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All articles selected from our web site; see QuestionCopyright.org for more .

Understanding Free Content



By Nina Paley

Content is an **unlimited resource**. People can now make perfect copies of digital content for free. That's why they expect content to be free — because it is in fact free. That is GOOD. Think of "content" — culture — as water. Where water flows, life flourishes.



Containers are not Free.

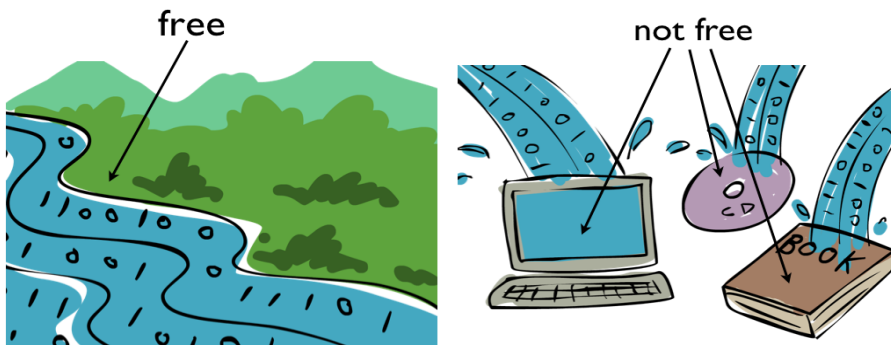
Containers—objects like books, DVDs, hard drives, apparel, action figures, and prints—are not free. They are a **limited resource**. No one expects these objects to be free, and people voluntarily pay good money for them. Think of "containers"—books, discs, hard drives—as jugs and vessels. These containers add utility to and increase the value of the water.

If you can get water for free in the public river, great—that doesn't reduce the value of vessels. Quite the contrary: when rivers flow, the utility and value of water vessels increases.

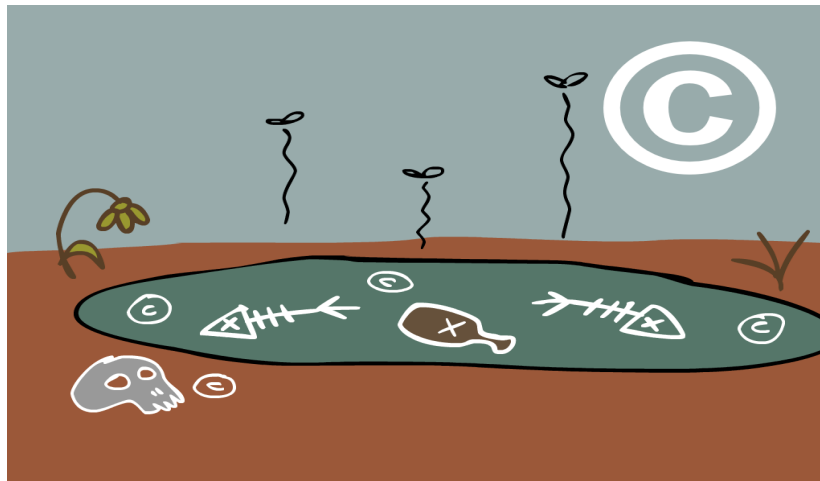


Content is Free.

Use the UNLIMITED RESOURCE to sell the LIMITED RESOURCE.

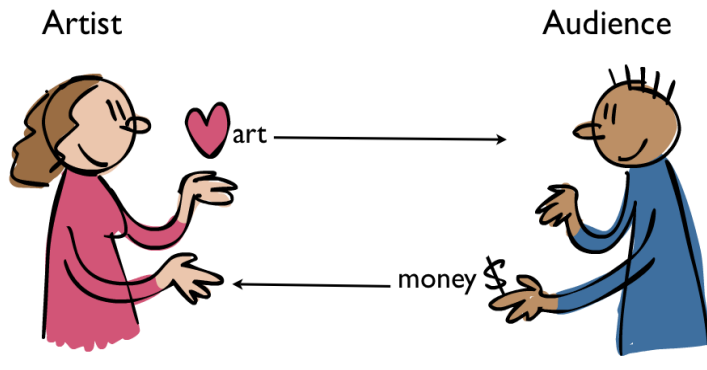


Continuing this metaphor: copyright monopolies are an attempt to dam up and control all the rivers, reducing them to a trickle. When Big Media succeeds locking up culture, it's like in closing off water: they get a stagnant pool that turns to poison. Fish die and mosquitoes swarm, because the water has no source to flow from nor destination to flow to.

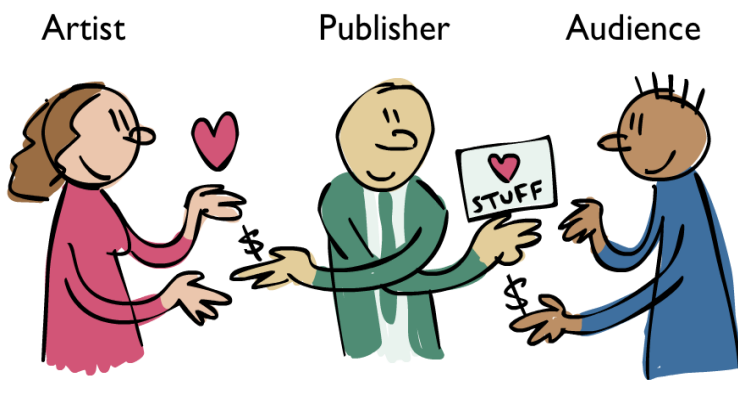


(That's how we get things like [this](#) [1].)

Artists don't "own" culture, but we do own our names (attribution). Any artist who has enjoyed a community of fans knows how the power in their name is generously granted by audiences. Our audiences want us to thrive. They want their money and support to reach us.



Therefore an artist's cooperation with a merchandiser is valuable. A signed book is worth more than an unsigned one. Merchandisers who cooperate with artists—share revenue with them—get the blessing of both artist and audience and can sell more objects for more money.



Under the Creative Commons Share Alike license, [Sita Sings the Blues](#) [2]—containing objects can be manufactured and sold by anyone without my permission. But whoever shares revenue with me gets my "[creator endorsed mark](#) [3]" or signature, and gets my fans sent to the product (via community word-of-mouth and my web site).

[3]



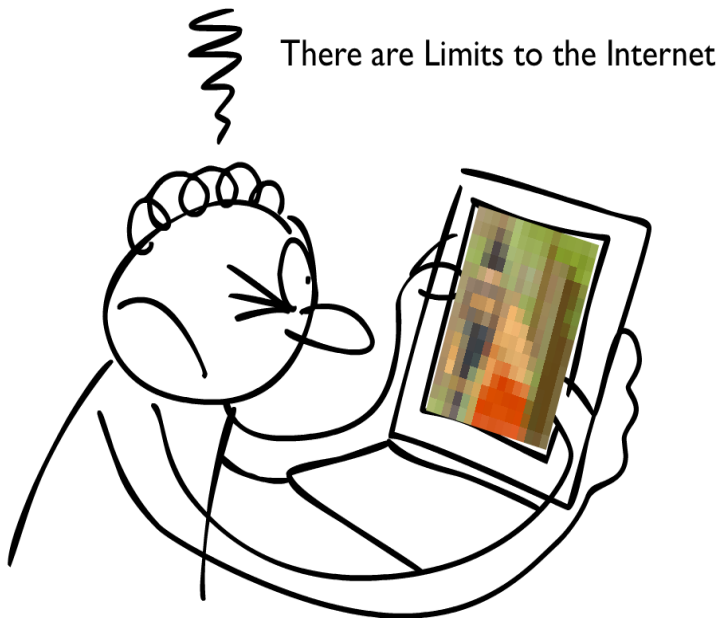
Competing products can nonetheless be sold without my endorsement. If they're cheaper, of better quality, or more accessible, they might sell better than my endorsed products. Why shouldn't they? Competition can be good. All the more incentive for any business I partner with to make their products high quality, reasonably priced and easily available. There's no incentive to compete with a good product; if there's a good affordable [Sita Sings the Blues](#) [2] coffee table book or graphic novel, why should anyone bother publishing another? If they do, the competing book must have some important quality lacking in the first. If that competitor's quality differential is so high it's worth more than my endorsement, then good for them for doing something right.

Remember:

Free Enterprise is Free Culture too.

Common Questions about Free Content:

Q. Why make a book when you can get the content free on the Internet?

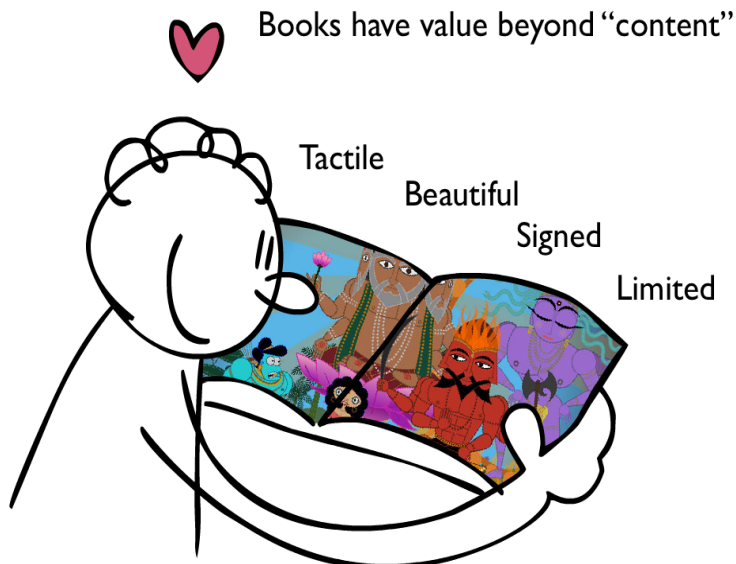


A. Because there are limits to the Internet. You can't touch it or smell it. Images are restricted to screen quality and may cause eyestrain.

Books have value as objects beyond the intellectual wealth they embody. They are portable, tactile, and invulnerable to power outages. Art books can have even more valuable attributes: glossy coatings,

embossing, reflective and matte inks, paper textures, super-high resolutions. Books can be beautiful objects in their own right. Signed books are works of art. Books can have value as collector's items, because they are LIMITED.

Audiences seek a connection with creators. Even if the content is free, many fans desire a physical token of the work. They also want to support the artist. Merchandise — objects, like books, DVDs, apparel — acts as a medium to conduct these artist-audience transactions.

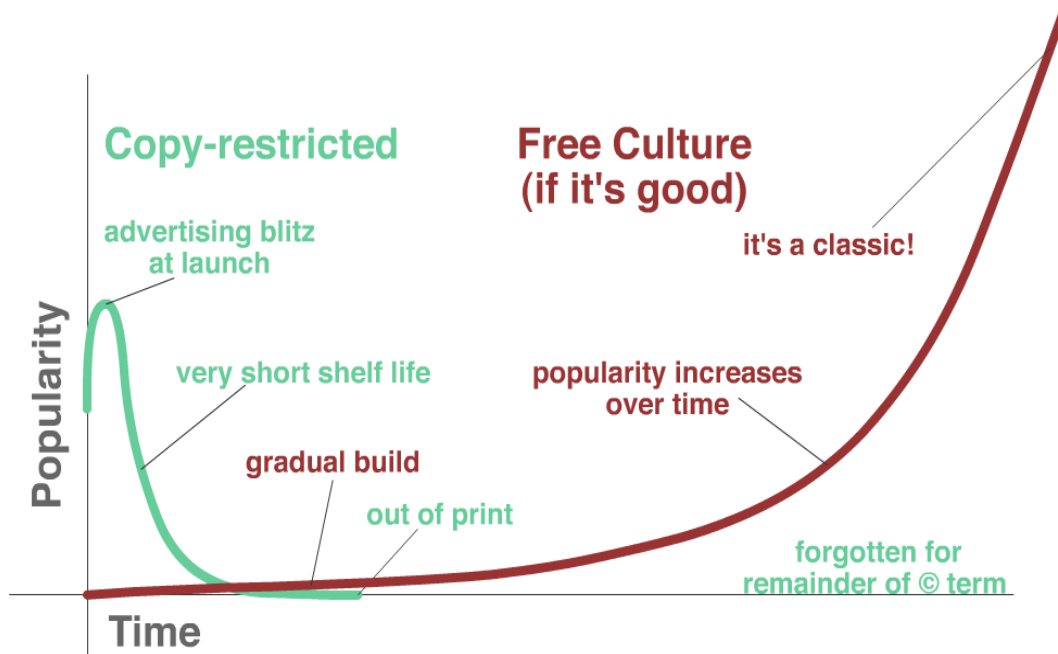


Q. Why make it free on the internet if it's available as a book (or DVD, CD, etc.)?

A. Because if it's free, it can spread. If it's good, the audience will quote it, cite it, share it, review it, and promote it. Free accomplishes everything advertising does, except it's good not evil, free not controlled, voluntarily shared not forced down throats. Instead of spending vast sums on crappy advertising to sell "content" you've locked up, just free the content and let it advertise itself. Use the unlimited resource to sell the limited resource.

Q. But even with the internet, I still have to advertise!

A. Maybe. Depends on what your content and how much time you have. If what you have is good, just give it time. "Viral" growth is exponential, but it can take a while. Or you can use advertising to artificially direct audience attention to something they wouldn't care about otherwise. If the work is not good, interest will drop off when advertising does.



That's our vision of Free. It's not communism. It's not capitalism as we know it. It's definitely not monopolies. It is Free Culture, and Free Enterprise.

The Cobbler: A New Career Model for Artists and Entertainers



By **Laure Parsons**

In the past, high production and distribution costs have forced artists into a kind of gambling mentality. In order to reach audiences, artists had to rely on production companies and distributors, who in turn had to take a large percentage of revenues to cover the high costs associated with producing a film, making a run of books, or releasing an album.

Because distributors spread their risk across many different works, betting that a few will "make it big", artists too were led to a lottery attitude: your work either won big or not at all. If a work had the fortune to make it big, it could sometimes make money for the artist despite many middlemen taking their pieces — but if it did not, the artist was unlikely to make much money at all.

Also, since the distributors would put more effort behind the works that served them better, the "successful" works tended to be the ones which had the most charged back against their royalties. So even the "successes" were of more benefit to distributors than to artists.

As cheap, digital means of production and dissemination emerge, however, a new paradigm for artists is emerging too. Filmmakers, musicians, and writers now have the opportunity to work in a more stable, less risky way — with an economic model like a corner shoe cobbler, with a skill and a loyal clientele. While it may not have the glamour of red carpets and stadium shows, it can be a life in which one's vocation is sustainable, at a level that pays a living wage and allows one to be one's own boss. One trades a small chance of making a lot of money quickly for a greatly improved chance of making *some* money steadily. For many artists, that's a good trade-off.

Already many filmmakers are experimenting with separating theatrical or broadcast licensing from online distribution or nontheatrical screenings, in what is typically referred to as "hybrid distribution". In film, most of the mechanisms available at this time for generating revenue online (such as iTunes, Netflix, and Hulu) require the filmmaker to use a middleman. Revenues from these services for independent films will generally not be more than \$50K altogether, and they will most likely be under \$10K for the first year or two, before subtracting the fees of the middleman. Some filmmakers cut out the middleman entirely and sell their films directly on DVD or online, arrange their own screenings, etc.

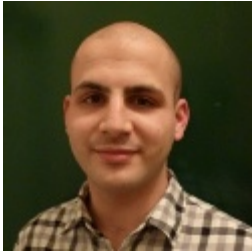
Other artists are exploring strategies that directly exploit the audience's desire to connect with and support the artist. This is the approach taken successfully by Amanda Palmer (see "[Why I'm not Afraid to Take your Money](http://www.onthemediamedia.org/transcripts/2010/03/12/05)" [<http://www.onthemediamedia.org/transcripts/2010/03/12/05>]) and Nina Paley ("[Sita Sings the Blues](http://www.sitasingstheblues.com)" [<http://www.sitasingstheblues.com>]), for example. By completely giving up the small possibility of "going gold" in a centralized distribution system, they've opened up the more likely possibility of making a steady living through the support of a fan base that is best reached through decentralized means.

For the first time, it is possible for a filmmaker to make a film on a very small budget, use promotion and distribution methods that are low-cost or free, and find enough revenue to break even and possibly to support themselves in a basic fashion. It means you probably won't become a millionaire, but in return your chances of being able to support yourself through your work go up, and they go up more the better your work is.

To succeed this way, artists must be realistic about the quality of their work — but that's always been the case: engaging directly with audiences just makes it the case sooner. And artists have to learn some new skills. Finding and engaging with an audience can be time-consuming, and not all artists are equally suited to it. Fortunately, many aspects of this process can be outsourced, and in some cases distributors are learning to sell services to artists instead of trying to control access to their work. There are even tools that allow filmmakers to create their own distribution strategies while contracting others to do hard sales or theatrical booking.

Not everyone who can shine shoes is cut out to own their own shoe repair business, and not all artists are cut out to manage a small business in media creation. But for the first time, artists have a real choice about distribution, and for some of them, being a cobbler will have a lot more appeal than being a gambler.

GAO Report Debunks Claims that Piracy is a Major Threat to U.S. Economy



By **Victor Cohen**

A couple of months ago, a collection of seven entertainment industry groups including the RIAA, the MPAA, and the Screen Actor's Guild submitted a filing in response to the Intellectual Property Enforcement Coordinator's request for comments on its upcoming "Joint Strategic Plan" to carry out its enforcement duties. Their main concern is that digital piracy "undermines our economy, steals our jobs and threatens our national interest." [\[1\]](#) [\[4\]](#) As a remedy, the industry puts forward a breathtakingly draconian wishlist of enforcement measures, including:

- ISP-level monitoring and filtering of files or traffic, website blocking and redirection, bandwidth throttling, and monitoring software installed on individual users' computers to check for copyright infringement. [\[2\]](#) [\[5\]](#)
- Bypassing the Digital Millennium Copyright Act's notice-and-takedown procedure by allowing copyright owners to create databases of works or digital files and force ISPs — in order to qualify for the DMCA § 512 safe harbor — to automatically take down any matching content uploaded to their network and to prevent matching content from being uploaded or linked to at all. [\[3\]](#) [\[6\]](#)
- Making the Department of Justice and the Department of Homeland Security follow the industry's schedule by coordinating piracy interdiction efforts with new releases of blockbuster movies. [\[4\]](#) [\[7\]](#)

In order to argue for such a staggering array of privacy invasions, network neutrality violations, ISP-burdening expansions of the DMCA, and reallocations of federal agents away from preventing more life-threatening crimes, the industry groups that made this filing must have a solid mountain of evidence that piracy poses a major threat to the American economy and the very existence of the entertainment industry, right?

Unfortunately they don't, says the U. S. Government Accountability Office. On April 12, the GAO released a report entitled "Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods" that closely examined the data and research methodologies that have been used to argue and formulate government policy on exactly this issue. The report's conclusion is vastly different from that of the industry: "Each method has limitations, and most experts observed that it is difficult, if not impossible, to quantify the economy-wide impacts [of piracy and counterfeiting]." [\[5\]](#) [\[8\]](#) Though it did call piracy a "sizeable" problem, it cast serious doubt on the three main studies that the industry has used to make its case: a 2002 FBI economic impact study had "no record of source data or methodology," a 2002 DHS Customs and Border Protection division estimate of lost revenue and jobs had been discredited, and the FTC was unable to locate any record of making a lost sales estimate that is attributed to it. [\[6\]](#) [\[2\]](#)

The GAO went on to highlight weaknesses it found in the Business Software Alliance's 2009 piracy estimates and a similar study published by the MPAA's international counterpart, the Motion Picture

Association. It was important to consider, noted the GAO, that there is not necessarily a one-to-one rate of substitution between pirated works and lost sales. In other words, not every pirated album equates to a lost sale, since consumers sometimes like a song or an album enough to download it for free, but not enough to purchase it. Also, piracy estimates made in one country are not necessarily easily extrapolated to another. [7] [9] In addition, studies that use a set of multipliers known as the RIMS-II multipliers to show how capital changes in one industry affect another generally do not take into account the effect of the extra disposable income that downloaders will have available to spend in other parts of the economy as a result of not having paid for the content. [8] [10] In a nutshell, this money does not vanish into thin air, it is spent in other ways so that there is no net loss to the economy as a whole.

Finally, the GAO lamented the lack of data showing the positive effects that piracy can have on the economy. These include the benefit to consumers of having lower-priced goods available and the ability of consumers to sample music or other copyrighted works before they purchase them as a means of encouraging further sales. [9] [11]

While the industry's wishlist is just a set of recommendations at the moment, proposals as extreme as the ones listed above can easily find their way into other forms of regulation. Right now, the U.S. is in the middle of negotiations for the Anti-Counterfeiting Trade Agreement, which even in its current draft form discusses an enhanced, global version of the Digital Millennium Copyright Act as well as ISP filtering and three-strikes policies for copyright infringers. The United Kingdom has already become the victim of bad figures, when they helped pass the Digital Economy Act on April 12th. France's highly unpopular HADOPI law, which incorporates a three-strikes disconnection policy, has been in place since October, 2009.

The industry groups' proposals are drastic, broad, and devastating to the internet, to privacy, and to free expression online. Before the IPEC or any government body considers them, it should heed GAO's warnings and demand better evidence that piracy is indeed as much of a threat to the economy as the industry claims. We must be vigilant that our own treaty negotiations, agency rulemakings, and legislation are based on solid data that takes into account all the effects, positive and negative, that piracy can have on our economy.

References:

[1] [12] Comments of Creative Community Organizations, pp. 2, March 24, 2010: <http://www.dga.org/news/pr-images/2010/Joint-submission-re-IPEC.pdf> [13]; last accessed 04/25/2010.

[2] [14] Id at 10.; [3] [15] Id at 17.; [4] [16] Id at 12-13.

[5] [17] United States Government Accountability Office, Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods, (this page is not numbered, please see the page titled "Highlights"), April 12, 2010: <http://www.gao.gov/products/GAO-10-423> [18]; last accessed 04/25/2010.

[19] Id at 18-19. I must note GAO's confusing language here: it refers to the studies individually as pertaining to counterfeiting, which is a separate issue from piracy, but then collectively as "referenced by various industry and government sources as evidence of the significance of the counterfeiting and piracy problem to the U.S. economy."

[20] Id at 22; [21] Id at 23; [22] Id at 14-15

A Music Teacher Describes How Copyright Hinders Music Education



By **Janet Underhill**

Janet Underhill has been teaching music for 30 years at a private school in Chicago. She has taught piano, voice, guitar, recorder and general music to students of all ages, from kindergarten to graduate school. In this article, she tells how copyright prevents her from providing her students the best possible materials.

I teach general music. My goal is to engage all of my students in music making, to develop their musical skills, and then to send them on to their choice of band, chorus, private lessons, ensembles. Hopefully, my students will continue to connect with music, singing and playing, as part of their lives.

I need materials that are formatted for the elementary student that will foster the development of musical skills as well as provide the materials for enjoyable singing experiences. Such music should contain the changes that the beginning guitar student can handle.

True, there are plenty of songs written expressly for the music classroom. They come with permission to copy for classroom use; they're cute, clever, integrated with the broader curriculum, written in the service of math, social science, English -- and have no connection whatsoever to the wider world of parents, grandparents, the community and the culture. The songs are disconnected, expressively flat, remarkably forgettable. They cannot be shared with parents and grandparents, aunts and uncles. They don't exist outside of the walls of the school. The children sense this, and do not take them very seriously.

What my students need is a good mix of children's song literature, folk music, appropriate pop literature, Broadway songs, and songs from the American song book. Songs need to make connections across the curriculum, across the generations and across cultures. Freedom to choose these kinds of songs is crucial to my work as a teacher.

Copyright laws restrict how I can use music from, say, the Beatles. The problem with simply purchasing the music is that it often comes in formats that don't work with my young students. I need lead sheets with simple, hopefully mostly primary chords, written in a fairly big type, and with the words beneath. I want my students to connect with the notes as well as the words. Their singing experiences should be music reading experiences as well.

I can't find music like this. Any collection may contain one or two songs that are appropriate, but their format always presents problems for the young singer and student. They are often printed in keys that don't match the vocal ranges of my singers. They are too difficult to read because they often come in voice plus piano accompaniment formats. The easy guitar song books often include changes that are far too complicated for my young guitar players.

So, in an attempt to address these issues within the current copyright world, I went about writing to publishers with suggestions for song books for the elementary music classroom, well-tested songs from all these various musical traditions. The market for such materials is as huge as the elementary school

systems. But market is not my consideration. Music education of the young is my concern.

I bought and examined several publications from Hal Leonard, the giant in this field. There are many terrific books in their library that might serve the classroom purpose quite well. They all have problems that would need to be addressed in order to make them truly useable.

I wrote to Hal Leonard, offering suggestions along the above guidelines. I got back a terse, impersonal response, which I will paraphrase here: No input allowed. We do not consider, review or accept outside solicitations.

It's a lock without a key. I have greatly reduced access to good music because of copyrights, all held by a few megacorporations. And I am shut out of the process that might result in materials that would serve genuine educational goals, that might actually connect the students to the very world of music these corporations wish to promote.

It makes me wonder whom copyright is really meant to serve.

The Surprising History of Copyright and The Promise of a Post-Copyright World



By **Karl Fogel**

There is one group of people not shocked by the record industry's policy of suing randomly chosen file sharers: historians of copyright. They already know what everyone else is slowly finding out: that copyright was never primarily about paying artists for their work, and that far from being designed to support creators, copyright was designed by and for *distributors* — that is, publishers, which today includes record companies.

But now that the Internet has given us a world without distribution costs, it no longer makes any sense to restrict sharing in order to pay for centralized distribution. Abandoning copyright is now not only possible, but desirable. Both artists and audiences would benefit, financially and aesthetically. In place of corporate gatekeepers determining what can and can't be distributed, a much finer-grained filtering process would allow works to spread based on their merit alone. We would see a return to an older and richer cosmology of creativity, one in which copying and borrowing openly from others' works is simply a normal part of the creative process, a way of acknowledging one's sources and of improving on what has come before. And the old canard that artists need copyright to earn a living would be revealed as the pretense it has always been.

None of this will happen, however, if the industry has its way. For three centuries, the publishing industry has been working very hard to obscure copyright's true origins, and to promote the myth that it was invented by writers and artists. Even today, they continue to campaign for ever stronger laws against sharing, for international treaties that compel all nations to conform to the copyright policies of the strictest, and most of all to make sure the public never asks exactly who this system is meant to help.

The reward for these efforts can be seen in the public's reaction to the file-sharing lawsuits. While most people agree that this time the industry went too far, the error is mainly treated as one of degree — as if the record companies had a valid point, but had merely resorted to excessive force in making it.

To read the true history of copyright is to understand just how completely this reaction plays into the industry's hands. The record companies don't really care whether they win or lose these lawsuits. In the long run, they don't even expect to eliminate file sharing. What they're fighting for is much bigger. They're fighting to maintain a state of mind, an attitude toward creative work that says someone ought to own products of the mind, and control who can copy them. And by positioning the issue as a contest between the Beleaguered Artist, who supposedly needs copyright to pay the rent, and The Unthinking Masses, who would rather copy a song or a story off the Internet than pay a fair price, the industry has been astonishingly successful. They have managed to substitute the loaded terms "piracy" and "theft" for the more accurate "copying" — as if there were no difference between stealing your bicycle (now you have no bicycle) and copying your song (now we both have it). Most importantly, industry propaganda has made it a commonplace belief that copyright is how most creators earn a living — that without copyright, the engines of intellectual production would grind to a halt, and artists would have neither means nor motivation to produce new works.

Yet a close look at history shows that copyright has never been a major factor in allowing creativity to flourish. Copyright is an outgrowth of the privatization of government censorship in sixteenth-century England. There was no uprising of authors suddenly demanding the right to prevent other people from copying their works; far from viewing copying as theft, authors generally regarded it as flattery. The bulk of creative work has always depended, then and now, on a diversity of funding sources: commissions, teaching jobs, grants or stipends, patronage, etc. The introduction of copyright did not change this situation. What it did was allow a particular business model — mass pressings with centralized distribution — to make a few lucky works available to a wider audience, at considerable profit to the distributors.

The arrival of the Internet, with its instantaneous, costless sharing, has made that business model obsolete — not just obsolete, but an obstacle to the very benefits copyright was alleged to bring society in the first place. Prohibiting people from freely sharing information serves no one's interests but the publishers'. Although the industry would like us to believe that prohibiting sharing is somehow related to enabling artists to make a living, their claim does not stand up to even mild scrutiny. For the vast majority of artists, copyright brings no economic benefits. True, there are a few stars — some quite talented — whose works are backed by the industry; these receive the lion's share of distribution investment, and generate a correspondingly greater profit, which is shared with the artist on better than usual terms because the artist's negotiating position is stronger. Not coincidentally, these stars are who the industry always holds up as examples of the benefits of copyright.

But to treat this small group as representative would be to confuse marketing with reality. Most artists' lives look nothing like theirs, and never will, under the current spoils system. That is why the stereotype of the impoverished artist remains alive and well after three hundred years.

The publishing industry's campaign to preserve copyright is waged out of pure self-interest, but it forces on us a clear choice. We can watch as most of our cultural heritage is stuffed into a vending machine and sold back to us dollar by dollar — or we can reexamine the copyright myth and find an alternative.

The first copyright law was a censorship law. It had nothing to do with protecting the rights of authors, or encouraging them to produce new works. Authors' rights were in no danger in sixteenth-century England, and the recent arrival of the printing press (the world's first copying machine) was if anything energizing to writers. So energizing, in fact, that the English government grew concerned about too *many* works being produced, not too few. The new technology was making seditious reading material widely available for the first time, and the government urgently needed to control the flood of printed matter, censorship being as legitimate an administrative function then as building roads.

The method the government chose was to establish a guild of private-sector censors, the London Company of Stationers, whose profits would depend on how well they performed their function. The Stationers were granted a royal monopoly over all printing in England, old works as well as new, in return for keeping a strict eye on what was printed. Their charter gave them not only exclusive right to print, but also the right to search out and confiscate unauthorized presses and books, and even to burn illegally printed books. No book could be printed until it was entered in the company's Register, and no work could be added to the Register until it had passed the crown's censor, or had been self-censored by the Stationers. The Company of Stationers became, in effect, the government's private, for-profit information police force [1].

The system was quite openly designed to serve booksellers and the government, not authors. New

books were entered in the Company's Register under a Company member's name, not the author's name. By convention, the member who registered the entry held the "copyright", the exclusive right to publish that book, over other members of the Company, and the Company's Court of Assistants resolved infringement disputes [2].

This was not simply the latest manifestation of some pre-existing form of copyright. It's not as though authors had formerly had copyrights, which were now to be taken away and given to the Stationers. The Stationers' right was a *new* right, though one based on a long tradition of granting monopolies to guilds as a means of control. Before this moment, copyright — that is, a privately held, generic right to prevent others from copying — did not exist. People routinely printed works they admired when they had the chance, an activity which is responsible for the survival of many of those works to the present day. One could, of course, be enjoined from distributing a specific document because of its potentially libelous effect, or because it was a private communication, or because the government considered it dangerous and seditious. But these reasons are about public safety or damage to reputation, not about property ownership. There had also been, in some cases, special privileges (then called "patents") allowing exclusive printing of certain types of books. But until the Company of Stationers, there had not been a blanket injunction against printing in general, nor a conception of copyright as a legal property that could be owned by a private party.

For about a century and a third, this partnership worked well for the government and for the Stationers. The Stationers profited from their monopoly, and through the Stationers, the government exercised control over the spread of information. Around the end of the seventeenth century, however, owing to larger political changes, the government relaxed its censorship policies, and allowed the Stationers' monopoly to expire. This meant that printing would return to its former anarchical state, and was of course a direct economic threat to the members of the Company of Stationers, accustomed as they were to having exclusive license to manufacture books. Dissolution of the monopoly might have been good news for long-suppressed authors and independent printers, but it spelled disaster for the Stationers, and they quickly crafted a strategy to retain their position in the newly liberal political climate.

The Stationers based their strategy on a crucial realization, one that has stayed with publishing conglomerates ever since: authors do not have the means to distribute their own works. Writing a book requires only pen, paper, and time. But distributing a book requires printing presses, transportation networks, and an up-front investment in materials and typesetting. Thus, the Stationers reasoned, people who write would always need a publisher's cooperation to make their work generally available. Their strategy used this fact to maximum advantage. They went before Parliament and offered the then-novel argument that authors had a natural and inherent right of ownership in what they wrote, and that furthermore, such ownership could be transferred to other parties by contract, like any other form of property.

Their argument succeeded in persuading Parliament. The Stationers had managed to avoid the odium of censorship, as the new copyrights would originate with the author, but they knew that authors would have little choice but to sign those rights back over to a publisher for distribution. There was some judicial and political wrangling over the details, but in the end both halves of the Stationers' argument survived essentially intact, and became part of English statutory law. The first recognizably modern copyright, the Statute of Anne, was passed in 1709 and took effect in 1710.

The Statute of Anne is often held up by champions of copyright as the moment when authors were finally given the protection they had long deserved. Even today, it continues to be referenced both in legal arguments and in press releases from the publishing industry. But to interpret it as an authors'

victory flies in the face of both common sense and historical fact [3]. Authors, having never had copyright, saw no reason now to suddenly demand the rather paradoxical power to prevent the spread of their own works, and did not do so. The only people threatened by the dissolution of the Stationers' monopoly were the Stationers themselves, and the Statute of Anne was the direct result of their lobbying and campaigning. In the memorable words of the contemporary Lord Camden, the Stationers "...came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security." [4] To make their argument more palatable, they had proposed that copyright would originate with the author, as a form of property that could be sold to anyone — anticipating, correctly, that it would most often be sold to a printer.

This proposal was a shrewd tactical move, because one of Parliament's concerns was to prevent the re-establishment of a centralized monopoly in the book trade, with its attendant potential for a renewal of censorship by the crown. Benjamin Kaplan, professor of law emeritus at Harvard University and a respected copyright scholar, describes the Stationers position succinctly:

....The stationers made the case that they could not produce the fragile commodities called books, and thus encourage learned men to write them, without protection against piracy... There is an apparent tracing of rights to an ultimate source in the fact of authorship, but before attaching large importance to this we have to note that if printing as a trade was not to be put back into the hands of a few as subject of monopoly — if the statute was indeed to be a kind of "universal patent" — a [legal] draftsman would naturally be led to express himself in terms of rights in books and hence to initial rights in authors. A draftsman would anyway be aware that rights would usually pass immediately to publishers by assignment, that is, by purchase of the manuscripts as in the past. ... I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the statute.[5]

The Statute of Anne, taken in historical context, is the smoking gun of copyright law. In it we can see the entire apparatus of modern copyright, but in still-undisguised form. There is the notion of copyright as property, yet the property is really intended for publishers, not authors. There is the notion of benefitting society, by encouraging people to write books, but no evidence was offered to show that they would not write books without copyright. Rather, the Stationers' argument was that publishers could not afford to *print* books without protection from competition, and furthermore that printers could not be depended to reproduce works faithfully if given unfettered freedom to print. The corollary, they implied, was that without the prospect of reliable distribution, authors would produce fewer new works.

Their argument was not unreasonable, given the technology of the time. Making a perfect copy of a printed work required access to the original press and compositor, anyway; if reliable reproduction were to be encouraged, then a single-holder copyright system had a certain logic to it. And the publishers would now be effectively forced to pay authors in return for exclusive printing rights (although in fact the Stationers had sometimes paid authors even before, simply to guarantee the completion and delivery of a work). The authors who succeeded in selling this new right to printers had no particular motivation to complain — and naturally, we don't hear very much about the authors not so favored. The consolidation of author's copyright probably contributed to the decline of patronage as a source of income for writers [6], and even allowed some authors, though always a small minority, to support themselves solely from the royalties their publishers shared with them. The fact that a given copyright could only be held by one party at a time also helped prevent the proliferation of divergent

variations, a problem that had vexed authors perhaps even more than plagiarism, as there was no easy method by which they could endorse or disclaim particular variations.

But the overall historical record is clear: copyright was designed by distributors, to subsidize distributors not creators.

This is the secret that today's copyright lobby never dares say aloud, for once it is admitted, the true purpose of subsequent copyright legislation becomes embarrassingly clear. The Statute of Anne was just the beginning. Having granted the premise that copyrights should exist at all, the English government found themselves under pressure to extend copyright terms further and further. In the long legal saga that ensued, what's important is not the particular sequence of laws and verdicts, but the identity of the plaintiffs: they were just the sort of stable, settled business interest capable of sustaining litigation and lobbying over a period of decades — that is, they were publishers, not authors. They had proposed the author's copyright out of economic interest, and only after the crutch of a censorship-based monopoly had been taken away from them. When it became clear that the tactic worked, they lobbied to strengthen copyright.

And this is still the pattern today. Whenever the U.S. Congress extends copyright terms or powers, it is the result of pressure from the publishing industry. The lobbyists will sometimes trot out a superstar author or musician as an exhibit, a human face for what is essentially an industry effort, but it's always quite clear what's really going on. All you have to do is look at who's paying the lawyer's and lobbyists' bills, and whose names appear in the court dockets — publishers'.

The industry's centuries-long campaign for strong copyright law is not merely a reflexive land grab, however. It's a natural economic response to technological circumstances. The effect of the printing press, and later of analog sound recording technology, was to make creative works inseparable from their means of distribution. Authors needed publishers the way electricity needs wires. The only economically viable method of reaching readers (or listeners) was the bulk print run: to manufacture thousands of identical copies at once, then physically ship them to various points of distribution. Before agreeing to such an investment, any publisher would naturally prefer to buy or lease the copyright from the author, and just as naturally would lobby the government for the strongest possible copyright powers, the better to protect their investment.

There is nothing inherently exploitative about this; it's just straightforward economics. From a business point of view, a print run is a daunting and risky project. It involves the high up-front costs of a physical medium (be it dead tree pulp, magnetic tape, vinyl platters, or pitted optical discs), plus complicated, expensive machinery to imprint the content onto the medium. There's also the unseen investment of vetting the master copy: because a flawed master can reduce the value of the entire run, publishers and authors go to considerable trouble to generate a polished, error-free version of the work before printing. There is little room for an incremental or evolutionary process here; the work must be brought to near-perfection before the public ever sees it. If any mistakes are overlooked, they will have to be tolerated in the finished product, at least until the process is started again for the next print run. The publisher must also negotiate prices and line up distribution paths, which is not only a matter of bookkeeping, but of physical expenses, of trucks and trains and shipping containers. Finally, as if all this weren't enough, the publisher is compelled to spend even more money on marketing and publicity, to have a better chance of at least recovering all these outlays.

When one realizes that all this must happen before the work has generated a penny of revenue, it is little wonder that publishers argue hard for copyright. The publisher's initial investment — that is, their risk — in any individual work is greater, in economic terms, than the author's. Authors by themselves

might have no inherent desire to control copying, but publishers do. And in a world filled with publishers' royalty-supported marketing departments, authors, of course, need publishers all the more. The concentration of distribution revenues results, inevitably, in the familiar logic of an arms race.

The arrival of the Internet fundamentally changed this equation. It has become cliché to say that the Internet is as revolutionary a development as the printing press, and it is. But it is revolutionary in a different way. The printing press may have made it possible to turn one book into a thousand books, but those books still had to travel from the press into the hands of readers. Physical books were not only the medium in which the content was consumed, they were also the medium in which it was transported to the consumer. Thus, a publisher's total expense was proportional to the number of copies distributed. In such a situation, it is reasonable to ask that each user bear a portion of the costs of distribution. Each user is, after all, more or less responsible for her particular quantum of expense. If the book (or record) is in her hands, it must have gotten there somehow, which in turn means someone spent money to get it there. Divide those expenses by the number of copies, add in some amount for profit, and you arrive, roughly speaking, at the book's price.

But today, the medium over which content is distributed can be unrelated to the medium in which it is ultimately consumed. The data can be sent over a wire, at essentially no cost, and the user can print up a copy at her own expense, and at whatever quality she can afford, on the other end [7]. Furthermore, it is no longer important to possess the master; in fact, the concept of the master copy itself is obsolete. To make a perfect copy of a printed work is actually quite hard, although making a corrupt or abridged copy is very easy. Meanwhile, to make a perfect copy of a digital work is trivially easy — it's making an *imperfect* copy that requires extra effort.

Thus the practice of charging the same fee for each copy, regardless of how many copies there are or who made them, is now unjustifiable. The cost of producing *and distributing* the work is now essentially fixed, no longer proportional to the number of copies. From society's point of view, every dollar spent beyond the amount needed (if any) to bring the work into existence in the first place is a waste, an impediment to the work's ability to spread on its own merits.

The Internet did something the Company of Stationers never anticipated: it made their argument a testable hypothesis. Would creators still create, without centralized publishers to distribute their works? Even minimal exposure to the Internet is enough to provide the answer: of course they will. They already are. Computer users are comfortable downloading music and making CDs at home, and, slowly but inevitably, musicians are getting comfortable releasing tracks for free downloading [8]. Many short works of both fiction and non-fiction are already available online. Printing and binding entire books on demand is rarer, but only because the equipment to do it is still somewhat expensive. That equipment is getting steadily cheaper, however, and it's only a matter of time before the copy shop down the street has it. There is no fundamental difference between music and text, from a distribution point of view. As printing and binding technology gets cheaper, authors will see more and more clearly that they have the same alternative musicians do, and the result will be the same: more and more material available without restriction, by the choice of the author.

Some might argue that authors are different, that they are more dependent on copyright than musicians. After all, a musician expects to perform, and can therefore gain indirectly by releasing recordings for free — greater exposure leads to more performances. But authors don't perform; they reach their audience only through their works, not in person. If they now had to come up with ways to fund themselves without imposing an artificial scarcity on their works, could they do it?

Imagine the simplest scenario: you walk into the neighborhood print shop and tell the clerk the Web

address of the book you want. A couple of minutes later, the clerk comes back with a freshly printed, hardbound book, straight off the Internet. He rings up the sale.

"That'll be eight dollars. Would you like to add the one dollar author's suggested donation?"

Do you say yes? Perhaps you do, perhaps not — but note that when museums charge a voluntary admission fee, people often pay it. The same sort of dynamic is at work in the copy shop. Most people are happy to pay a tiny extra bit on top of some larger amount, if they have their wallet out already and think it's for a good reason. When people fail to make small, voluntary donations to a cause they like, it's more often due to the inconvenience (writing a check, putting it in the mail, etc) than the money. But even if only half, or fewer, of all readers were to make such donations, authors would still earn more than they do under traditional royalty schemes, and furthermore would have the pleasure of finally being the readers' ally in distribution, instead of their enemy.

This is not the only possible system, and it can easily coexist with others. Those not convinced by voluntary donations should consider another method: the [Fund and Release](#) system (also called the [Threshold Pledge](#) system [9]). This system is designed to solve the classic problem of distributed funding, which is that each contributor wants reassurance that others are also contributing, before putting in her own money. Under fund-and-release, the hopeful creator of a new work states up front how much money will be required to produce it — this is the "threshold". An intermediary organization then collects pledges, in any amounts, from the general public. When the total amount pledged reaches the threshold (or exceeds it by some standard percentage, to account for bookkeeping and assumption of risk), the intermediary signs a contract with the creator, and the pledges are called in. *Only* at this stage, when there is enough money to achieve the desired result, is anyone asked to actually pay up. The intermediary holds the money in escrow, paying the creator according to whatever schedule they negotiated. The last of the money is paid when the work is completed and made publically available, not just to the contributors, but to the entire world. If the creator doesn't produce, the intermediary returns the money to the donors.

The fund-and-release system has some interesting properties not found in the monopolistic, copyright-based marketplace. The resultant work is available to everyone in the world, free of charge. Yet the author was also paid enough to produce the work; if she needed more, she would have asked for more and seen if the market would bear it. Those who did choose to pay paid only as much as they were comfortable with, no more. And finally, there was no risk for the contributors — if the threshold is never reached, then no one pays anything.

Not all methods will be so pleasantly high-minded, of course. A couple of years ago, the established author Fay Weldon famously accepted money from Bulgari jewelry to write a novel that featured Bulgari products prominently. She did so, titling the book "The Bulgari Connection". The book was originally intended as a limited edition to be given away at a corporate function, but having written it, Weldon took it to a publisher for general release. Does this mean that in the future we'll have to scrutinize all creative works for signs of hidden corporate sponsorship? Perhaps, but this is nothing new — product placement was invented in the context of traditional copyright, and has flourished there, as it probably would anywhere. Copyright is neither the cause of corporate sponsorship nor its antidote. To look to the publishing industry as a force for deccommercialization would be weirdly out of touch indeed.

These are just a few examples of ways to support creative work without copyright. There are many

other methods [10]; there were many even before the Internet made convenient, direct micropayments possible. Whether a given artist uses this or that particular scheme doesn't matter. The important thing is that with little or no friction to impede the payment of tiny amounts, authors will find ways to make such payments happen on the scale they need. Those economists who are enamoured of markets as a solution to everything should be in love with the possibilities here (but, predictably, many are not, because they hate to see anything become depropertized).

To see a glimpse of the future, it may be most helpful to look not at net-savvy musicians, but at software. The flourishing Free Software movement is probably the best example we have today of a post-copyright world. Free software (some also call it "Open Source") is the brainchild of Richard Stallman, a programmer who had the idea of releasing software under a deliberately reversed copyright. Instead of prohibiting sharing, the software's license explicitly permits and encourages it. A number of others soon caught on to his idea, and because they were able to share and modify each other's programs without limit, they quickly produced a large body of working code.

Some predicted that this initial success would quickly level off as the software increased in size and complexity and required centralized, hierarchical organizations to maintain. But instead of foundering, the Free Software movement has grown so quickly that even its own participants are surprised, and it shows no signs of stopping. It now produces software whose functionality rivals that available in the proprietary market. Free software is widely used by banks, corporations, and governments, as well as individual computer users. More web sites run the free Apache web server than run all other web servers combined. Free operating systems are now the fastest-growing segment of the operating system market. Although some free software authors are paid for their work (after all, their services provide a benefit to those who use the software, and some of those users are willing to pay for it), others volunteer their time. Each software project has its own reasons for existing, and each programmer their own reasons for contributing. But the cumulative effect is a direct flaunting of copyright's entire justification: a thriving community of intellectual production now exists without enforcing copyrights, yet achieves substantially the same results as its mainstream counterpart.

According to the traditional justification of copyright, this shouldn't be happening. The software is essentially in the public domain; its copyright serves mainly to identify the original authors, and in some cases to prevent anyone else from imposing a stricter license. The authors have given up every exclusive right except the right to be identified as the authors. They have voluntarily returned to a world before copyright law: they enforce no royalties, and have no control over the distribution and modification of their works. The software's license gives everyone automatic permission both to use and to redistribute it. You can simply start handing out copies, there's no need to notify anyone or ask permission. If you want to modify it, you're free to do that too. You can even sell it, though naturally it's difficult to charge much, since you'd be competing with others handing out the same goods at no cost. A more common model is to encourage people to download the software for free, and instead sell *services* such as technical support, training, and customization. These models are not fantasies, they are the basis for profitable businesses that exist right now, paying real programmers competitive salaries to work on free software. But the point is not that people are paid to do it — some are, but many more are not, and yet write it anyway. The real point is that a tremendous amount of free software is produced and maintained every year, at a rate that grows quickly even by the standards of the software industry.

If this phenomenon were isolated to software, it would be explainable as an aberration — software is different, programmers are overpaid, and so on. But it's not just software; if you look carefully, there are signs of it happening everywhere. Musicians are starting to release their tracks online for free downloading, and the quantity of freely available writing on the Internet — starting with reference and

non-fiction works, but now including fiction and poetry — long ago passed the point of measurability. Software is not fundamentally different from these other forms of information. Like poems, songs, books, and movies, it can be transmitted digitally. It can be copied in whole or in part; it can be excerpted for use in other works; it can be modified and edited; it can even be satirized.

The abandonment of copyright is farthest along in software mainly because programmers were among the first groups to have Internet access, not because of anything special about the nature of software. Gradually, creators in other areas are realizing that they too can disseminate their works without publishers or centralized distribution chains, by simply allowing the freedom to copy. And increasingly, they are choosing to do so, because they have little to lose, and because it's the easiest way for their work to find its way to an appreciative audience. Far from being especially dependent on copyright law, creators gain the most by abandoning the copyright monopoly.

Even in their early stages, these trends raise an obvious question. If copyright is not really needed to stimulate original creation, then what purpose does it serve today? For it is quite clear that if copyright did not exist already, we wouldn't invent it now. We just finished building ourselves a gigantic copying machine (the Internet) that doubles as a communications device, and incidentally makes it convenient to transfer small amounts of money between people. Sharing is now the most natural thing in the world. The idea that artists are somehow harmed by it is demonstrated false every day, by the thousands of new works that appear online, credited and fully acknowledged by their authors, yet free for the taking. If someone were to argue that creativity would soon dry up unless we immediately institute a system of strict controls over who can copy what, we could reasonably look on them as insane. Yet, in slightly more diplomatic language, this is essentially the argument used by the copyright lobby to press for ever stronger laws.

Creativity is not what's at stake here, and in its more honest moments the publishing industry even tacitly admits this. Although for public relations purposes industry leaders make token declarations about the need for poor artists to earn a living, their most detailed and compelling statements are usually about the business effects of copyright. Larry Kenswil of Universal Music Group, the world's largest record company, was quoted in the New York Times of Jan. 5th, 2003, in an article about digital copy protection schemes, saying "You're not buying music, you're buying a key. That's what digital rights management does: it enables business models."

It's hard to imagine a more succinct statement of the industry credo. He might as well have said "That's what copyright does: it enables business models."

Unfortunately, not all of the propaganda put out by the industry is as straightforward and honest as Kenswil's. The Recording Industry Association of America, for example, explains copyright this way on their web site at <http://www.riaa.org/>:

You don't need to be a lawyer to be a musician, but you do need to know one legal term — copyright. To all creative artists — poets, painters, novelists, dancers, directors, actors, musicians, singers, and songwriters — the term matters dearly.

To all artists, "copyright" is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To them, "copyright" means the chance to hone their craft, experiment, create, and thrive. It is a vital right, and over the centuries artists have fought to preserve that right; artists such as John Milton, William Hogarth, Mark Twain, and Charles Dickens. Twain traveled to England to protect his rights, and Dickens came to America to do the same.

Recognize that? It's a page straight out of the Stationers' playbook — an undisguised retelling of the copyright myth, complete with references to individual authors, designed to arouse our support for struggling artists valiantly fighting for their artistic integrity. Apparently, all those artists throughout history who did just fine without copyright aren't included in "all creative artists" as far as the RIAA is concerned. Professor Patterson's comments, about the Stationers' similar use of authors as a foil in front of the eighteenth century English parliament, are equally applicable today: "They [the Stationers] did so by arguments intended to elicit sympathy for the author (conveniently ignoring their role in creating the poor plight of the author that they bemoaned) and avoided sound logic and reason." [11].

The next paragraph in the RIAA's introduction to copyright is even worse. It's a brief — very brief — introduction to the origins of copyright law, heavy with the cadence of historical inevitability, but rather loose with the facts:

Copyright law all started with the "The Statute of Anne," the world's first copyright law passed by the British Parliament in 1709. Yet the principle of protecting the rights of artists predates this. It may sound like dry history at first blush, but since there was precedent to establish and rights to protect, much time, effort, and money has been spent in legal battles over the centuries.

This breathless summary is the copyright equivalent of "Christopher Columbus sailed to America to prove the Earth was round and make friends with the Indians". Yes, much money has indeed been spent in legal battles, but the RIAA is careful not to say who spent it, nor are any further details given about the "principle of protecting the rights of artists" that is alleged to predate these developments.

The rest of their page continues in a similar vein, with so many omissions, mischaracterizations, and outright lies that it's hard to imagine how anyone doing even a modicum of research could have written it. It is, basically, low-grade supporting propaganda in their ongoing campaign to convince the public that copyright is as fundamental to civilization as the laws of thermodynamics.

The RIAA also indulges in one of the favorite tactics of the modern copyright lobby: equating illegal copying with the unrelated, and much more serious, offense of plagiarism. For example, Hilary Rosen, the (now former) head of the RIAA, used to speak at schools and colleges, urging the students to adopt the industry's views about information ownership. Here is her own description of how she presents the case:

Analogies are what really work best. I ask them, "What have you done last week?" They may say they wrote a paper on this or that. So I tell them, "Oh, you wrote a paper, and you got an A? Would it bother you if somebody could just take that paper and get an A too? Would that bug you?" So this sense of personal investment does ring true with people.

Since people who duplicate CDs do not usually replace the artist's name with their own, let's ask the question Hilary Rosen should have asked: "Would it bother you if somebody could just show a copy of your paper around, so other people could benefit from what you wrote, and see that you got an A?" Of course, the students would have answered "No, we aren't bothered by that at all," which isn't what Rosen wanted to hear.

The RIAA is extreme only in the clumsiness of their propaganda. Their message is, in essence, the same one offered by the rest of the copyright industry, which maintains a constant drumbeat of warnings that online content swapping will deprive creators of their reputations and their ability to work, despite overwhelming evidence that copyright never provided them with much of a livelihood anyway, and that they would happily continue to create without it as long as they have a way to

distribute their works. The campaign might sound harmless or silly when described as I have described it here, but because they are fighting for survival, with large budgets and skilled publicity departments, the publishers have succeeded in shaping public opinion to a surprising degree. Consider this poor woman, from the International Herald Tribune of Sep. 11th, 2003, in an article about the RIAA file-sharing lawsuits:

One woman who has received a subpoena from the recording industry association said she had struggled to explain to her 13-year-old son why file-sharing was wrong.

"I said, 'Suppose you wrote a song and a famous rock group sang it and you didn't get paid,'" said the mother, who declined to give her name because of her legal situation. "He said: 'I wouldn't care. That would be awesome.' They're still just in that young age where money doesn't matter."

The mother said she had better results when she compared taking someone's song to plagiarizing a school paper.

(One can only hope the sensible 13-year-old manages to keep his head, when so many around him are apparently losing theirs.)

The combination of a still-sympathetic public and deep pockets has unfortunately allowed the copyright industry to exercise dangerous influence at the legislative level. The result is a disturbing trend: mutually reinforcing physical and legal barriers that, while ostensibly designed to combat illegal copying, have the inevitable effect of interfering with *all* copying. Digital copy-protection schemes are increasingly enforced by your computer's hardware itself, rather than by malleable and replaceable programs. And the same companies that own content often also manufacture the hardware that makes distribution possible. Have you bought a computer from Sony? What about a CD from Sony's music division? That's the same company, and its left hand knows what its right hand is doing. With government cooperation, this combination becomes even more powerful. In the United States we now have a law — the Digital Millennium Copyright Act — that makes it illegal to circumvent a digital protection scheme, or even to produce software that helps others circumvent a digital protection scheme. Unfortunately, since much hardware and software automatically imprints such schemes on any media it produces, the Act effectively stifles authorized copying and many other activities that would otherwise fall into the category of "fair use" under current copyright law.

It is vital to understand that these side effects are not accidents, not unexpected consequences of an otherwise well-intentioned effort to protect artists. Rather, they are an integral part of a strategy that, at bottom, has nothing to do with encouraging creativity. The purpose of this three-pronged industry effort — the publicity campaign, the legal campaign, and the hardware "protections" — is simply this: to prevent the Internet experiment from being carried out to completion. Any organization that is deeply invested in the concept of copy control cannot be pleased to see a system arise that makes copying as easy as clicking a mouse. To the extent possible, such organizations would like to see the same pay-per-copy model that we've been using for centuries continue, even though the fundamental physics of information have changed to make pay-per-copy obsolete.

Although the copyright lobby succeeds in getting new laws passed, and even in winning some court cases, these victories rest on a disintegrating foundation. How much longer will the public continue to believe in the copyright myth, the notion that copyright was invented to make creative work possible? The myth has been maintainable so far because it always had a tiny grain of truth: although copyright was not inspired by authors, and was not enacted to protect them, it did enable the widespread *distribution* of many original works. Furthermore, there are still many publishers (generally the smaller

or individually-owned ones) who behave with an admirable sense of cultural stewardship, subsidizing unprofitable but important works with money earned by stronger sellers, sometimes even losing money outright in order to print things they think worthwhile. But because they are all bound by the economics of large-scale printing, they are all ultimately dependent on copyright.

There won't be a dramatic battle between the publishing industry and the copying public, with a climax, a denouement, and a clear winner striding out of the dust. Instead, what we will see — are already seeing — is the emergence of two parallel streams of creative work: the proprietary stream, and the free stream. Every day, more people join the free stream, of their own volition, for all sorts of reasons. Some enjoy the fact that there are no gatekeepers, no artificial barriers. A work can succeed by its merits and word of mouth alone: although there's nothing to stop traditional marketing techniques from being used in the free stream, there's less to subsidize them, so word of mouth and peer-review networks are taking on a greater importance there. Others enter the free stream as crossovers from the proprietary, releasing a portion of their work into the free domain as an advertisement or an experiment. Some simply realize that they have no chance of success in the proprietary world anyway, and figure they might as well release what they have to the public.

As the stream of freely available material gets bigger, its stigma will slowly vanish. It used to be that the difference between a published author and an unpublished one was that you could obtain the former's books, but not the latter's. Being published *meant* something. It had an aura of respectability; it implied that someone had judged your work and given it an institutional stamp of approval. But now the difference between published and unpublished is narrowing. Soon, being published will mean nothing more than that an editor somewhere found your work worthy of a large-scale print run, and possibly a marketing campaign. This may affect the popularity of the work, but it won't fundamentally affect its availability; and there will be so many "unpublished" but worthwhile works, that the lack of a publishing pedigree will no longer be considered an automatic strike against an author. Although the free stream does not use traditional copyright, it does observe, and unofficially enforce, a "credit right". Works are frequently copied and excerpted with attribution — but attempts to steal credit are usually detected speedily, and decried publicly. The same mechanisms that make copying easy make plagiarism very difficult. It's hard to secretly use someone else's work when a Google search can quickly locate the original. For example, teachers now routinely do Google searches on representative phrases when they suspect plagiarism in student papers.

The proprietary stream cannot survive forever, in the face of such competition. The abolition of copyright law is optional; the real force here is creators freely choosing to release their works for unrestricted copying, because it's in their interests to do so. At some point, it will be obvious that all the interesting stuff is going on in the free stream, and people will simply cease dipping into the proprietary one. Copyright law may remain on the books formally, but it will fade away in practice, atrophied from disuse.

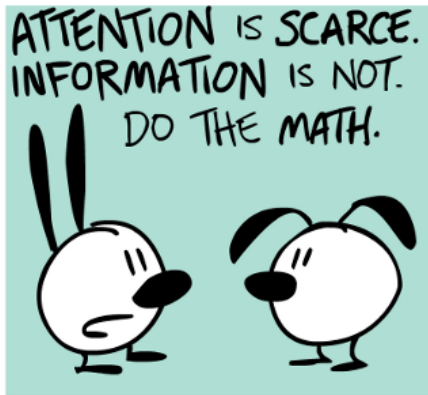
Or, we can sit back and allow this process to be halted, by permitting manufacturers to build in hardware "protections" that interfere with our ability to copy legitimately; by allowing the copyright lobby to capture our legislatures, to the point where we are constantly looking over our shoulders for the copyright police; and by hesitating to use the free stream to its full potential, because we've been taught a false story of what copyright is all about.

We can, if we choose, have a world where concepts like "out of print" or "rare book" are not only obsolete, but actually meaningless. We can live in a fertile and vibrant garden of constantly evolving works, created by people who wanted deeply to make them available, not mandated by a publisher's

market research. Schools would never be forced to stay with out-of-date textbooks because of the per-copy prices set by publishers, and your computer would always let you share songs with your friends.

One way to get there is to question the copyright myth. Copying isn't theft, and it isn't piracy. It's what we did for millenia until the invention of copyright, and we can do it again, if we don't hobble ourselves with the antiquated remnants of a censorship system from the sixteenth century.





"Artists Should Be Compensated For Their Work"



By **Nina Paley**

This phrase comes up in many discussions of copyright: "*Artists should be compensated for their art.*" It is assumed that a) Artists are inherently entitled to monetary compensation for their Art, and b) copyright is a mechanism for this compensation.

I challenge both assumptions.

Of course, what people actually say is usually "*Artists should be compensated for their work*". Below I'm going to distinguish between Art and Work, because confusing the two is exactly the problem.

a) Artists are inherently entitled to monetary compensation for their work.

I agree that artists are entitled to payment **FOR THEIR WORK**.

WORK is labor exchanged for money. Employer and worker negotiate a fee, the labor is performed, and the worker is paid. Many artists are workers: they are waiters, baristas, truck drivers. They should be compensated for their work, and they are, which is why they work.

Some artists perform a kind of skilled labor for money. This type of pre-negotiated labor is called a commission. Commissioned work is work, and artists are compensated for it, which is why artists take commissions.

But artists are not inherently entitled to monetary compensation **FOR THEIR ART**.

Art is a gift. An artist creates Art (not to be confused with skilled labor) on their own initiative. An artist "labors" in service of their vision, their Muse, the Art itself. The Muse alone is the Artist's employer. It's debatable whether the Artist can negotiate with their Muse before performing the labor — I certainly try to — but like most labor, terms are dictated by necessity. Just as economic necessity forces many workers into hard labor for low wages on their employer's terms, so does suffering force many Artists into labor on the Muse's terms. But unlike corporations and human

employers, the Muse turns out to always have the artist's best interests at heart. I'd much rather serve the Muse than an employer; but the Muse doesn't negotiate a moneyed wage. Monetary compensation is not part of the deal.

The Muse "pays" me in Life. "Do this," she says, "and you will Live. Turn away, and at best you will only survive." I do have a choice: I can make the Art, or not. I accept the Muse's terms. I perform the labor, and receive my "payment": Life.

ART is negotiated with the MUSE. The "payment" is LIFE.

WORK is negotiated with an EMPLOYER. The payment is MONEY.

If artists want to be paid in MONEY, they should negotiate a fee before performing their work. That is the proper condition for payment. Or they can create work with no pre-negotiated payment, without demanding payment after the fact. That's fine too. But to then demand payment after voluntarily working on your own terms — that is extortion.

Consider the Squeegee Man. He wipes windshields unbidden, then demands payment. He did the work; does he "deserve to be compensated"? Most would say no; if we wanted our windshields cleaned, we would negotiate this service in advance.

If I decide to sit behind a desk, take calls, devise flawed business plans, and lie, do I DESERVE to be compensated like a bank CEO? No. The bank CEO's work was pre-negotiated. He gets \$25 million in salary and bonuses because that was the deal BEFORE he sat down at his desk and did the work.

Does the bank CEO deserve his compensation? Well, most people are questioning that right now. I'm surprised it's taken a massive financial crisis for that to happen, but at least folks are asking.

Since we've been in a massive artistic crisis for decades, maybe people have given up on asking whether the top .5% of artists [http://www.forbes.com/lists/2009/53/celebrity-09_The-Celebrity-100_EarningsPrevYear.html] deserve their monetary compensation. If I sing and prance around on stage, am I entitled to \$110 million a year? It's the same work Madonna does, and that's what she makes. But Madonna arranged to be paid in advance of the singing and prancing, and performed it as work.

And if artists deserve to be compensated, then how much do they deserve? Isn't art priceless? How do you determine how much it's worth?

We could let the market decide. That could work... IF WE GET RID OF MONOPOLIES. The Free Market only works without monopolies. Information monopolies like copyright destroy that system. I'm all for allowing the Free Market to function, but it can only function without copyright.

Indeed, Madonna is not compensated as an artist; she is reaping profits from her information monopoly — that is, the copyright that restricts her Art. So if Madonna is your model, you aren't rooting for artists; you are rooting for monopolists. If your mechanism for "compensating" artists requires them to become monopolists and to grow and position their monopolies as monopolists do, then you are championing monopolies, not Art.

Art is not a commodity, it is a gift. If you want to produce a commodity, negotiate its worth in advance. Art is made on the initiative of the artist. Otherwise, it's commissioned work, which obviously compensates the worker. But the the commissioner is often a corporation or investment group, who will expect a monopolist's return on their investment. So the pro-copyright argument is simply in favor of maintaining the oligarchy whose elites happen to be the main patrons of art in our age. It's like supporting monarchies because kings and queens patronize artists.

This may be hard to hear, but: many artists who claim they just want to eat and pay rent are lying (perhaps to themselves). Most artists don't want a living wage — they want to win the lottery. Suggest to most filmmakers and musicians that "success" is about \$75,000 a year, and they'll turn up their noses. You call that a jackpot? They're only in it for the millions, baby. If that means working a day job and remaining obscure, so be it. Millions need to be poor so that one can be rich; they're willing to do their time being poor, so that one day they can be rich at the expense of others. Their turn will come, they think.

I suggest playing a different game entirely, because the lottery is a tax on people who are bad at math. But those kinds of artists want to play the lottery more than they want their art to reach people.

I do not mean to suggest that all artists have this attitude. There are also those who would be quite happy with a living wage; this is good, because that's a much more realistic expectation for even a very talented artist. The problem is that our copyright discourse is dominated by the lottery attitude, such that when people say "Artists should be paid for the work" what they really mean is "All Art should be monopolized, so that some Artists can have a tiny chance of maybe getting rich one day."

The best way for art to "compete" in a "free market" is to flow freely. The Internet makes it easy for an artist to give their work to an audience. It also makes it easy for audiences to return the gift. Giving is quite different from paying or being extorted. Money given is different from money coerced. It is a free transaction.

Not everyone will like a particular work of art. I don't think people who dislike a work should be obligated to pay for it. Certainly works that offend, nauseate, or bore me, don't inspire me to support their creators. But works that move and inspire me also move me to support their creators. I am touched by the Artist's love, and want to offer something in return. Money is an obvious choice: the Artist can almost certainly use it. But it's not always the right choice. I'm moved by many Beatles tunes, but I'm not inspired to send a check to Paul McCartney. He doesn't need the money (not to mention he's a big time monopolist). However, money is almost always an appropriate gift for a non-rich (read: typical) artist. It will be appreciated, and it's not so personal as to be disturbing or threatening.

The Internet makes it very easy for fans to voluntarily send money to artists.

It's really simple. Art competes with other art on the basis of quality. The Internet allows it to spread, to reach as many people as possible. Those who enjoy it have an easy mechanism to give back to the Artist if they are so moved. Not everyone will be so moved, nor should they be. Not everyone has to like everything. Not everything can touch us.

In conclusion:

Artists are NOT inherently entitled to monetary compensation for their Art. However we as a society can decide to support the Arts. The problem with this is that 95% of the Arts sucks. Most of us don't want to be supporting artists that suck, nor allowing government committees to determine what is and is not worthy of support. My NYSCA grant rejection and its [attendant comments](#) [9] have taught me never to trust government arts agencies. I'll gladly accept funds from them, but I'm acutely aware that they aren't reliably competent to separate the wheat from the chaff.

The best way society can support the Arts is to allow Art to spread, and to continue to encourage giving money to artists. That seems pretty natural to most people anyway, and it doesn't infringe on anyone's freedom.



Why Artists Share



By **Nina Paley**

All creators get to decide what happens to our work. We can keep it secret, and not show it to anyone. We can keep it private, and limit access to private parties. Or we can make it public, by publishing it.

Once you've made a work public, it is public. So if you don't want people sharing your work, please, please, keep it secret or private.

I've often wondered why "creators" (or corporations) get so upset when the public accesses their work, after they've made it public. If

you can't stand people looking at it without your permission, why not keep it locked up in a vault somewhere? No one's forcing you to publish; why insist on doing so, and then claim to be victimized by your own audience?

The answer is that a work has little or no value unless it's shared. The more people take it in, the more valuable it becomes. A work has no cultural value except what the audience gives it. In other words, A WORK'S VALUE COMES FROM THE AUDIENCE.

[Sita Sings the Blues](#) [1] is tremendously valuable now, and its value increases every time someone watches it. Back when I finished the film in 2008, and hardly anyone knew about it, it wasn't worth much. The very worst thing that can happen to a film is nobody sees it: that makes it worthless. Lots of people seeing the film make it valuable.

Artists make an enormous mistake when they believe a work's value comes from themselves. Some of it comes from the artist. Most of it comes from the audience.

Most filmmakers get paid on the "front-end," for their time (by investors, patrons, grants, etc.), and even with strict copyright and commercial distribution, make almost no royalties on the back-end. The audience isn't paid for their time at all.

I contributed about 7,800 hours to making *Sita*. That's a lot of time, and every hour I put into it makes the film more valuable. I conservatively estimate the audience has contributed at least 300,000 hours to

Sita, probably a lot more. Every hour they put into it makes it more valuable too. They've put a lot more hours into it than I have, and I haven't paid them a dime. Yet I enjoy attribution for the film, and all this value accrues to me! Sweet.

But if you still don't believe that the value comes from the audience, and is instead inherent to the work itself, then by all means please keep your work safely locked away, and don't publish it.

Breaking the bargain: copyright extensions violate "moral rights"

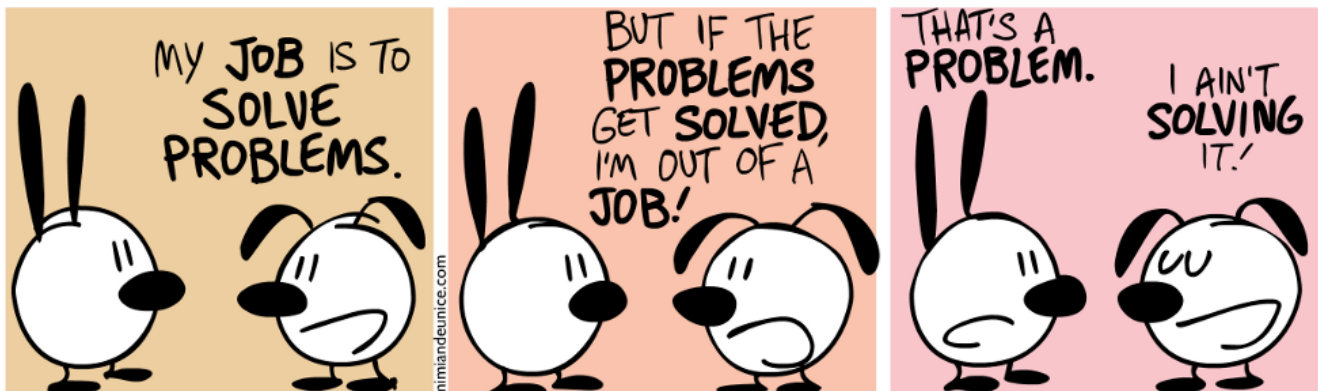


By **Nina Paley** and **Karl Fogel**

When the copyright industry lobbies for extensions to already-long copyright terms, they always present it as a way of giving the artists of the past their due — as a further protection of the "moral rights" that artists have in their creations.

But consider this: many artists of the past were forced to sign over their copyrights in order to work at all. They may have taken comfort in the fact that copyright would expire after a set time, and in knowing that people would eventually be able to share their work freely. Today, when copyright terms are continually extended, we should stop and wonder if these extensions go *against* the wishes of the works' dead creators. Few artists of the 1920's or 30's had the option of saying, "I want people to share my work", but they at least knew that copyrights would expire after 28 years — if the terms had been left alone, that is — and this may have made a temporary lockup more acceptable to them.

How many of those artists are rolling over in their graves now, as copyright is continually extended? Just because the Disney Corporation thinks copyright should be forever doesn't mean the thousands of artists whose works are now locked up thought so, or would think so now. The fact that so many artists are adopting Creative Commons licenses today indicates that many artists believe otherwise. If artists have "moral rights" to their works, surely extending copyright terms *without their consent* violates those rights.



Cease and Desist Censorship



By Karl Fogel

A US court has found that copyright law can cover "cease-and-desist letters", that is, letters sent by copyright holders telling someone to stop distributing copyrighted content.

Cease-and-desist letters are frequently used as tools of censorship (as **Chilling Effects** [<http://www.chillingeffects.org>] has ably documented).

A common scenario is that someone gets upset at having something of theirs quoted, and is able to shut down the quotation by claiming copyright over its text and then sending C&D letters to anyone who displays it. The quoted text is not royalty-generating for the copyright holder (not that it would excuse censorship even if it were); rather, the sender of the C&D is simply using copyright law as a tool to prevent the publication of potentially embarrassing information — that is, to censor.

The recipients of C&D letters often don't have the legal resources to fight them, but they at least can cause publicity problems for the sender by posting the letters. "*Look, Global MegaCorp is trying to force us to stop posting their research papers, in which their own scientists determine that their products kill kittens. Read their letter here!*" And by drawing attention to the attempted censorship, these organizations are sometimes able to raise enough resources to fight the C&D order in a legal arena.

But now a lawyer who sends C&D letters has persuaded a judge that *the texts of the letters themselves* can be copyrighted, and therefore recipients can be enjoined from displaying them publicly.

That's right: they can censor you, and then they get to censor your ability to talk about the exact way in which you've been censored. Lovely, isn't it?

The fundamental problem here is copyright law's promiscuous tendency to assign a monopoly-empowered owner to every snippet of text (or music, or video) out there, no matter what the consequences to society. As far as the law goes, the judge's reasoning may well be sound. I'm not a lawyer, but his finding (Case No. MS-07-6236-EJL-MHW) actually seems to make sense within the crazy framework of copyright law:

Under the DMCA, the copyright holder need only plead a prima facie case of copyright infringement. In re: Verizon Internet Servs., Inc., 257 F. Supp. 2d 244, 263 (D.D.C. 2003). A certificate of registration of a copyright constitutes prima facie evidence of the validity of the copyright and facts stated in the certificate. 17 U.S.C. Section 410(c). Melaleuca has registered the Sheppard Letter with the Copyright Office. See Supplemental Filing Re: Copyright Registration Certificate for Sheppard Letter, Ex. 1 (Docket No. 18-2). This is prima facie evidence that the Sheppard Letter is copyrighted and satisfies the first prong of demonstrating a prima facie case of copyright infringement. 43SB has valid arguments and enforcing this subpoena pre-litigation may have far-reaching consequences, therefore some preliminary examination of the potential claim is necessary. However, the Court will not go into an in-depth analysis of the merits of a copyright infringement claim in determining whether to quash this subpoena. It is sufficient in this instance that Melaleuca has

registered the Sheppard Letter with the Copyright Office.

The party seeking a subpoena must also make a prima facie showing of copying of constituent elements of the work that are original. See In re: Verizon Servs., Inc., 257 F. Supp. 2d 244, 263 (D.D.C. 2003). The entire Sheppard Letter was posted on the Website by user "d2." This suffices to show a copying of constituent elements of the work that are original by user "d2." Therefore, the Court finds that all the elements necessary for a subpoena to issue under 17 U.S.C. Section 512(h), including the notification requirements of section 512(c)(3)(A) and the prima facie case, have been satisfied for user "d2." The Court recommends that the motion to quash with respect to "d2" be denied.

(I think the full text of the decision is here [<http://www.internetlibrary.com/pdf/Subpoena-43sb.com-D-Idaho.pdf>], which I found via a link from this summary [http://www.internetlibrary.com/cases/lib_case531.cfm] at the Internet Library of Law and Court Decisions. Note that the principal issue seems actually be a motion to quash a subpoena seeking the identity of a comment poster, and the finding of copyrightability of the C&D letter is merely part of that decision. However, I am not a lawyer, and would appreciate any comments lawyers might have on the structure of this decision and its effectiveness as precedent.)

What's interesting about the whole situation (aside from its obvious irony) is the implication that at least some senders of C&D letters *know* that there's something shameful in what they're doing. At least, they are clearly aware that the public will perceive them as attempting to bully their targets into silence. It's a rare acknowledgement from the copyright industry (or at least from John W. Dozier, Jr., the lawyer who [started this](#) [5]) that the public understands how copyright law is used to censor — for otherwise, why object to cease-and-desist letters being displayed? If they thought their requests were reasonable, they wouldn't mind them being made public.

The question now is how to get more people to understand that not only is it censorship when you get a C&D letter for posting memos (or C&D letters), it's also censorship when you're not allowed to translate a book you like, or are prohibited from making a derivative work without the approval of the author of the original work.





Seen Any Ghost Works Lately?

By **Karl Fogel**

There's a famous phenomenon in copyright known as the *orphan works* problem. It refers to the situation in which the copyright owner of a given work cannot be found. This effectively prevents others from using such a work as part of a new project. For example, if you want to make a movie based on a novel, you must first get permission from the novel's copyright holder. But if the novel is an orphan work, then you can't even

find the copyright holder. Technically speaking, you could proceed without permission — but you would do so at your own risk. The copyright owner could emerge at any time and demand penalties. You might end up having to pay damages; worse, you might have to abandon or censor your derivative work, no matter how much effort you'd put into it.

Related to the problem of orphan works is another problem, much more serious, yet much less discussed. I call it the *ghost works* problem. Ghost works are all the works that never get made in the first place, or are made but not released, because copyright concerns prevent them either from being started or from being distributed. Every project that dares not base itself on an orphan work becomes a ghost work, but there are many more ghost works beyond that. Indeed, it would be fair to say that today *most* works are ghost works. That is, most works either don't exist or are not accessible, because copyright obstructs them. Whenever you walk into a bookstore, survey the shelves around you and imagine them to be 90% empty, for in a sense they are.

That might sound surprising. After all, the shelves look full, don't they? To see why they are not, let's start with an inverse example: a classic work that (fortunately) isn't a ghost work, but easily could have been, had its authors lived under the modern copyright regime.

In April 2007, the singer Max Ziff and I gave a concert at the Berkeley Piano Club, in Berkeley, California. We performed one of the great works of nineteenth-century German song: *Die Schöne Müllerin*, Franz Schubert's musical setting of twenty poems by Wilhelm Müller. Müller and Schubert were not a team, though. In fact, when Müller wrote the poems, around 1820, it was with the intention that an entirely different composer, Ludwig Berger, would set them to music, which Berger did. Müller and Schubert never met, and Müller apparently never even knew that Schubert too had set his poems to music.

Not that Schubert was trying to hide anything from Müller. It was simply that, at the time, there was no cultural expectation that one must ask permission before making a derivative work from someone else's original work. Müller's poems, having been published, were now considered part of the common culture, and if composers wanted to write songs based on them, they were free to do so. To our eternal benefit, Franz Schubert had this freedom: *Die Schöne Müllerin* is a truly inspired piece of music, one that has influenced generations of singers and composers.

Our concert thus depended on the public domain in two ways. One way is obvious: *Die Schöne Müllerin* is, legally, in the public domain today, so we are free to perform it without arranging royalty payments to anyone. But there is a deeper dependency, too: this music would not exist in the first place had there not been a healthy public domain *at the time the poems were written*.

Imagine if Müller and Schubert had lived in the present day, instead of the early nineteenth century. Müller writes his poems, intending for Ludwig Berger to set them to music; Berger does so. Then a mostly unknown composer, Franz Schubert, appears out of the blue, wishing to set them to his own music and asking Müller's permission. But Müller can't give permission — he doesn't own the copyright anymore, his publisher does, and the publisher, not wishing to encourage competition with the Berger settings, is inclined to refuse. Perhaps Schubert could pay for the privilege? But no, he doesn't have those kinds of resources. Or perhaps he'd like to negotiate a royalty-sharing arrangement? But Schubert has no lawyer, and no head for haggling over contracts. He's a composer, not a negotiator. Well then, he is free to set the songs for his private enjoyment (that's "fair use") but he certainly may not distribute them!

In all likelihood, things wouldn't even get that far, of course. Instead, Schubert would know in advance that he cannot always follow where his inspiration leads, when where it leads him is into someone else's copyrighted territory. Instead, he would just accept that the work of most of his contemporaries is out-of-bounds for someone like him, an unknown with no resources. And so we would not have *Die Schöne Müllerin...* nor *Die Winterreise* (another of his song cycles), nor many of his individual songs, which often set the work of living poets.

And that's just one composer.

This exercise in imagination highlights one of the most insidious aspects of the ghost works problem: that it cannot be easily measured, no matter how great its magnitude. We can point to an existing album, a movie, or a book and say "There! There is that thing, that physical object, whose existence is beyond doubt." But how can we point to something that is not there? How can we know what we do *not* have? We can only measure the loss indirectly; nevertheless, there is compelling anecdotal evidence that it is large.

Some of this evidence comes from the world of free and open source software, where it is traditional not only that the software itself be released under open copyright licenses, but that the software's documentation be similarly licensed. This means, among other things, that derivative works such as translations can be made by anyone. In theory, this could be done without permission or cooperation from the original authors, but in practice translations are almost always authorized and approved, because cooperation is easier than territorialism.

The result of this freedom is that the documentation for virtually all major open source programs, and many minor ones, has been translated into several languages, usually enough languages to cover the vast majority of the software's user base. Furthermore, the translations are usually kept up-to-date as the software and its documentation evolve.

This phenomenon is not limited to technical documentation. In late 2005, I published a book entitled *Producing Open Source Software: How to Run a Successful Free Software Project*. The publisher, O'Reilly Media, although marketing the book through traditional trade and bookstore channels, agreed to release it under a permissive (open source) copyright. Accordingly, I put the book's full text online at producingoss.com — and pretty soon people showed up to translate it! I did nothing to seek out translators, except release the book under a liberal license; only after the first translators showed up did I put a notice on the front page soliciting more. Now we've got a German translation under very active development (with two separate translators who only met through cooperating on this project), a Hebrew one happening somewhat more slowly, and some recent arrivals looking at doing a Chinese version.

This is happening with a book that has, let's face it, a fairly limited audience. Not only that, it's the

second time this has happened to a book I've published (see cvsbook.red-bean.com). Once could be coincidence; twice is starting to look like a pattern. And I'm only using my own books as examples because they're the first thing that came to mind. There are hundreds of open source projects that could tell a similar tale about their documentation. The lesson to draw here is that, were it not for copyright restrictions, most books in the world would be translated into several languages. After all, the better the book, the more some multilingual reader will be motivated to translate it. The translation doesn't have to be perfect, because there will also be people who show up to edit it. These projects tend to self-organize in exactly the same way that open source software projects do.

But under the current copyright regime, if you want to release a translation of a book that was published under traditional restrictions, you don't just sit down and start translating. Instead, you start by negotiating the *right* to translate — a process which is completely unrelated to actually translating, and is also daunting, time-consuming, and likely to fail. It's hard to imagine a more potent gumption sink than "rights negotiation". The mere prospect is enough to shut down most translation projects — which is why I look at those bookstore shelves and see them as mostly empty.

For those who leave rights negotiation for later, the penalties can be severe indeed. Recently, I opened the April 2nd, 2007 issue of the *New Yorker* to see the following notice from David Denby in the "Critic's Notebook" section:

In 1977, Charles Burnett, a U.C.L.A. film student, made his thesis film, "Killer of Sheep," a fictional portrait of life in the Watts section of Los Angeles, for less than ten thousand dollars. The film has attained legendary status, but it has never been released theatrically before, because of music-rights issues. Burnett used many kinds of African-American music on the soundtrack, and the movie itself has the bedraggled eloquence of an old blues record. [...]

In other words, for thirty years — long past the time when its topics were contemporary, long past when it could have had the most impact and been most appreciated — a great film has languished unseen. For thirty years, *Killer of Sheep* was a ghost work. And to what end? Movie licensing royalties are probably not why those musicians recorded that music, and are in general not a significant part of most musicians' incomes. That a few musicians occasionally hit the royalties jackpot is indisputable, but does that skewed and random result really justify the censoring of a film for three decades?

Now sensitized to the presence of ghost works all around us, I usually don't need to go out of my way to find examples. Instead, I can depend on them finding me with some regularity. Such was the case here. While writing this article, I opened my *New Yorker* and saw the above piece. I could have chosen from several other examples that crossed my path in the last week — and those are just the stories that someone bothers to tell. This fact alone is a clue to the size of the problem.

If one person can gather a few examples of ghost works without even trying, many people working together can really start to catalogue the problem. Maybe after we have enough we'll start to notice some patterns. So please keep your eyes open, and if a ghost work crosses your path, let us know. Our contact page is <http://www.questioncopyright.org/contact>.

Going on the Offensive: Abolition or Reform?



By **Karl Fogel**

How bad is the current copyright system? Should we push for abolition, or just radical reform?

Both. There are many people for whom abolition is too large a step, at least right now, but who see how broken things are and are willing to consider even drastic reforms. A reader recently pointed to a particularly good article entitled [Some thoughts on a "Copyright Offensive"](#) [1]. As he wrote:

We need a set of proposals that we can push. They need to be such that they can make the situation better. They need to be such that we can reach a compromise on them that will still make things better.

In that spirit, here's a proposal, loosely adapted from the one in that article. If we're not going to abolish copyright, let's at least try to make it benefit the public:

1. **Share-alike protections come for free.** No registration is required for works under "share alike" licenses (licenses that require derivative works to also be shareable).
2. **Restrictions do not come free; they require eventual registration.** If a work is to be under restrictive copyright, then within two years after publication, it must be marked and registered with the copyright office. (Registration can be done electronically now, so this is no longer the burden it was when the United States ceased to require registration as part of the conditions for joining the Berne Convention.)
3. **Once a work is registered, there is a yearly tax to maintain the copyright** That is, charge a fee for the maintenance of monopoly privileges, just as in other industries.
4. **The copyright tax is 1% of the value of the covered work, as declared by the copyright holder.** The holder is motivated to declare an honest value by having to agree to liberate the work (make it public domain or sharealike) on payment by anyone of the full declared value. The holder may adjust the declared value up or down upon reregistration each year; the fee is recalculated accordingly. See [Balanced Buyout](#) (below) for details.
5. **Copyright lasts for 10 years, then the work converts to sharealike or the public domain, at the holder's discretion.** If the holder does not declare a preference, the default is sharealike.
6. **Sharealike terms do not expire.**
7. **Separate laws to protect attribution, independently of copyright.** Attribution laws would apply equally to copyrighted, sharealike, and public domain works, since authorship is independent of copyright status.

Balanced Buyout: How to Convert Monopolies into Markets



By **Karl Fogel**

One of the biggest problems with today's copyright system (and patent system, for that matter) is that there is no economic pressure pushing works toward the public domain. Instead, the incentives are all structured toward copyrighting for as long as possible — far past the point of really benefitting even the copyright holder, let alone the public. Below is a proposal for a truly balanced policy, one that that would give copyright holders a motivation to release works sooner, and give the public a way to influence how long any particular work stays under copyright.

This article describes a new copyright system, one designed to reflect the public's interest in moving works into the public domain, while at the same time preserving the most useful market characteristics of the current system. It works through a tempered monopoly: instead of offering today's automatic, fixed-term, and essentially zero-cost copyright grant, it offers a monopoly whose value and duration are based on a combination of the public's and the creator's interests, which are not necessarily at odds.

Best of all, it is simple and low-overhead. It does not require any complex negotiations, third-party assessments, or intricate pricing formulas. Here's how it works:

First, new creations would still get an initial automatic copyright term, but fairly short: on the order of three to five years. Today's copyright terms automatically last many decades — holders are given years of monopoly power regardless of whether they actually want or need it. Thus the first step is to arrange things so that, if the owner does nothing, works will enter the public domain much sooner than they would today.

Later we'll look at the question of initial term lengths in more detail. For now, let's focus on the moment when a work is about to default into the public domain under this new system.

Assuming the copyright owner takes no further action, the work just enters the public domain [1].

But there's an alternative: instead of letting the monopoly lapse completely, the copyright owner can choose to register the work each year for continuation of copyright, with a registration fee *proportional to the self-declared value of the work*. That is, the copyright owner picks a number of dollars that she claims the work is worth. It can be any number at all, but the yearly registration fee will be a percentage of it — for discussion's sake, say 2%. (The exact proportions don't matter here: it could be 1% or 5% instead of 2%, registration could be semi-yearly instead of yearly, etc. The idea is the same, regardless of the details.)

Now comes the key: since that declared value is now a matter of public record, anyone can pay it to the copyright owner to liberate the work into the public domain. This would be a mandatory transaction: the copyright holder has declared what the work is worth, and has an incentive not to declare too high, because she'll have to pay a percentage of it to renew every year. Anyone willing to pay the total amount can cause the work to go into the public domain.

Because the value of a work may change over time, the registrant may adjust the declared value up or down each year when renewing the registration [2]. This is also one of the reasons behind that initial brief (but free) monopoly term: it gives the copyright holder a chance to see what the work is worth, and she can use that information to decide how much to register the work for when the initial term ends.

Let's run through an example. Suppose I write my great novel, "*The Helprin Affair*". For a brief period of time, I have a regular copyright, just like today. After that, I decide to register to keep my copyright. Calculating (based on sales so far) that my novel is worth US \$100,000, I therefore pay \$2000 to the copyright office, which I can afford, because the novel has been selling strongly and I'm sure I'll make that back in royalties this year too. The next year, I make the same decision... But eventually, there will come a time when it's no longer worth it to me. At that point, I can either reduce the declared value, so as to pay a smaller fee, or release the work entirely. (There should be an upper limit on renewals, however; no work should be kept out of the public domain permanently. Monopolies are still monopolies, after all.)

At any time after my initial registration, some third party can look up the declared value of "*The Helprin Affair*" in the copyright office's records, and pay me \$100,000 to liberate it on the spot, or in later years perhaps less or more, if I've changed the declared value in subsequent registrations.

Note that this is not a purchase of the copyright itself, but rather a liberation of the work from copyright entirely. People would still be free to lease or sell their copyrights as before, for whatever price they can get (which, interestingly, may be higher or lower than the registered value — the market dynamics behind that decision are just as rich as those involved in determining a work's value under today's copyright system). But whoever the owner is, whether the author or someone else, they're responsible for keeping up the registration. And while the work is still under registration, anyone can come along and pay the registered owner the declared value to liberate it. The justification for making this a mandatory transaction is that since the copyright owner chose the price in the first place, it is by definition fair, and the public's ultimate interest is in having the work be available to *everyone*, without restriction.

The initial term, for which no registration is required, has some purposes beyond just giving the creator a chance to assess the market value of the work.

First, requiring explicit registration from the very beginning would penalize small-scale artists disproportionately: they are likely to be short of resources and to either forget to register, or not know how. They would thus be unfairly disadvantaged in comparison to those working with publishers, who have a legal staff to remind them of registration requirements. But after an artist has a chance to see a work succeed, they're not likely to forget to register it (though a few may still forget — no system is perfect).

Another reason to grant a free initial period of copyright is conservatism. Although I'm not convinced that copyright is truly necessary at all in the Internet age, there is at least an argument for giving new works a "clear landing space" for a few years after their creation: a default exclusive copyright, much like today's but lasting a shorter time, can help give the work time to establish its own identity. Again, I'm not sure this is really necessary — but it wouldn't be excessively harmful, and it might make a lot of people more comfortable with reform.

There is a balancing act going on here. It may be useful for the original work to have time to become known on its own terms, before derivatives appear that capitalize on the momentum of the original work's initial appearance but that might also eclipse it before it has a chance to make an impression. On

the other hand, we also want derivatives to become possible during the "reaction cycle" of the original work, that is, during the time when the original work is still relevant, so that derivatives have a chance to be meaningful responses. (This is very similar to the [right to fork](#) in open source software; see **The Wind Done Gone** [http://en.wikipedia.org/wiki/The_Wind_Done_Gone] for an example of why this right is important in art).

So what's an appropriate amount of time for the original work to make its splash, before having to contend with derivatives? I won't pretend to know for sure, but for the purposes of discussion, let's say three years. Instinctively, anything over five years feels too long to me, and less than a year feels too short. But it doesn't matter here what the exact number is; three will do for now. That's a period of time within which most royalty-generating works make the majority of their revenue anyway. Registrations could then continue the monopoly for another ten even fifteen years (though I think the latter number still too high, because it's so punishing to independent derivative works).

While this proposal is a compromise, it's at least a compromise tilted toward the public interest. By analogy, think of a homeowner who cuts a driveway opening onto a public street, in order to gain access to a private garage. If I take a streetside parking space away from the public, I expect to pay the city (that is, the public) a fee, and usually annually, too, not just a one-time fee. Similarly, a copyright owner who wants to keep a work out of the public domain should pay for that privilege. But unlike a garage, this privilege need not be permanent, because losing monopoly control over a work after roughly a decade is not as serious as losing one's indoor parking space.

This system would go a long way toward alleviating the [orphan works](#) [see above] problem, by ensuring that the copyright owner of a work could be found (someone must be paying the fee over at the registry), and toward alleviating the [ghost works](#) problem (in which derivative works are suppressed), by setting a maximum amount of money that, for the vast majority of works, would probably still be affordable for a motivated party wanting to see that work in the public domain.

The copyright lobby frequently talks of finding an appropriate "balance" between the needs of creators and the needs of the public. Like many appeals to balance, it is usually a smokescreen for something else: in this case, for efforts to increase copyright terms and restrictions beyond their already grotesque lengths. The "balance" they're talking about neatly presupposes that creators and the public are somehow on opposite sides, while publishers are, curiously, absent from the picture altogether. (Their portrayal is also historically suspect, as copyright was designed to subsidize distribution more than creation — that is, it's been about publishers, not artists, all along.)

Nevertheless, why not take them at their word? If balance is such a good thing, let's have it: a true economic balance between the desire of copyright holders to retain exclusive control, and the desire of the public to let creative works roam freely. If that kind of balance is what we want, then the balanced buyout system comes much closer to it than do today's one-sided copyright laws.

[1] Entering the "public domain" does not, of course, mean that accurate attribution is no longer protected. Crediting and copying are entirely separate things, and while the public's interest is served when works can be copied and derived from, it is not served if people take credit for what they did not do. Thus it may be wise to legally protect attribution separately from copyright, although note that the absence of dedicated attribution laws has not resulted in a plague of plagiarism on the Internet. This is probably because widespread distribution and search tools are a far better protector of attribution than any law: there is no plagiarism problem in the world of open source software, for

example.

[2] Alternatively, the owner could be allowed to adjust the declared value at *any* time (perhaps even as a reaction to liberation offers), with the provision that any upward adjustment would require immediate payment of the difference between the old and new registration fees. However, the public domain would be better served by simply allowing adjustment only at fixed intervals: if the owner of a work can't figure out its market value and set the fee accordingly, that is no reason to favor the owner over the public when the work is being liberated at a price the owner once clearly thought sufficient.



What We Lose When We Embrace Copyright



by Danny Colligan

Preface

A lot of our work at Question Copyright happens in small chunks, because the issues and myths surrounding copyright are so numerous and interconnected that it's usually best to disentangle them and try to deal with them one by one. Slowly, brick by brick, we're trying to strengthen the idea that sharing culture is a civil right.

But sometimes it's nice to just come right out and make the case all at once too, through straightforward, rigorous reasoning. The article below from Danny Colligan is the best single legal and logical argument we've seen for the abolition of copyright: an "article of reference" that lays out the problems with copyright restrictions in a thorough, well-organized and well-referenced way. For any open-minded skeptics of copyright reform out there, this is the perfect place to start — if you've been wondering how people could possibly object to copyright, the answer is below! —The Editors

Scope of this article

This article is intended for a general audience. No technical nor legal background is assumed. Also, I only examine American copyright law here.

Introduction

With the advent of computers and computer network technology, copyright law has become increasingly relevant in the average American's life. One of the themes in the relationship between technology and law has been that law frequently lags behind technology. Copyright law, however, goes even further — it plainly contradicts the realities of modern technology. Specifically, computers and computer networks copy information, often without the explicit consent of any person, and copyright law criminalizes such copying. This mismatch of legality and reality poses devastating consequences.

The downsides to copyright law are legion. Not only does copyright pose large economic costs to society, but it degrades fundamental civic institutions as well. Privacy and due process are significantly eroded under copyright law. Furthermore, academic research is stalled, the public domain is curtailed and the Internet is handicapped. The relentless expansion in the scope of copyright law threatens to take additional victims. Alleviating these problems will require nothing less than the complete elimination of copyright law.

What is copyright?

To quote from the US Copyright Office:

"Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works... [copyright] protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed... work is under copyright protection the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device." [\[27\]](#)

This explanation (taken from the FAQ of the US Copyright Office) is probably the clearest, most concise official explanation of copyright. Even so, it is rather complex. Let us review the more salient points, for clarity:

- Copyright covers artistic works
- Copyright on an artistic work is automatically granted once it is fixed in a tangible medium (Electronic Frontier Foundation co-founder John Perry Barlow draws the analogy: "In other words, the bottle [containing the wine is] protected, not the wine." [\[2\]](#))
- Copyright has its basis in the US Constitution

The FAQ neglects to mention what form of protection a copyright affords an author or why this protection might be desirable. A different document of the Copyright Office, "Copyright Basics," provides the answer:

"[Copyright] generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- To reproduce the work in copies or phonorecords;
- To prepare derivative works based upon the work;
- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- To perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio-visual works;
- To display the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work; and
- In the case of sound recordings... to perform the work publicly by means of a digital audio transmission.

... It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright." [\[28\]](#)

Again, penetrating the US Copyright Office's legalese can prove a difficult task, so let us decipher what this really says in layman's terms. The essential point is that *copyright is a monopoly on distribution*. The holder of the copyright on a work may do a variety of things with that work (distribute it, reproduce it, perform it, derive other works from it, display it publicly, etc.). Others may do those same

things with that work only with the explicit permission of the copyright holder. Any unauthorized distribution, reproduction, or performance (etc.) is a violation of the copyright holder's monopoly on those things and is therefore illegal. Violation can expose the infringer to both civil and criminal penalties.

The real rules can be found in Title 17 of the US legal code. [\[22\]](#)

Why does copyright exist?

Copyright exists because it is believed that monopolistic financial incentives stimulate artistic production. The same mentality held during the writing of the Constitution, when the Framers penned Article I, Section 8 Clause 8, which empowers the US Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [\[31\]](#)

Many scholars speak of a copyright "balance" between the rights that publishers have vs the rights that consumers have with regard to copyrighted works. But that term does not accurately capture the exchange that is taking place here. As Free Software Foundation founder Richard Stallman points out, the best analogy is that of a trade-off. Namely, society trades some of its freedoms (the freedom to distribute copies, to make derivative works, etc.) for a limited period of time in which the creator/monopolist has the exclusive right to all of these actions. After that period of time, the work falls into the public domain, at which time the monopoly is rescinded and anyone can do whatever they please with the work. [\[32\]](#)

What is copyright not?

Just as important as defining what copyright is is stating what it is not. Often, people wrongly conflate copyright with the very different issues of patents, trademarks, etc. with the umbrella term of "intellectual property." As Stallman puts it,

"The term 'intellectual property' is at best a catch-all to lump together disparate laws. Nonlawyers who hear one term applied to these various laws tend to assume they are based on a common principle and function similarly.

Nothing could be further from the case. These laws originated separately, evolved differently, cover different activities, have different rules, and raise different public policy issues." [\[13\]](#)

Furthermore, advocates of copyright often draw confusing analogies that attempt to equate copyright infringement with actual social ills such as plagiarism [\[A\]](#). These comparisons are invalid, and pointing them out as such will help to focus the discussion on the real issues.

Copyright has nothing to do with patents

Roughly speaking, copyright (US code title 17) applies to art whereas patents (US code title 35) apply to inventions. As an example, James Watt patented the steam engine since it was an invention, but would not have been able to patent a song that he wrote; a song falls into the legal domain of copyright. Patents, as opposed to copyrights, are not automatically granted by virtue of a work coming into existence — purported inventors must apply for and be granted a patent by the US Patent and Trademark Office. Patent law has its own serious problems and is also in desperate need of reform. But

that is a topic for another article. The important thing for our purposes is to understand that patent and copyright laws cover completely different arenas. [\[B\]](#)

Copyright has nothing to do with trademarks and identity

Essentially, trademark is a protection against fraud. When one buys a can of Coca-Cola off of the supermarket shelf, the Coca-Cola trademark informs the buyer that the can is a legitimate product of the Coca-Cola company. If another soda manufacturer put a Coca-Cola label on its own cans, that would be a deceptive practice — the one that the legal protections of trademark were explicitly designed to prevent. Trademark law protects *identity*: it allows parties (such as sellers and buyers) to interact with one another with a certain assurance — the assurance that they are conducting transactions with whom they believe they are conducting transactions. There is no overlap in what trademark law and copyright law cover. [\[F\]](#)

Copyright has nothing to do with attribution or plagiarism

Copyright infringement is also unrelated to plagiarism. Plagiarism is the act of passing someone else's work off as one's own; that is, failing to properly attribute the work to the correct creator. Copyright infringement is the act of distributing a work without the copyright holder's permission. To infringe on the copyright for the Beatles' "Hey Jude," I could, for instance, copy the song over a computer network to another location. In contrast, to *plagiarize* the Beatles' "Hey Jude," I would have to go around attempting to convince others that I actually wrote the song. [\[G\]](#)

Plainly, misattribution and copyright infringement are different things, but you would not know that from listening to, say, Hilary Rosen of the RIAA. Plagiarism is the cardinal academic and artistic sin, so it is no surprise that the content industry attempts to channel the outrage directed at plagiarizers for their own purposes:

The RIAA also indulges in one of the favorite tactics of the modern copyright lobby: equating illegal copying with the unrelated, and much more serious, offense of plagiarism. For example, Hilary Rosen, the (now former) head of the RIAA, used to speak at schools and colleges, urging the students to adopt the industry's views about information ownership. Here is her own description of how she presents the case:

Analogies are what really work best. I ask them, "What have you done last week?" They may say they wrote a paper on this or that. So I tell them, "Oh, you wrote a paper, and you got an A? Would it bother you if somebody could just take that paper and get an A too? Would that bug you?" So this sense of personal investment does ring true with people.

Since people who duplicate CDs do not usually replace the artist's name with their own, let's ask the question Hilary Rosen should have asked: "Would it bother you if somebody could just show a copy of your paper around, so other people could benefit from what you wrote, and see that you got an A?" Of course, the students would have answered "No, we aren't bothered by that at all," which isn't what Rosen wanted to hear. [\[12\]](#) [\[26\]](#)

Deliberate attempts to confuse copyright infringement with plagiarism only obscure the real issues behind the two distinct concepts, to the detriment of anyone attempting to understand them.

Copyright infringement is not "stealing" nor "theft" nor "piracy"

Copyright advocates will often use derogatory terms such as "stealing" or "theft" or "piracy" to describe copyright infringement. Many in the mainstream media use these terms without questioning the implicit assumptions in these words, which biases the discussion from the outset. It is worthwhile to conduct an examination to see if these phrases are apt descriptions of the activity their users seek to characterize.

Theft is the taking of another person's property without that person's consent. Does, say, transmitting a copyrighted music file over a computer network — a clear case of copyright infringement — fit this definition of theft? (Note neither the sender nor the recipient is the owner of the copyright for that file in this example.) It does not, for a few reasons. First, the music file is non-rivalrous and non-excludable — technical terms in economics that mean nobody has less music after a copy is made, and both people can still enjoy use of the file. Contrast this with, for instance, a car: if it is stolen, the owner clearly can not use it. But no one really "took" the file because nobody was deprived of the use of it. Second, both parties must consent to the transaction for the file to be transmitted. Thus consent is clearly given, in contrast to theft.

What people really mean when they say "Copyright infringement is theft" is "The copyright owner is not getting paid per-copy for this particular transaction, and he would have been paid if this had been a conventional commercial transaction to obtain the information, such as the sale of a CD at Tower Records." This statement rests on a set of shaky assumptions. In particular, if the recipient needed to pay for the information, would he have sought to obtain it in the first place? In more personal terms, would you have bought a CD at retail price if you couldn't have gotten it for free? Other economic and psychological objections to this premise are discussed in [\[44\]](#).

The meaning of "piracy" has changed over the years, depending on who is flinging the insult at whom. In its modern incarnation, it is tantamount to an accusation of "theft" via copyright infringement. [\[29\]](#) [\[9\]](#)

A brief aside on computers and computer networks

Before the advent of computer technology, making copies of any kind of work (a book, a film, musical notation for a song) was laborious and potentially expensive. [\[C\]](#) But copying is an activity that personal computer users do many times a day, whether they know it or not. Copyright laws regulate much of this copying, thus making copyright law much more applicable to the average person than before. Since the nature of modern computer technology is core to the main arguments of this article, it is useful to quickly review what computers do with regard to copying and transmission of information.

The nature of information

On a computer, "information" is anything that can be digitized — that is, encoded in a sequence of zeros and ones ("bits"). This definition includes, but is not limited to, movies, music, software, photographs, and books. Physical objects like furniture, land or clothing can't be digitized and so don't fit this definition.

Information has two important properties: it is both non-exclusive and non-rivalrous. "Non-exclusive" means that any number of people can access and use it simultaneously. "Non-rivalrous" means that one person having more information doesn't imply that another person has less. The matrix below gives some examples of other goods to put things in perspective: [\[30\]](#) [\[D\]](#)



	Excludable	Non-excludable
Rivalrous	Private goods: food, clothing, toys, furniture, cars	Common goods (Common-pool resources): fish, hunting game, water
Non-rivalrous	Club goods: satellite television	Public goods: national defense, free-to-air television, air, information

The nature of computers

Computers fundamentally depend on copying to successfully operate. Without the ability to copy, computers would be stripped of much of their functionality. Computers copy in two cases: upon the instruction of the user, and as a performance enhancement.

In the first case, a user often commands a computer to copy bits from one location to another. Usually this is done in the context of a file. A file is nothing but a stream of bits (and therefore information) which happens to be managed by a particular software abstraction called a "file system". Of course, users can copy bits across file systems as well, as when a user copies a music file to an iPod or other digital media device.

The second case: most computer users are familiar with files, but not all are familiar with how computers copy information without the explicit permission of a user. For performance reasons that are beyond the scope of this article, computers are continuously moving information back and forth through the "memory-storage hierarchy." This hierarchy consists of various physical components that make up a computer: the hard disk, main memory (RAM), caches, registers, etc. Each level of this hierarchy has different performance characteristics: hard disks are large but slow, whereas registers are very fast but also scarce. Pre-emptive copying between levels of the hierarchy, called "caching," is necessary for good computer performance. Caching is real copying, and it happens automatically and very frequently (perhaps hundreds of times a second) without any user control.

The nature of computer networks

Computer networks also fundamentally depend on copying to successfully operate. If you are viewing this article over a computer network, then several copies of this text were made in the process of displaying it on your screen.

The information that is this text was probably copied from disk to main memory in the remote server computer. The information was then sent over the Internet via many hops between routers. Routers are

the computers that enable the flow of information on the Internet. When a router receives information, it determines the destination of the information and then copies the information over a network connection to the next closest router to the destination (much like a central post office might inspect the destination street address of a letter and then deliver it to a closer branch office). Finally, when the information reached your computer, your computer copied the data from the network into main memory, and perhaps created a temporary file for that information. To display the text on your screen, the information was transformed in a way that would be legible and copied into a "frame buffer" — the part of main memory that controls what you see on the screen.

But there is even more copying going on than that! Just as computers "cache" information within the memory-storage hierarchy for performance reasons, computer networks also "cache" information at special computers at various points on the network to achieve good performance. It takes time to travel around the world to fetch information, so there are a variety of caches deployed throughout the world that remember certain information for a brief period of time. The result is this: for the period of time that a piece of information is cached, the distance that your computer needs to travel to get that information is significantly shortened — it only needs to go as far as the nearest cache, rather than the original source of the information. Again, this caching results in further copying of information automatically taking place without the explicit instruction of any user.

The nature of the Internet

The largest and best-known of all computer networks is, of course, the Internet. The Internet connects a multitude of disparate computer networks together to form a super-network where any computer that speaks IP ("Internet Protocol," not "Intellectual Property") can communicate with each other. Transmission of information over the Internet has four main properties: it is instantaneous, perfect, global and free.

Instantaneous:

Of course, transmission of information over the Internet is not instantaneous in the strict sense. Network latency is still bounded by the speed of light, and transmitting a large file like a DVD over a network still takes a non-negligible amount of time because bandwidth capacity is not infinite. However, network bandwidth is exponentially improving and is currently at the point where most Internet transmissions (web sites, images, etc.) are effectively instantaneous from a human perspective.

Perfect:

The Internet makes perfect copies of information. When a file is copied from one computer to another, the sequence of bits in that file at the destination computer is exactly the same as the sequence of bits in the origin computer. This is a marked contrast to older forms of copying (by hand, printing press, etc.) where a perfect copy was exceedingly difficult, if not outright impossible, to produce.

Global:

The Internet has no physical boundaries. Any computer connected to the Internet can contact any other computer on the Internet, regardless of its physical location.

Free:

Transmitting information over the Internet is essentially free in the *gratis* [\[E\]](#) sense. From the perspective of the end user, there is no marginal cost to sending an additional bit over the Internet.

Why copyright is detrimental to society

When it was invented, copyright seemed like a relatively benign legal instrument. Today, however, the implications of preventing copying of certain materials are downright insidious. What begins as a measure ostensibly for the public good instead leads to profound negative consequences for society. In this section I will enumerate some of these consequences.

Copyright enforcement necessarily entails monitoring of all computer communications, and therefore the destruction of online privacy

Laws exist to be enforced, otherwise they cease to have any power. The logical conclusion of enforcing copyright law is perfect monitoring of all systems that could potentially copy any copyrighted information. In the previous section, I established that computers are particularly good at making copies and the Internet is particularly good at distributing copies. Therefore, any enforcement of current copyright law would require surveillance of anything that goes in or out of a computer — a total monitoring of network communications. [\[H\]](#)

How would complete surveillance be implemented?

Routers and other computers on the Internet that copy information from source to destination don't actually look at the contents of the information to route the transmission. Instead, they only look at the headers — other information attached to the transmission which tells routers where to send the packet (the equivalent of the address on the outside of the envelope). Doing any additional inspection of the transmission beyond this simple routing is known as "Deep Packet Inspection" (DPI). DPI is the equivalent of the postman opening up envelopes sent through the postal service to look at their contents. With the use of DPI, any monitoring agent could determine the contents of the transmission and, perhaps with a little extra work, if those contents were copyrighted.

But the collateral damage of this scheme is huge. The fact is that there is no way to monitor for copyrighted content without monitoring all content. There is a reason why opening others' mail is a federal offense — postal privacy is necessary to preserve the confidence of those who use the postal service. The DPI of all Internet transmissions would be a similar offense, eliminating the privacy of any non-encrypted transaction over the Internet. [\[10\]](#)

Copyright law criminalizes a large percentage of the population

It should be clear at this point that anyone using computers, and especially computer networks, is probably guilty of some sort of copyright infringement. Every artistic work that is fixed in a tangible medium is automatically copyrighted, and computers copy things indiscriminately, often without the explicit approval of their users. This is a recipe for massive copyright infringement.

Infringement Nation

It might be surprising, however, just how much copyright law has permeated our lives, especially outside of the context of computer networks. In "Infringement Nation: Copyright Reform and the Law/Norm Gap," John Tehranian illustrates the ubiquity of copyright law by giving the hypothetical example of a law professor going through his day unknowingly accumulating copyright infringements. He doesn't do anything particularly out of the ordinary, but singing, taking photographs, etc. all somehow constitute a copyright infringement in their own unique way. At the end of the day, even without the use of file-sharing networks, Tehranian's hypothetical professor is liable for up to \$12.45 million in civil damages, to say nothing of any criminal charges that might be brought against him. It is a demonstration that many normal activities, even offline, serve to implicate a person in copyright infringement. [\[1\]](#)

The effects of large-scale criminality

Clearly, the United States is not prepared to throw a sizable percentage of its population into jail (if only for the lack of jail cell space). But a more subtle change has already taken place. Any kind of criminality erodes one's civil liberties on an individual level. If one is suspected of a crime, one might have one's phone tapped or house under surveillance or computer seized for inspection. If one is convicted of a crime, one might lose other privileges — travel, voting, etc. But a society in which everyone is presumptively guilty of a particular crime (copyright infringement, in this case) is a society in which individual rights can be revoked at the whim of the authorities. This state of affairs is a profound blow to personal security and civil liberties. Electronic Frontier Foundation attorney Fred von Lohmann elaborates:

"If you can treat someone as a putative lawbreaker... then all of a sudden a lot of basic civil liberty protections evaporate to one degree or another... If you're a copyright infringer, how can you hope to have any privacy rights? If you're a copyright infringer, how can you hope to be secure against seizures of your computer? How can you hope to continue to receive Internet access? ... Our sensibilities change as soon as we think, "Oh, well, but that person's a criminal, a lawbreaker." Well, what this campaign against file sharing has done is turn a remarkable percentage of the American Internet-using population into "law-breakers." ... So when we're talking about numbers like forty to sixty million Americans that are essentially copyright infringers, you create a situation where the civil liberties of those people are very much in peril in a general matter. [I don't] think [there is any] analog where you could randomly choose any person off the street and be confident that they were committing an unlawful act that could put them on the hook for potential felony liability or hundreds of millions of dollars of civil liability. Certainly we all speed, but speeding isn't the kind of an act for which we routinely forfeit civil liberties. Some people use drugs, and I think that's the closest analog, [but] many have noted that the war against drugs has eroded all of our civil liberties because it's treated so many Americans as criminals. Well, I think it's fair to say that file sharing is an order of magnitude larger number of Americans than drug use... If forty to sixty million Americans have become lawbreakers, then we're really on a slippery slope to lose a lot of civil liberties for all forty to sixty million of them." [\[25 p.207\]](#)

Copyright law chills academic research

Copyright has evolved from merely being a prohibition of distribution for commercial profit in certain cases to a device used to censor free speech when that speech is counter to a copyright holder's

financial interests. Researchers, in particular, have been affected. Two examples of this are the cases of Ed Felten and Dmitry Sklyarov.

Ed Felten

Ed Felten was a computer science professor who in April 2001 was preparing to submit a paper on the weaknesses in an encryption scheme developed by the Secure Digital Music Initiative. SDMI had previously invited anyone who thought they could break the encryption to attempt to do so, but only if they reported the results back to SDMI so they could improve the product. Felten and colleagues took up the challenge. But before presenting a paper documenting their exploits at an academic conference, Felten et al received a threat from SDMI that releasing their research could be illegal under the Digital Millennium Copyright Act. The logic behind this injunction was that "By publishing a paper describing how a copyright protection system could be circumvented, the RIAA lawyer suggested, Felten himself was distributing a circumvention technology. Thus, even though he was not himself infringing anyone's copyright, his academic paper was enabling others to infringe others' copyright." [\[25 p.155-158\]](#) [\[23\]](#)

Dmitry Sklyarov

In July 2001, Russian programmer Dmitry Sklyarov was arrested during the Defcon security conference in Las Vegas. At the conference he had publicized a way to circumvent the copy protection on Adobe System's eBooks. Sklyarov was eventually acquitted and allowed to return to Russia, but the case can hardly be seen as a conclusive victory for copyright law scope limitations. The jury acquitted Sklyarov on very narrow grounds that never really addressed the legitimacy or legality of copyright law itself: "Because both the defense and prosecution agreed that ElcomSoft [Sklyarov's employer] sold software designed to crack copyright protections, the case essentially turned on ElcomSoft's state of mind during the period it was offering the software." [\[38\]](#)

Not only does this intimidation suppress active research that the targets of the injunctions are doing, it also discourages future endeavors in the academic area. Sklyarov said he would make sure any more computer security research he did would have to decisively fall within the realm of legality (never mind how vaguely defined legality is in this space). [\[39\]](#) For a more exhaustive list of uses of DMCA notices to halt security research, see [\[40\]](#).

Copyright law's reach already extends to many things, and is expanding with no end in sight

The original provisions for copyright were very narrow. The original Copyright Act in the 18th century only endowed the authors of maps, charts and books with copyrights for fourteen years (28 with an optional one-time renewal), and only under certain conditions (authors had to be American, authors had to register their works, etc.). However, as copyright scholar Lawrence Lessig remarks in *The Future of Ideas*, "The distinctive feature of modern American copyright law is its almost limitless bloating — its expansion both in scope and in duration." [\[24 p.106\]](#)

Expansion in duration

Copyright's duration has expanded rapidly in the past half century after remaining relatively stagnant since the founding of the country. In 1831, Congress extended the maximum copyright term to 42 years and again in 1909 to 56 years. Since 1962, however, Congress has taken the liberty of extending copyright eleven times, with the Sonny Bono Copyright Term Extension Act of 1998 being the most recent extension. Congress also abolished the "renewal periods" in 1976, so that copyrighted works would not pass into the public domain even if the copyright holder had no interest in keeping his or her

copyright (or was otherwise unable to renew it). If that sounds like a negligible change, consider that in 1973, more than 85 percent of copyright owners failed to renew their copyright. Today, the maximum term of copyright stands at 95 years. [\[25 p.131-135\]](#)

Expansion in scope

The expansion in duration of copyright has mirrored its expansion in scope. As previously mentioned, only maps, charts and books were originally protected. Now, the question seems to be "What is not protected?" Protection extends to architecture, drama, performances, software, etc. The original Copyright Act only prohibited republishing, but modern copyright law prohibits any derivative works, performance or transformation of the original work. Renewals have been completely abolished. Registration for copyright has also been completely abolished — now it is automatically granted.

Lessig writes:

"If you write a book, your book is automatically protected. Indeed, not just your book. Every e-mail, every note to your spouse, every doodle, every creative act that's reduced to a tangible form — all of this is automatically copyrighted. There is no need to register or mark your work. The protection follows the creation, not the steps you take to protect it." [\[25 p.136-139\]](#)

Furthermore, original copyright law restricted only commercial activity. Modern copyright law restricts both commercial and noncommercial activity. [\[25 p.170-171\]](#)

Examples of copyright law expansion

The following three episodes demonstrate just how poisonous dramatically expanding copyright law can be.

1. The Sonny Bono Copyright Term Extension Act of 1998 was an especially egregious law because it implemented a retroactive copyright extension, meaning that it extended the copyright term for works that had already been created. This flies in the face of copyright's ostensible purpose, which is incentivize creation of works that had not already been brought into existence. It makes no sense to give more of a financial incentive to someone to create something that has already been created.
2. The state of Oregon is not unique, but particularly aggressive, in enforcing copyright law with regard to the reproduction of its own state law. Restricting the distribution of laws which one must follow in order to avoid becoming a criminal raises serious public policy concerns. How is one supposed to follow the law if copies of the law are not widely accessible and available? Furthermore, the public *paid* for these laws already, through taxes, not copyright royalties. [\[33\]](#)
3. The AACS Licensing Authority (tasked with administering the AACS copy protection scheme) issued Digital Millennium Copyright Act takedown notices — letters officially requesting the removal of material on copyright grounds — targeting a variety of sites. Those sites' infractions? Publishing a number that the AACS LA thought it had exclusive distribution of because the number was integral to its copy protection scheme [\[34\]](#). Ed Felten, no stranger to the DMCA himself, explains why claiming ownership over a number seems so orthogonal to the original purpose of copyright law:

"Giving a private party ownership of a number seems deeply wrong to people versed in mathematics and computer science. Letting a private group pick out many

millions of numbers (like the AACCS secret keys), and then simply declare ownership of them, seems even worse.

"While it's obvious why the creator of a movie or a song might deserve some special claim over the use of their creation, it's hard to see why anyone should be able to pick a number at random and unilaterally declare ownership of it. There is nothing creative about this number — indeed, it was chosen by a method designed to ensure that the resulting number was in no way special. It's just a number they picked out of a hat. And now they own it? ...

"When the great mathematician Leopold Kronecker wrote his famous dictum, "God created the integers; all else is the work of man", he meant that the basic structure of mathematics is part of the design of the universe. What God created, AACCS LA now wants to take away." [\[45\]](#)

For further examples of DMCA takedowns issued for supposed online infractions of copyright law, see [\[35\]](#).

What does the future hold?

If the past serves as a good predictor of the future, the reach of copyright law will arbitrarily extend in scope and duration. However, we don't even need to speculate about what legislators might consider implementing because many of the bills have already been introduced. Consider the INDUCE Act, which would effectively outlaw peer to peer networks [\[36\]](#). Or the Intellectual Property Protection Act, which does not simply criminalize copyright infringement but attempted copyright infringement as well [\[37\]](#). For even more copyright proposals, see the list on page 246 of *Against Intellectual Monopoly* [\[3\]](#).

Copyright law creates a corporate information police, undermining accountability and due process

The Digital Millennium Copyright Act empowers every content owner to be responsible for enforcing his or her copyrights. Large content corporations, such as the constituent members of the Motion Picture Association of America and Recording Industry Association of America, have not been timid about doing so. Their objective is not fairness nor justice; their objective is profit. Copyright law puts enforcement of the law in the hands of an ad hoc corporate information police who have a history of abusing their power.

Abusive, vindictive litigation

Violators of copyright infringement are liable for up to \$150,000 in damages per work under current copyright law. Needless to say, it is rare to find someone who can pay this amount. Using massive, unpayable potential damages as a cudgel, content industry lawyers often manage to convince would-be defendants to pay them around \$4,000 to avoid a lawsuit. In the case where this generous offer fails, the content industry has shown itself to be more than willing to bring the full brunt of its lawyers down on hapless folks including:

- Brittany Chan, who allegedly engaged in file sharing when she was 13 years old
- Defendants who are disabled and incapable of using a computer

- At least one defendant who was deceased — the RIAA intended to continue to move forward with the case before negative publicity caused the organization to withdraw the case [\[41\]](#)

The cards in these cases are incredibly stacked against the defendants. The content industry is suing under laws that they themselves pressed for passage in Congress. They are almost ensured a victory, since copying copyrighted content is something of which virtually every computer user is guilty. And the pockets of the content industry are deeper than those of the average defendant, since the plaintiffs tend not to pick wealthy people to sue. This dynamic flips the concept of due process on its head: guilt is assumed, and innocence must be proven.

A lack of accountability

Various studies have shown that the content industry lawyers are overzealous to the point of being irresponsible in issuing DMCA notices. Their strategy depends on the very imprecise practice of harvesting IP addresses from peer to peer networks and then attempting to identify a person based on his or her IP address. IP addresses usually do not have a one-to-one mapping to people. In fact, a research group at the University of Washington managed to receive 500 DMCA takedown notices for a printer on their network, which is incapable of any file sharing. [\[42\]](#) Similarly, a Princeton professor received many nonsensical DMCA takedown requests for services that were not running on his content distribution network. [\[21\]](#) The requirement to send one of these notices is a "good faith" belief that copyright infringement is taking place. However, there is no regulatory authority that needs to approve a sending of a notice. Additionally, copyright owners have an incentive to send out as many notices as possible, given that there is no downside for misidentification and the upside could be several thousand dollars or more. They are essentially a form of targeted spam, but unfortunately one that the recipient cannot afford to ignore.

Copyright law erodes the public domain and free culture

Copyright law exists, in theory, so that artistic works can be contributed to the public domain. When virtually no works are entering the public domain, however, the theoretical argument for copyright largely disappears. This is the case today: large content owning corporations own vast swaths of copyrights that they refuse to license to independent artists (or only do so at a high to unreasonably high rate [\[50\]](#)). The result is a culture controlled by the few corporate entities lucky enough to have amassed the necessary copyrights to reuse and remix the culture of the past one hundred years. These corporations profit from the government-enabled monopolistic largess flowing into their pockets, and the public loses. As Lessig puts it in *Free Culture*, "Never in our history have fewer had a legal right to control more of the development of our culture than now." [\[25 p.170\]](#)

But what about "fair use"?

Written into copyright law is an exception called "fair use." This provides a potential user of a copyrighted work the right to use that work, within limits. What these limits are, however, are not clearly defined. There exists a formula, written into the legal code, to determine whether a use of a copyrighted work is "fair" or not. Regardless of the input to the formula, the output is always the same: maybe it's fair use; talk to an attorney. This protection is decidedly flimsy. The case of filmmaker Jon Else is typical:

"I did, in fact, speak with one of your colleagues at Stanford Law School ... who confirmed that [my use of a clip from The Simpsons] was fair use. He also confirmed that Fox would "depose and litigate you to within an inch of your life," regardless of the merits of my

claim. He made clear that it would boil down to who had the bigger legal department and the deeper pockets, me or them." [\[25 p.98\]](#)

(Aside: "Fair use" is a term that I put in the same category as "intellectual property" and "piracy" as phrases that decidedly bias a discussion in favor of the interests of content owners. What makes use of a work unfair, by default? Why is use that is fair the exception? To unquestioningly use the term "fair use" is to not seriously address these important questions.)

Copyright law poses large economic costs to society

Not only does copyright law take a toll on privacy and due process, it also burdens society in terms of dollars. It is difficult to quantify the economic cost to society of having, maintaining, and enforcing copyright and I am not aware of any study that attempts to do so. However, it can be established that the costs are significant.

Costs come in two forms. The first is the actual transfer in dollars from one party to the other. The second cost is in time, which can be converted into dollars by considering the opportunity cost of dealing with copyright. Opportunity cost is the value of the next-best choice available for how that time could have been spent. For instance, the next-best choice for an artist to clearing the rights for a new work of art (which is a legal necessity) is making more art. The opportunity cost for the artist, therefore, is the profit he would have gained by making more art.

Here is a partial list of costs incurred to support the present American copyright apparatus:

- The cost of maintaining a US copyright office (and all time spent by individuals interacting with the office)
- The time spent by elected officials in crafting, debating and passing new copyright laws
- The cost to comply with copyright law by schools, libraries, photocopying businesses, etc.
- The time spent by US attorneys prosecuting criminal copyright cases
- The schooling and training of privately employed copyright lawyers
- The salaries of privately employed copyright lawyers
- The salaries of managers who oversee intellectual property divisions within a corporation
- The salaries of judges, bailiffs, stenographers, policemen, and other court employees when copyright cases are heard
- Royalties paid for copyright licenses
- Damages awarded in civil copyright lawsuits
- The salaries of lobbyists who advocate additional copyright reform
- Lastly and most importantly, the economic activity that would have occurred if the transmission, modification and/or redistribution of certain information were not prohibited

Copyright law prevents the Internet from fulfilling its promise

The Internet is the most powerful mechanism for human communication ever devised. The potential uses of free, instantaneous, global, perfect information distribution are practically limitless. Limitless, that is, if we do not hinder ourselves with the restrictions of copyright law.

Per-copy royalties are nonsensical when copying is free and unlimited

The marginal cost of making a copy of information on the network is essentially zero. Since there is no quota on maximal copying, one can make as many copies as one wants of particular information; the supply is infinite. A supply and demand model of economics dictates that if supply is infinite, prices drop to zero. The only reason that anyone should pay for a copy of anything is that there is a limited number of copies. In other words, copies are scarce because there is a finite supply. Charging for every copy might make sense in certain kinds of markets, but not one for non-rivalrous, non-excludable goods like information.

John Gilmore's take

Electronic Frontier Foundation co-founder John Gilmore has similar sentiments:

"What is wrong is that we have invented the technology to eliminate scarcity, but we are deliberately throwing it away to benefit those who profit from scarcity. We now have the means to duplicate any kind of information that can be compactly represented in digital media. We can replicate it worldwide, to billions of people, for very low costs, affordable by individuals. We are working hard on technologies that will permit other sorts of resources to be duplicated this easily, including arbitrary physical objects ("nanotechnology"; see <http://www.foresight.org>). The progress of science, technology, and free markets have produced an end to many kinds of scarcity. A hundred years ago, more than 99% of Americans were still using outhouses, and one out of every ten children died in infancy. Now even the poorest Americans have cars, television, telephones, heat, clean water, sanitary sewers — things that the richest millionaires of 1900 could not buy. These technologies promise an end to physical want in the near future.

"We should be rejoicing in mutually creating a heaven on earth! Instead, those crabbed souls who make their living from perpetuating scarcity are sneaking around, convincing co-conspirators to chain our cheap duplication technology so that it won't make copies — at least not of the kind of goods they want to sell us. This is the worst sort of economic protectionism — begging your own society for the benefit of an inefficient local industry. The record and movie distribution companies are careful not to point this out to us, but that is what is happening." [23]

Conclusion

Lessig once wrote that "No one serious in this debate is promoting the abolition of copyright." [24 p.xvi] Those words were already not true when he wrote them, and they are even less true now. With the downsides to copyright law so apparent and consequential, many are becoming decidedly more serious about this proposal. Copyright is a trade-off that the public makes with specific authors — a trade-off in which the public has recently been getting shortchanged. If the public is not reaping any benefit from a policy — indeed, massively suffering from it — it is only reasonable and responsible to advocate for its reversal. The time has come to seriously consider putting an end to copyright.

Responses to some frequent questions

"But how will X make money if copyright is eliminated?"

This question, in my experience, is the most frequent response to the suggestion that copyright should be eliminated. X could be anyone that supposedly profits from the current copyright regime: artists, software engineers, etc. It is important to recognize that this question carries along with it an assumption about the copyright system which is wrong — namely, the belief that the objective of copyright is to subsidize certain professions. So before answering the original question, I will discuss the assumption.

Copyright is a means, not an end

Copyright is a means to an end, the end being the creation of artistic works. The monopoly given out via a copyright is not an end unto itself — in fact, any monopoly is a nonoptimal and undesirable economic arrangement, all other things being equal. So it is wrong to be primarily concerned about the revenue of people that may have profited under this scheme because their earnings were not the point of the policy of copyright in the first place. There is no Constitutional right to the success of a particular business model.

Perhaps an analogy will clarify. Suppose a government determines that national defense is a priority for the country. Because defense is so important, the government will consider granting nonoptimal economic arrangements to certain entities to further defense. Accordingly, monopolies are granted to certain defense contractors to build helicopters, cruise missiles and stealth bombers. Suppose further that, subsequently, an era of world peace dawns and the government decides that national defense is no longer as high of a priority. The government therefore dramatically cuts the defense budget which terminates the aforementioned contracts with the defense contractors. At this point someone comes along and asks, "But how will the defense contractors continue to make money now that world peace has been achieved?" The answer is that it is beside the point: giving public funds to defense contractors was only useful to the end of defense. But since the same objectives have been achieved by other means, there is no further need for this arrangement.

The point is there is no *a priori* obligation on the part of society to ensure that a certain profession is subsidized. That is not to say that what people that profit from copyright do is not important; of course it is. They just will have to play by the rules that all the professions that do not benefit from copyright play by — competition and innovation under the free market.

Freedom of information does not imply economic ruin

So can artists, software engineers, etc. continue to make money without artificial constraints on the distribution of information? Of course they can!

In *Against Intellectual Monopoly*, Boldrin and Levine point out several instances where the absence of copyright has not led to bankruptcy — quite the opposite, in fact. They give the example of authors in the nineteenth century who demanded an advance from a book publisher in return for a promise of sending the publisher the first finished work, enabling the publisher to get a first-mover advantage that would ensure profits. In modern times, they point to similar arrangements on works that are not copyrighted such as the *9-11 Commission Report* that still bring in healthy earnings for publishers (even when the text is freely, legally downloadable from a web site). For breaking news stories, they argue, many often pay to get access to the headlines first, even though the same will eventually be available to the public at a later time. Other examples of industries that became profitable in the absence of copyright include the nineteenth century printed sheet music industry, the early twentieth century movie industry and the modern pornography industry. [\[3 p.22-39\]](#) Finally, it is worth

recognizing that copyright is a relatively recent invention, and much material that would now be copyrighted was still being created before copyright's advent:

"For at least three thousand years, musical and literary works have been created in pretty much every society, and in the complete absence — in fact, often under the explicit prohibition — of any kind of copyright protection. For the economic and legal theories of "no innovation without monopolization," this plain fact is as inexplicable a mystery as the Catholic dogma of *virginitas ante partum* is for most of us." [\[3 p.30\]](#)

Kevin Kelly takes a different approach in demonstrating potential profitability in an age of unrestricted copying: "When copies are free, you need to sell things which can not be copied... Well, what can't be copied?" He offers the example of trust as something that is incapable of being copied. Also, he continues, immediacy, personalization, interpretation, authenticity, accessibility, embodiment, patronage, and findability are avenues to profit since none of them can be copied, either. Kelly also mentions advertising (which he does not elaborate on in his article) as a proven method of monetization. [\[5\]](#)

Karl Fogel points out a variety of current and future models that are working and could potentially work as businesses. He gives the example of the Free Software movement as an example of a successful post-copyright movement. Many companies, including Red Hat, Sun, IBM, and Google utilize the freely (as in *libre* [\[E\]](#)) available software for their own ends — some to sell support, and some to build web applications. He believes that as other industries start to come to grips with a post-copyright reality, those industries will start looking more like the modern software industry. Fogel highlights a few alternate business models that could sustain workers in a post-copyright world: fund-and-release, corporate patronage and micropayment patronage. [\[12\]](#)

Some, including Swedish Pirate Party founder Rick Falkvinge, go as far as to assert that the elimination of copyright will not change any business practices significantly. As he says, "What makes a profit today will make a profit tomorrow." [\[11\]](#) For instance, performing artists reap concert revenues from performances without the aid of copyright.

Finally, it is worth noting that there will be many business methods and opportunities that we can not foresee. The innovation that a competitive free market demands of its participants will undoubtedly produce previously unimagined ways of doing things as it has in the past. Our inability to presently enumerate them does not imply their future nonexistence.

"It is true that certain present aspects of copyright are undesirable, but the basic idea seems sound. Couldn't we tweak copyright law to eliminate your objections?"

No.

Certainly there are improvements that could be made to copyright law to mitigate some of the damage I discuss. For instance, one could imagine reinstating copyright renewals and mandatory registration so that much more work would fall into the public domain sooner. There is also room for improvement in the DMCA takedown process; perhaps the requirement of getting a judge's approval to proceed with the notice would reduce the number of fraudulent takedowns issued.

However, the vast majority of the problems would be unsolved even with legislative modifications, because the problems are intrinsic to copyright law. That is, they derive at the most basic level from the restrictions that copyright law puts in place. Further copyright laws would not fix copyright's economic

costs, the erosion of privacy, the large-scale criminalization of the populace, the information police problem, etc.

Also, as a practical matter, one wonders how these enlightened reforms would be passed and upheld in the first place. Remember that both the legislature and the judiciary have presided over bloating increases in both the scope and duration of copyright.

"Aren't your complaints more about the DMCA and/or DRM than copyright itself?"

No.

It is true that some of the problems I discuss follow from the application of DRM and the DMCA. DRM ("Digital Rights Management") is a technology that allows companies to enforce their own arbitrary copyright policies. Circumvention of these policies by users of DRM'ed devices is prohibited by the DMCA. In the case of Dmitry Sklyarov, the intersection of these two phenomena caused his arrest. The DMCA is a case in point for the dramatic expansion in scope of copyright law.

However, my response is similar my response to the question of whether we could simply eliminate the undesirable parts of copyright law. Would eliminating or rewriting the DMCA make things better? Perhaps, but it wouldn't address the problems intrinsic to copyright itself. Furthermore, given the expanding tentacles of copyright, it is not hard to imagine that if the DMCA did not exist copyright would soon grow to cover essentially the same things as the DMCA does now.

"Your article's coverage of the advantages of copyright is lacking. How can you expect readers to fairly judge the value of copyright if you only present one side?"

(Why does no one ask this question when the copyright lobby claims that copyright is necessary to preserve civilization?)

If my article's coverage of copyright's upsides are lacking, that is only because there are so few advantages to begin with, not because of deliberate omission on my part. I gave these upsides short treatment in the "Why does copyright exist?" section, but will elaborate here.

Copyright has two supposed advantages. The first is the monopoly that the author enjoys; this is an advantage to the author (more realistically, the publisher) alone. It is a disadvantage to the rest of society, which must pay the monopoly-determined price to obtain, redistribute or transform the work (or, not pay the price at all if the author refuses to distribute/license it). The second advantage is to society when artistic works are produced that would not have been otherwise. As my response to the question "But how will X make money if copyright is eliminated?" shows, this is a dubious advantage since there is no evidence that artistic production suffers without copyright law. In summary, the first advantage only benefits the monopolist to the detriment of society and the second is not an advantage at all.

In any case, the point of this article is to point out the copyright's problems, which often go unacknowledged. In light of the limited benefits copyright might bring, it is my opinion that the loss of privacy, elimination of due process, erosion of accountability, huge economic cost, imposition of criminality, public domain deterioration and Internet limitations that copyright imposes are not worth the bargain.

"Is anyone actually advocating Deep Packet Inspection on the Internet, or is that just a straw man you set up?"

I said in the referenced section, "The logical conclusion of enforcement of copyright law is perfect monitoring of all systems that could potentially copy any copyrighted information." What exists right now is a crude approximation to that logical conclusion. The tactic for detecting copyright infringement presently seems to be harvesting the IP addresses of file sharers via monitoring of the P2P application networks themselves. This is a far from perfect tactic, and DPI would certainly be more effective. DPI is also not the only way that perfect monitoring could be achieved: instead of monitoring the network, the end hosts (that is all users' computers) could instead be monitored. By mandating installation of spyware to detect copyrighted material, the same perfect surveillance would be achieved. See [48] for a discussion of these issues.

The content industry has been lobbying for stricter enforcement of copyright law, the logical conclusion of which is total surveillance (done by DPI, for instance), so there is reason to believe that the era of DPI-enabled copyright enforcement is not far off. See the French Three Strikes copyright law for an example. [47] Rock musician Bono's opinion is typical of those in the content industry who advocate for total surveillance to prevent copyright infringement: "We're the post office, [the Internet Service Providers] tell us; who knows what's in the brown-paper packages? But we know from America's noble effort to stop child pornography, not to mention China's ignoble effort to suppress online dissent, that it's perfectly possible to track content." [49]

DPI is a multi-use technology, and detection of copyright infringement is not how the majority of DPI equipment is used (for the time being). Mostly it is used for "traffic shaping" to make some information flow through the network faster than other information, for a variety of reasons. See [46] for a good overview of DPI technology and the DPI industry.

"Wouldn't eliminating copyright also void copyleft licenses?"

Some licenses, including the GNU General Public License (which covers the GNU/Linux kernel) and the Creative Commons Attribution Share Alike license (which covers Wikipedia), are "copyleft" licenses. In contrast to copyright licenses, copyleft licenses state that no one has an exclusive right to distribute the work. Copyleft licenses further stipulate that additional distribution of the work (or derivations) must be done under the same terms as the original work.

Copyleft licenses do depend on copyright for enforcement. So it is technically correct that abolition of copyright, all other things being equal, would void all copyleft licenses. However, it seems rather unlikely that Congress, having become sufficiently informed to realize the need for serious copyright law reform or abolition, would fail to take copyleft licenses under consideration. Congress could abolish copyright but preserve copyleft provisions under a different legal mechanism.

References and Further Reading

[1] Tehranian, John. "Infringement Nation: Copyright Reform and the Law/Norm Gap." Utah Law Review Vol.2007 (2007): p.537. Also available at <https://www.law.utah.edu/webfiles/ULRarticles/155/155.pdf>

[2] Barlow, John Perry. "The Economy of Ideas." Wired March 1994. http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html

- [3] Boldrin, Michele and Levine, David K. Against Intellectual Monopoly. Cambridge: Cambridge University Press, 2008. Also available at <http://levine.sscnet.ucla.edu/general/intellectual/againstfinal.htm>
- [4] Abelson, Hal and Ledeen, Ken and Lewis, Harry. Blown To Bits. Upper Saddle River, NJ: Addison-Wesley, 2008.
- [5] Kelly, Kevin. "Better than Free." 2 May 2008. http://www.edge.org/3rd_culture/kelly08/kelly08_index.html
- [6] Stallman, Richard. "The Right to Read." Communications of the ACM Volume 40, Number 2 (1997). Also available at <http://www.gnu.org/philosophy/right-to-read.html>
- [7] Stallman, Richard. Free Software, Free Society. Boston: GNU Press, 2002. Note: other articles by Stallman that I used and cited separately are also included in this book, which is also available at <http://www.gnu.org/philosophy/fsfs/rms-essays.pdf>
- [8] Clarke, Ian. "Freenet Philosophy." <http://freenetproject.org/philosophy.html>
- [9] Stallman, Richard. "Words to Avoid." <http://www.gnu.org/philosophy/words-to-avoid.html>
- [10] Schneier, Bruce. "The Value of Privacy." 19 May 2006. http://www.schneier.com/blog/archives/2006/05/the_value_of_pr.html
- [11] Falkvinge, Rick. "Copyright Regime vs Civil Liberties." <http://video.google.com/videoplay?docid=4472314929478865652#>
- [12] Fogel, Karl. "The Surprising History of Copyright and The Promise of a Post-Copyright World." 9 October 2005. <http://questioncopyright.org/promise>
- [13] Stallman, Richard. "Did you say 'Intellectual Property'? It's a Seductive Mirage." 2004. <http://www.gnu.org/philosophy/not-ipr.html>
- [14] Stallman, Richard. "Why Software Should Not Have Owners." 1994. <http://www.gnu.org/philosophy/why-free.html>
- [15] "The Problem." Digital Freedom Web Site http://www.digitalfreedom.org/the_issue/index.html
- [16] Doctorow, Cory. Authors@Google <http://www.youtube.com/watch?v=xgXwmXpaH2Q>
- [17] Shapiro, Samantha M. "Hip-Hop Outlaw (Industry Version)." New York Times Magazine 18 February 2007. <http://www.nytimes.com/2007/02/18/magazine/18djdrama.t.html>
- [18] Anderson, Nate. "100 Years of Big Content fearing technology — in its own words." Ars Technica. 11 October 2009. <http://arstechnica.com/tech-policy/news/2009/10/100-years-of-big-content-fearing-technologyin-its-own-words.ars>
- [19] "Photoshop of Horrors" The Rachel Maddow Show <http://www.youtube.com/watch?v=tFaSzOJ92zU&NR=1>
- [20] "Apology for singing shop worker" BBC News. 21 October 2009. http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/8317952.stm
- [21] Freedman, Mike. "Inaccurate Copyright Enforcement: Questionable "best" practices and BitTorrent specification flaws" Freedom to Tinker. 23 November 2009. <http://www.freedom-to-tinker.com/blog/mfreed/inaccurate-copyright-enforcement-questionable-best-practices-and-bittorrent-specificatio>

- [22] US copyright law. <http://www.law.cornell.edu/uscode/17/>
- [23] Gilmore, John. "What's Wrong With Copy Protection." 16 February 2001. <http://www.toad.com/gnu/whatswrong.html>
- [24] Lessig, Lawrence. The Future of Ideas. New York: Vintage Books, 2001. Also available at <http://www.the-future-of-ideas.com/>
- [25] Lessig, Lawrence. Free Culture. New York: The Penguin Press, 2004. Also available at <http://www.free-culture.cc/freecontent/>
- [26] Fogel, Karl. "New York University Confuses File Sharing with Plagiarism." QuestionCopyright.org 7 August 2007. http://questioncopyright.org/nyu_note_on_illegal_downloading
- [27] US Copyright Office. "Copyright in General." <http://www.copyright.gov/help/faq/faq-general.html>
- [28] US Copyright Office. "Copyright Basics." <http://www.copyright.gov/circs/circ1.pdf>
- [29] Stallman, Richard. "Copyright and Globalization in the Age of Computer Networks." 2001. <http://www.gnu.org/philosophy/copyright-and-globalization.html>
- [30] Wikipedia — Rivalry (Economics) [http://en.wikipedia.org/wiki/Rivalry_\(economics\)](http://en.wikipedia.org/wiki/Rivalry_(economics))
- [31] US Constitution Copyright Clause. <http://topics.law.cornell.edu/constitution/articlei#section8>
- [32] Stallman, Richard. "Misinterpreting Copyright — A Series of Errors." 2002. <http://www.gnu.org/philosophy/misinterpreting-copyright.html>
- [33] Doctorow, Cory. "Oregon: our laws are copyrighted and you can't publish them." BoingBoing. 15 April 2008. <http://www.boingboing.net/2008/04/15/oregon-our-laws-are.html>
- [34] Felten, Ed. "AACS Plays Whack-a-Mole with Extracted Key." Freedom to Tinker. 1 May 2007. <http://freedom-to-tinker.com/blog/felten/aacs-plays-whack-mole-extracted-key>
- [35] Chilling Effects chillingeffects.org
- [36] McCullagh, Declan. "Senate bill would ban P2P networks." CNET News. 23 June 2004. http://news.cnet.com/Senate-bill-bans-P2P-networks/2100-1027_3-5244796.html
- [37] McCullagh, Declan. "Gonzales proposes new crime: 'Attempted' copyright infringement." CNET News. 15 May 2007. http://news.cnet.com/8301-10784_3-9719339-7.html
- [38] Bowman, Lisa M. "ElcomSoft verdict: Not guilty." CNET News. 17 December 2002. <http://news.cnet.com/2100-1023-978176.html>
- [39] Bowman, Lisa M. "Sklyarov reflects on DMCA travails." CNET News. 20 December 2002. <http://news.cnet.com/2100-1023-978497.html>
- [40] Electronic Frontier Foundation. "Unintended Consequences: Ten Years Under the DMCA." <http://www EFF.org/wp/unintended-consequences-ten-years-under-dmca>
- [41] Beckerman, Ray. "How the RIAA Litigation Process Works." 9 April 2008. <http://beckermanlegal.com/pdf/?file=/howriaa.htm>
- [42] Anderson, Nate. "Study paints grim picture of automated P2P enforcement." Ars Technica. 5 June 2008. <http://arstechnica.com/old/content/2008/06/study-paints-grim-picture-of-automated-dmca-notice-accuracy.ars>

[43] Tummon, Jacob. "The case for the Death of Copyright." The Vancouver Sun. 20 February 2008. <http://www.canada.com/vancouversun/news/editorial/story.html?id=9c7df727-ab6e-4427-9281-0e2eac3f2643&p=1>

[44] Oberholzer-Gee, Felix and Strumpf, Koleman S. "The Effect of File Sharing on Record Sales: An Empirical Analysis." Journal of Political Economy, Vol. 115, pp. 1-42, February 2007. Also available at www.unc.edu/~cigar/papers/FileSharing_June2005_final.pdf

[45] Felten, Ed. "Why the 09ers Are So Upset." Freedom to Tinker. 3 May 2007. <http://freedom-to-tinker.com/blog/felten/why-09ers-are-so-upset>

[46] Anderson, Nate. "Deep packet inspection meets 'Net neutrality, CALEA.'" Ars Technica. 26 July 2007. <http://arstechnica.com/hardware/news/2007/07/Deep-packet-inspection-meets-net-neutrality.ars>

[47] Anderson, Nate. "French anti-P2P law toughest in the world." Ars Technica. 10 March 2009. <http://arstechnica.com/tech-policy/news/2009/03/french-anti-p2p-law-toughest-in-the-world.ars>

[48] Freedman, Mike. "Erroneous DMCA notices and copyright enforcement, part deux." Freedom to Tinker. 15 December 2009. <http://www.freedom-to-tinker.com/blog/mfreed/erroneous-dmca-notices-and-copyright-enforcement-part-deux>

[49] Bono. "Ten for the Next Ten." The New York Times. 2 Jan 2010. <http://www.nytimes.com/2010/01/03/opinion/03bono.html>

[50] Paley, Nina and Fogel, Karl. "How Copyright Restrictions Suppress Art: An Interview With Nina Paley About "Sita Sings The Blues" QuestionCopyright.org 11 November 2008. http://questioncopyright.org/nina_paley_sita_interview

[A] See [12] for a particularly egregious example of this tactic by Hilary Rosen, former head of the RIAA.

[B] See [3] for a good discussion of patent reform

[C] See [29] for a brief overview

[D] For more properties of bits, see the "Koans" in [4 p.4-13]

[E] "Free" has two meanings in English. The first meaning (as in "free beer") and the one used here corresponds to the French *gratis*. The second meaning (as in "free to control your own destiny") corresponds to the French *libre*. Often the French is used to disambiguate.

[F] Trademark, as it happens, stands alone as the one member of the "intellectual property" club that needs little to no reform.

[G] The proper type of law to protect against plagiarism would be trademark law, since plagiarism steals the author's identity, thus depriving both the author and the public of the benefits of accurate attribution. This is exactly what trademark is designed to prevent. Unauthorized copying, on the other hand, *reinforces* the author's identity: regardless of whether copies are legal, they still accurately give the true author's name, and thus reinforce the author's connection to the work.

[H] This anti-surveillance argument was one of the main planks of Sweden's Pirate Party, a serious political party which went on to win two seats in the European Parliament in 2009 largely on the basis of concerns about digital civil liberties.

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