *very* high compression.

But Valenti loves the consumer, as long as the consumer shuts up and buys.

> Consumer-friendly choices are promoted by providing consumers with legitimate market-driven alternatives for renting, purchasing or even copying. But these options will never come to pass if the circumvention of technology *that provides these consumer choices* is legalized by this legislation.

There it is: Pass DMCRA and Hollywood will stop providing content. Just as the RIAA stopped producing CDs because they weren't copy-protected. And I do so love the thinking that can turn copy prevention into "technology that provides these consumer choices."

That was the last statement, alphabetically. I've read some commentary on the actual hearings but won't cite it here. DMCRA wouldn't restore copyright balance—but it would help. I continue to be astonished that, given Valenti's horrendous track record on decrying villainous new technologies, Congress continues to listen to him. But oh, there's that hair, and that voice, and that persona.

Database Protection

Facts can't be copyrighted. That's always been a key limitation in U.S. copyright law. The Supreme Court has extended that principle to say that a *database* of facts can't be copyrighted, not simply because it's a bunch of facts put together in a natural order (e.g., a telephone directory, the locus of the key case). Further, encrypted databases don't enjoy DMCA protection because they're not protected by copyright.

Somehow, database providers have not disappeared because of this limitation. But some of them want the added protection that copyright (or equivalent) would bring. Recently, there's been legislative action. Here, then, are seven items in that ongoing process—one where movement seems to be in the direction of less-bad legislation.

Strickland, Lee S., "Breaking news on the database front," *ASIS&T Bulletin* 30:2 (December 2003/January 2004). (www.asis.org/Bulletin/Dec-03/strickland2. html)

Strickland notes that database protection was actually part of early drafts of DMCA. More recent initiatives included HR 354, the Collections of Information Antipiracy Act, and HR 1858, the Consumer and Investor Access to Information Act. HR 354 "would have made illegal most uses of databases without payment" and would have provided perpetual protection for every dynamic database. HR 1858

"balanced the interests of database producers and users by focusing on direct competition and not the mere use of factual information." Neither one made much headway.

Last March (2003, that is), one of extreme copyright's ferocious warriers, Rep. Billy Tauzin from Louisiana, got together with Rep. Sensenbrenner from Wisconsin to develop a new database protection bill. The result, introduced October 8, 2003, is HR 3261, the Database and Collections of Information Misappropriation Act (DCIMA). This act works from common law misappropriation theory—that is, that there should be protection beyond copyright for information collected at some cost, with high time-sensitive value, where copying the information causes economic harm to the original collector.

After discussing some reasons that companies want new database protection so badly, Strickland summarizes the factors that must be met to impose liability under HR 3261:

- The plaintiff's database resulted from a substantial expenditure of money or time, and
- The defendant made a "quantitatively substantial part" of the database available "in commerce to others" in a "functionally equivalent manner," and
- The defendant knows this wasn't authorized, and
- This was done in a time-sensitive manner, and
- The defendant's act has caused an "actual loss of revenue" in the same market and reduced the incentive of the plaintiff to keep serving that market.

The devil is in the details—or lack thereof. What does "time sensitive" mean? While there's an exemption for nonprofit educational, scientific, or research institutions, it's pretty vague: they can use stuff if it's "reasonable under the circumstances, taking into consideration the customary practices associated with such uses of such databases." (And you thought fair use law was vague!) Protection *would* extend to private compilations of government data—and, since this protection can't rely on copyright, it might exceed the constitutional authority of Congress. Finally, there's another version of the "dreaded DMCA subpoena authority."

Strickland thinks the focus of the bill is good—but the execution is week. Further, "the *need* is quite certainly questionable as Rep. John Dingell cites the enormous growth of commercial databases as evidence there are no serious gaps in current legal protections." And, Strickland says, it's certain that this legislation could "serve to undercut our basic national information policy.

(I've quoted extensively from Strickland's piece, but you really should go read the whole thing.)

Ebbinghouse, Carol, "If at first you don't succeed, stop!: Proposed legislation to set up new intellectual property right in facts themselves," *Searcher* 12:1 (January 2004). (www.infotoday.com/searcher/jan04/ebbinghouse.shtml)

This isn't Ebbinghouse's first piece on database protection; it's just the first one I've encountered in some time. I **highly recommend** reading the whole article (nine pages as printed out), even if the immediate threat has subsided. She cites NetCoalition's "top 10 examples of the potential impact of H.R. 3261," including these gems (cited in part):

> 1. A price comparison Web site could be prohibited from gathering price information for consumers…
>
> 2. A public-interest Web site could be precluded from gathering headlines with links to news stories of interest to its members.
>
> 4. A university professor might be precluded from gathering information from a variety of Web sites for use in a paper that argues for or against the increase of global warming.
>
> 5. A local PTA might be prohibited from assembling information on drugs and other treatments for childhood diseases to make their research available on the organization's Web site.
>
> 7. A car manufacturer could stifle competition by preventing companies who make replacement parts from publishing charts showing which of their products are less-expensive replacement parts for those sold by the manufacturer.

She offers a good contextual discussion of these and other dangers and how the vagueness of the proposed legislation makes them important. It's a detailed, thoughtful discussion, even though some might argue with some of the specifics.

One indication of the depth of difficulty in H.R. 3261 might be the list of *opponents*—not only ALA, the ACLU, EFF, Google, and groups like that, but also the U.S. Chamber of Commerce, Bloomberg LP, and AT&T—not groups you'd expect to find on the "anti-business" side of any legislation. As she notes, the primary position of some organizations is that there's no need for the bill. It makes no provision for fair use or the first-sale doctrine. It has no safeguards against monopolistic pricing.

Ebbinghouse quotes extensively from those who support the legislation as to why it's needed. It's an excellent discussion with lots of resources for further reading. Maybe it's edging into history, but it's the kind of history that needs to be remembered.

"Your right to get the facts is at stake," Public Knowledge, undated. (www.publicknowledge.org/content/legislation/legislation-hr3261)

This brief discussion calls HR 3261 "deeply flawed" and says it "further strikes at the very heart of the public interest in an informed democracy." The group recognizes that database providers offer the public valuable services.

> But it is precisely because the services that they offer—professional editing, organizing, and supervision of new information on a minute-by-minute basis—are so valuable that the perception of any general threat to these enterprises is at best, overblown. There will always be a significant role for these commercial services, even when researches lawfully extract public information that has been assembled into these companies' commercial databases and re-use it elsewhere in creative or scholarly or scientific work.

Karl, Brandy, "How the current congressional database protection bill would go beyond current law, and why it is unconstitutional and misguided," *FindLaw's Writ*, February 11, 2004.

There's not much doubt where third-year law student Brandy Karl stands on HR 3261! She says that the bill "inverts the whole idea underlying copyright protection. For this reason, the DCIMA is unconstitutional. Moreover, from a policy perspective, the DCIMA would also be disastrous."

Karl goes on to note where databases are and are not currently protected and that facts themselves can never be protected. She notes the extremity of protecting "even those databases that lack any minimal degree of creativity," which amounts to protecting the facts themselves. She finds the Commerce Clause idea unconvincing—and has problems with the same vague elements of the bill that bother Strickland and Ebbinghouse. This is a relatively short and forthright piece, worth reading.

ALAWON 13:9 (February 19, 2004)

This and the next two items tell the rapidly-developing story in February and early March. (ALAWON is the ALA Washington Office Newsletter; you can subscribe by sending "subscribe ala-wo firstname lastname" to listproc@ala.org.)

13:9 is an "Action alert," calling for immediate grassroots action to fight HR 3261 after it was reported out of the House Judiciary Committee and to the House Energy and Commerce Committee. "It is crucial that library advocates with Representatives sitting on the House Energy and Commerce Committee tell their Representatives it is time to oppose this legislation."

Talking points include the lack of need for HR 3261, the likelihood of reduced competition and increased costs, vagueness and uncertainty, the overly-narrow exemption for nonprofits, and the fact that this constitutes copyrighting facts through a back door. "Despite years of negotiation, H.R. 3261 is not acceptable to libraries and other opponents."

Zetter, Kim, "Hands off! That fact is mine," *Wired News,* March 3, 2004.

> Imagine doing a Google search for a phone number, weather report or sports score. The results page would be filled with links to various sources of information. But what if someone typed in keywords and no results came back?
>
> That's the scenario critics are painting of a new bill wending its way through Congress that would let certain companies own facts, and exact a fee to access them.

Well, that's oversimplified, but that's *Wired News*. The story is justified by the Judiciary Committee approval and the Commerce Committee's plan to review it shortly after (or, apparently, a day before) the story appeared. And here are the "bill's biggest backers" in addition to the Software and Information Industry Association: "Reed Elsevier, which owns the LexisNexis database; and Westlaw, the biggest publisher of legal databases."

In a tactic borrowed from Jack Valenti, commercial database companies are quoted as saying "the public will lose access to information if companies are deterred from building databases because of theft." The story goes on to quote people on both sides, notably including a U.S. Chamber of Commerce opponent.

ALAWON 13:13 (March 8, 2004)

The House Energy and Commerce Committee *did* consider HR 3261, on March 2 (according to this story)—and reported it out with an unfavorable recommendation. A group then proceeded to introduce HR 3872, the Consumer Access to Information Act of 2004, a "more narrow alternative" presumably related to the earlier HR 1858.

"H.R. 3872 narrowly defines the definition of misappropriation of a database and calls for [FTC] oversight and enforcement while prohibiting private parties the right to sue." That alone makes it a better bill, eliminating the kind of lawsuit we could expect under HR 3261—that is, where a big database company sues a small fry to get rid of extracted data and says "If you're innocent, feel free to fight us and our hundred lawyers in court."

ALAWON calls the new bill a "positive political step"—in part because it "continues to emphasize the fundamental rift between the stakeholders and will likely make it more difficult for any bill to pass this year." After all, libraries and many others still believe that no database protection legislation is needed—and the history of database companies in the eight years since such protection was first proposed doesn't suggest that they're failing due to piracy or theft.

More on HR 3872, when and if it's appropriate. For now, it would appear that HR 3261 is dead or nearly so.

Saving the Public Domain

Lessig, Lawrence, "How I lost the big one," *Legal Affairs* March-April 2004.

This eight-page piece is adapted from Lessig's new book *Free Culture*; since you can find the whole book online, I won't bother to cite the extract's address. Lessig believes that his fundamental approach to Eldred v Ashcroft was wrong and self-defeating: "When Eric Eldred's crusade to save the public domain reached the Supreme Court, it needed the help of a lawyer, not a scholar." I can't say whether Lessig takes on too much guilt; it's not clear that another approach would have succeeded. His analysis is certainly interesting, well written, and **worth reading**.

He recounts the background of the case—how a retired New Hampshire computer programmer wanted to bring 19th century literature to life through an electronic version with links to pictures and text, how that grew into a library of public-domain works, and how he decided to fight the CTEA, which prevented Robert Frost's *New Hampshire* from entering the public domain.

Here's what Lessig has to say about the real harm of CTEA:

> [W]hile it is the valuable copyrights—Mickey Mouse and "Rhapsody in Blue"—that are responsible for terms being extended, the real harm done to society is not that Mickey Mouse remains Disney's. Forget Mickey Mouse. Forget Robert Frost. Forget all the works from the 1920s and 1930s that still have commercial value. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result.

He notes that most books go out of print within a year, and that this is also true for music and film. "Commercial culture is sharklike. It must keep moving." But although the commercial life of a creation has ended, its copyright goes on nearly forever—and, with no registration required, there's no good way to even *locate* the copyright holders. There are other issues here, recounted in some detail and having to do with digital technology.

Lessig believes that his key mistake was in relying on Constitutional principles, rather than dramatizing the harm done by CTEA. He notes the arguments of other lawyers on the case that "it had to seem as if dramatic harm were being done to free speech and free culture; otherwise, the justices would never vote against 'the most powerful media companies in the world.'" Lessig hates this view of the law and wasn't persuaded that the case needed to be sold that way. Maybe he was wrong.

He goes through some of the oral argument and comments from the Justices. He now sees in one question that the judge was asking for an empirical showing that the earlier 1976 act, which first dramatically extended copyright terms and eliminated registration, had impedted progress in science and the useful arts. Lessig declined to make such a claim, "like a professor correcting a student." He now says that was "a correct answer, but it wasn't the right answer. The right answer was to say that there was an obvious and profound harm."

An interesting and troubling discussion.

"Effort to reclaim public domain scores victory," Center for Internet and Society media release, March 16, 2004.

This release notes one of two current cases that could save the public domain: Golan v Ashcroft. Lawrence Golan conducts the Lamont Symphony Orchestra at the University of Denver. He and other artists claim that they have been severely harmed by the *retroactive* restoration of copyright in numerous artistic works, and seek to strike down Section 514 of the Uruguay Round Agreements Act, enacted in 1994. A U.S. District Court ruled that Eldred v Ashcroft did not invalidate Golan's claims and allowed the case to proceed. More later as appropriate. (The case has been in the works since 2001, so there may not be big developments real rapidly.)

Kahle v. Ashcroft, civil complaint for declaratory judgment, U.S. District Court, Northern District of California, March 22, 2004

The Center for Internet and Society's Cyberlaw clinic (yes, that's Lawrence Lessig and others) filed this complaint on behalf of Brewster Kahle, the Internet Archive, Richard Prelinger, and Prelinger Associates, Inc. The complaint—26 pages and presumably readily available on the internet—argues that the Berne Convention Implementation Act (BCIA) *and* CTEA work together to create an "effec-

tively perpetual" copyright term and asks for a declaratory judgment stating that copyright restrictions on "orphaned" works (those works no longer available but still under copyright) violate the U.S. constitution.

Directly affected in this case are those works published between January 2, 1964 and December 31, 1977. These works would have entered the public domain on January 1, 2004, had it not been for BCIA and CTEA. The sole focus is on orphan works. There's a lot of discussion of the history of copyright, a certain amount of hype for the Internet Archive, and some particularly relevant facts as to the low percentage of creative works that were ever registered (when registration was required for copyright) or that were renewed. "In the period 1790 to 1800, for example, copyright protected no more than 5% of published works" because the other 95% weren't registered—and for most of American's history, the renewal rate for works that *were* registered was 8% to 15%. Now, of course, *all* works have ever-longer copyrights because of BCIA and CTEA.

A case page at cyberlaw.stanford.edu/about/cases/kahle_v_ashcroft.shtml includes an FAQ that explains why this isn't "Eldred v Ashcroft all over again," how the findings in that case may support this new claim, and other significant aspects.

Miscellany

Two posts at Lawrence Lessig's weblog discuss the SCO Group and its CEO's astonishing suggestion that GPL somehow violates the Constitution. It's such an absurd theory that it's hard to focus on, but Lessig does a good job of explaining just how absurd the theory is. You'll find the discussions—and an odd variety of comments—at www.lessig.org/blog/archives/, followed by 001687.shtml and 001688.html respectively.

You'll find an excellent table on "U.S. copyrighted works that have expired into the public domain," with clear comments by Mary Minow, at www.librarylaw.com/DigitizationTable.htm. Note that the table's columns represent *conservative* dates: Works published before 1964 that were not renewed (if you can determine that) are in the public domain, as are *all* works published before 1978 that lack explicit copyright notice. Oh, and any works more than 120 years old are in the clear, at least for now.

Griffey, Jason M., "The perils of strong copyright: The American Library Association and free culture," Master's paper, School of Information and Library Science, University of North Carolina at Chapel Hill, April 2004

It may be unfair to criticize a student paper—even a master's paper. But Griffey publicized his paper widely so it's not unreasonable to offer comments. It's a 77-page piece, which includes 44 double-spaced pages for the paper itself, 27 pages scanned from ALA documents or downloaded from ALA's website, and a six-page bibliography.

I'm going to take issue with part of Griffey's paper, but I should start by saying that it's a thought-provoking paper that should lead to discussion and possible action within several ALA divisions. I certainly plan to suggest action within LITA, not that I have any power or real influence in the division these days…

"Free culture" appears in the title, but I don't see much reference to that term elsewhere—and, frankly, I'm not sure what it means. The first chapters of the paper discuss changes in copyright, copyright and libraries, and the tragedy of the commons. Chapter Four discusses the academic serials crisis, including a "survey" showing that four North Carolina academic libraries haven't cataloged ten open access journals as rapidly or as often as one might wish. (Duke seems to be doing pretty well on this measure, with seven of the ten including one that's only existed for a few months.) That chapter goes on to discuss the involvement of ALA and its divisions in SPARC and other initiatives, seemingly concluding that ALA and its divisions believe all scholarly journals should become open access. I think that's an overstatement, justified almost entirely by one quotation from a Washington, D.C. meeting that focused entirely on *scientific* publishing. It's worth noting that SPARC itself does not require that SPARC-related publications be open access; it's working toward lower-cost alternatives to expensive journals, not necessarily free ones.

Chapter Five seems to be the heart of the paper, or at least the chapter that might justify the alarming title. Griffey looks at six refereed journals from ALA divisions and one from an entirely different library association. He calls them "the premiere journals for their particular aspect of librarianship." Examining various downloadable author instructions and policies, he states that most of them *require* assignment of copyright to ALA—and, of course, finds that to be incongruous given ALA's apparent open-access principles. He also notes that none of the journals offers all of its refereed articles for free online access (none of these are open access journals). His conclusion argues that ALA should make its journals Open Access, even suggesting an author-

fee basis, and that by "keeping its own intellectual property closed and withheld from the public" ALA is "acting schizophrenically."

I scratched my head when I read the discussion because it seemed at odds with my memory of publishing through ALA—although it's true that I've only published in one of the six divisional journals mentioned. I've always resisted turning copyright over to another party, and it's never struck me that it was difficult to retain copyright when ALA was involved. What was I missing?

What I see in the text of the paper is that Griffey primarily quotes from journal policy statements, and some of those could use rewriting. But then there are pages 58 and 59. Page 58 is ALA's standard journal copyright *assignment* agreement—and it does indeed turn over copyright to the association, while granting a substantial number of rights back to the author (including all rights needed to make the article's text available online after a 30-day embargo).

But then there's page 59—the copyright *license* agreement, which is offered as the *first* choice for *Information Technology and Libraries* authors and I suspect is offered as an alternative by most other divisional journals. That agreement does *not* sign over copyright: "Copyright of the Work remains in Author's name, and the Author reserves all other rights." What rights does ALA request? Printing and reproduction rights and marketing rights—but these are *nonexclusive* rights. The sole limitation on authorial rights is this: "Author agrees not to publish the Work in print form prior to the publication of the Work by the publisher." Yes, there's a request that the author cite ALA publication when publishing it elsewhere, but it's only a request.

That's it. The author can put the work up on *any* website, before, during, or after print publication by an ALA journal. The author can post the work with a Creative Commons "some rights reserved" or "no rights reserved" license, although the latter might raise some issues if done prior to print publication. The author can drop the article into an institutional archive as soon as it's written, or approved, or whenever.

Now, maybe I'm wrong. Maybe divisions other than LITA don't offer this alternative agreement. I can't tell from the article. I'm not encouraged by this statement about *ITAL:* "They do *require* that the author assign copyright to the publisher, and any rights the author has is via the agreement and not via actually holding the copyright to the work." That is simply mistaken. That's the copyright *assignment* statement (page 58). I served on the *ITAL* editorial board for many years, and to the best of my knowledge the journal has *always* offered the copyright *license* agreement (page 59) as an alternative. I also find nothing in the *ITAL* author instructions that mentions assigning copyright to ALA.

My guess and belief is that five of the six divisional journals use the same pair of ALA agreements; *College & Research Libraries* may be an exception. If that's true, then Griffey has a legitimate complaint about the policies and procedures in some journal websites, but *not* about the agreements themselves.

Open Access is, of course, a separate issue. A publisher can demand copyright and still publish via the Open Access model. A publisher can publish via traditional models without requiring more than first-serial-rights assignment. (Griffey also reproduces *American Libraries* guidelines, although *American Libraries* is neither refereed nor a journal. Those guidelines do not involve assignment of copyright or any diminution of author rights except for publication rights during a three-month window following *American Libraries* publication.)

Should ALA divisions abandon their print journals and the associated advertising revenue, put the stuff online instead, and charge authors to make up for the lost advertising revenue? I can't imagine why. Yes, it would be good if refereed articles in ALA journals were available online at no charge—and I doubt such a move would reduce subscription revenue. It would add some costs, to be sure, at least if the articles are to be available in anything other than PDF form (HTML markup is different than print publication markup), but should be worth it. That issue is worth pursuing through the publication committees and divisional boards within ALA. It should not be a top-down mandate, since each division has different needs and budgetary issues.

But why abandon the print journals? They are a perquisite of divisional membership, read by thousands of division members. In all cases, the costs are subsidized by advertising—advertising that would almost certainly not be there for online versions. I'm reasonably certain that many division members prefer to get the journals mailed to them and consider that print copy a significant benefit of their dues. And, I believe, all divisional journals include a substantial amount of non-refereed material in addition to the refereed scholarly articles. Even BioMed Central and PLoS call for added-value services, some of them as part of paid print subscriptions, as one way of making OA work.

The divisional journals in ALA aren't part of the problem: They are simply not high-cost journals to non-members. *Children and Libraries* goes for $40 by subscription; *ITAL* is $55; *RUSQ* is $60; *College & Research Libraries* $65.

As I've said elsewhere, I believe that an optimal resolution of the serials crisis would leave most first-rank journals as print publications, whether or not they also have full-text online available for free. Griffey calls all six of these journals "premiere," a good synonym for first-rank. They *should* continue as print publications: They work well, they're reasonably priced, and there's no good reason to abandon print. Even within librarianship, those prices are low; by STM standards, they're absurdly low.

Should the refereed articles also be posted online and freely available? Yes, I believe they should—and I believe divisions would welcome that discussion. But that's a different discussion, one that has little to do with "the perils of strong copyright."

Griffey is to be congratulated for a thought-provoking paper and for pushing the suggestion that ALA and its divisions work on putting proclaimed beliefs more thoroughly into practice. There are flaws in the paper, but he raises useful points. (I exchanged email with Griffey after writing this commentary and before posting it; I'd guess our positions aren't that far apart.)

I would like to see divisions *begin* with the license agreement rather than the transfer agreement. I'd like to see them offer refereed articles online. That doesn't mean converting to ejournals; it does mean creative thinking about the issues.

Copyright Perspective

True Piracy and Other Thoughts

I read the news today, oh boy, about three cases where people were either arrested or chased out of a theater after diligent ushers spotted them using a camcorder to record a current motion picture.

I've been critical of Big Media and what I regard as extreme copyright legislation (at their behest) and practice, unbalancing U.S. copyright toward rightsholders at the expense of citizen rights. I've also been critical of the term "piracy" as used for most peer-to-peer file sharing and casual CD-R burning. I will continue to be critical in both areas.

So how do I feel about those devil studios urging ushers to spot camcorders in movie theaters and prevent them from being used, even charging people with crimes for using them?

More power to the studios. I hope they succeed.

Just as I cheer when those devils at RIAA manage to locate and shut down factories that demonstrably produce nothing but bootleg CDs and DVDs. Good for them.

There is such a thing as media piracy—the illicit mass redistribution of copyrighted materials for commercial profit, at the expense of creators and rightsholders. It does constitute a worldwide market running to billions of dollars. For software producers, motion picture companies, music publishers and, to some degree, book publishers, it's a problem.

I can see no legitimate reason to have a camcorder when going to the movies, and *certainly* no legitimate reason to use one. When you buy a movie ticket, you're buying the right to see one performance of one movie (unless it's a double feature). You are not buying permanent rights to that movie. The same goes for live performances, most of which *legitimately* forbid the use of camcorders or other recording equipment. (Yes, there are exceptions, mostly pop and rock bands, and that's great as well. For example, the Grateful Dead had an alternative business model that served them very well.)

Balanced, Not Weak

I believe in balanced copyright as a way to encourage creators and distributors—and, with balance, to encourage *new* partially derivative creations and assure a healthy flow of material to the public domain. Balanced copyright is not really weak copyright, certainly not where it comes to commercial exploitation without permission.

I was an annoying purist in my youth. I had one of the larger record collections in the co-op I lived in and kept the records in pristine condition. I would not, under any circumstances, loan those records to others (both because of probable damage and because I knew they were going to make cassettes from them) or dub cassette copies for others.

I'm also a science fiction reader with some sense of history. When someone says copyright should only last five or ten years, I remember Isaac Asimov's Foundation trilogy. While Asimov was paid by *Astounding* for the serial publication of the stories that made up the books (at the absurdly low rates that the S.F. magazines have always paid), he made *nothing* from the first book publication because Gnome Press had persistent money problems and dealt with them partly by failing to pay royalties.

See Chapter 53 of *I, Asimov* for some details. "He [Martin Greenberg, head of Gnome] had an unalterable aversion to paying royalties and, in point of fact, never did. At least he never paid me." Oddly, the Foundation trilogy was turned down by Doubleday (because it was old material), which published most of Asimov's other book-length fiction and which—11 years later—bought the rights back from Gnome, then published new editions that were enor-

enormously profitable for Asimov and Doubleday. With a ten-year copyright, one of the landmark works in science fiction would have earned almost nothing for its creator. With a 28-year or 56-year copyright term, of course, Asimov did pretty well.

"Live with It" is Not an Answer

I am appalled by people who scan contemporary books and release the scanned versions to the internet. That's copyright infringement of a sort that's unfair to the creator and damages everyone involved. I'm no friend of most informal music downloading, either, even as I believe the RIAA has gone overboard in trying to shut it down.

Copyright infringement is not theft, but it is a crime. Blatant copyright infringement of currently available works is unethical as far as I'm concerned. The ethical issues get cloudier for works that are not available for purchase or where "purchase" has morphed into highly restrictive licensing.

I've heard the argument that, since digital transmission makes it easy to pass around perfect copies of anything that can be digitized, copyright is outmoded and people need to find other ways to earn a living. That's excusing unethical behavior on the basis of technological imperatives. Telling me to "live with it" because that's the way things are is a sneering, me-first response. It makes me want to scream. It does not, however, make me want to "put 'em all in jail" or lock up creations with digital restrictions management so tight that everything becomes pay-per-use.

I believe most people understand that balanced copyright involves ethics as well as enforceability. Most people who find a book they consider worthwhile (and want to read more than once) *will* buy it even if photocopying it or downloading a scanned copy would be cheaper. There's increasingly strong evidence that, at least for most adults, casual downloading to experiment with new music—ethically questionable though it may be—does not actually eliminate CD purchasing. I believe most U.S. adults, given the choice of a $20 DVD that clearly comes from the motion picture company or a $10 DVD with photocopied cover art sold by a street peddler will pay for the legitimate copy. In short, I believe that most people will behave ethically if ethical behavior is feasible.

Rights for Creators and Citizens

I also believe in the first sale doctrine and fair use. Once you've purchased a legitimate reproduction of a creation, you should be able to do pretty much anything you want with it—with a few exceptions such as making multiple copies for sale to others and, for some creations, carrying out public performances. (The latter is tricky, to be sure.) You should be able to lend it (as long as you can't use it simultaneously), sell it (as long as you don't also keep it), give it away (as long as you don't also keep it), and copy portions of it for use in an assemblage. You should be able to use limited portions of it as inspiration or as the basis for a new creative work. You should be able to use it in the manner you see fit with those minimal restrictions noted. And, as long as it's a mass-produced copy, you should be able to mock it, alter it, or destroy it as you choose: Moral rights should be limited to originals and limited-run artistic works.

Oh, and if you're a creator, you should be able to give away as many of your rights as you choose. The concept that it's unconstitutional to give away your work—and also require that someone who uses your work in other work must also give away the new work—is simply ludicrous. Right now, I retain some rights in *Cites & Insights,* but I reduce the full range of copyright by permitting both derivation (not stated in the current license) and reproduction as long as it's not for sale. Those are my rights as the creator and copyright holder. If I changed the license to the "No rights reserved" dedication to the public domain (which I don't plan to do), that would be my right as copyright holder.

I believe in balanced copyright. If that sometimes results in coverage that seems to say "a curse on both your houses," that's because sometimes neither extreme makes much sense.

The Details

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