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# PROMOTING DIVERSE CULTURAL EXPRESSION: LESSONS FROM THE U.S. COPYRIGHT WARS

*Raymond Shih Ray Ku*<sup>\*</sup>

## ABSTRACT

*In 2007, the United Nations adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expression (CCD) with the goal of creating an environment that encourages individuals and social groups to create, distribute, and have access to diverse cultural expression from their own cultural and from cultures around the world. With regard to domestic and international efforts to implement the CCD and reconcile its goals with other international norms, the author argues that valuable lessons can be learned from current trends and issues in U.S. copyright law. Specifically, the author argues that the current debate over copyright's response to new technologies in general and how best to promote and protect musical expression in a digital and networked world illustrate the importance of disaggregating the interests of creators and distributors. Depending upon the funding mechanism chosen for creation, legal protection for distributors may undermine the goals of the CCD leading to fewer works being created, disseminated, and made accessible to the public.*

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**KEYWORDS:** *Convention on the Protection and Promotion of the Diversity of Cultural Expression, World Trade Organization, Copyright, Technology, Exclusive Rights, Monopoly Rights, Music, File Sharing, Peer-to-peer, public goods*

## I. INTRODUCTION

As evidenced by this symposium and many others like it around the world, the protection of cultural expression has become an increasingly important matter of public policy. Not only are conflicts over the legal protections afforded to expression serious domestic problems, they have become global sources of controversy as well – especially in the context of trade negotiation and regulation. This paper focuses on copyright law and policy as it is currently being shaped in the United States. One may ask what U.S. law and policy have to do with the United Nations Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) and its relationship with the World Trade Organization (WTO). The answer is simple. First, the CCD does not identify how cultural expression should be promoted or protected, and with respect to music, literature, film, and other creative works that fall within the CCD's definition of cultural expression,<sup>1</sup> copyright law, with its emphasis on exclusive rights to such works, has been an important, if not the dominant, model for promoting and protecting such expression since England adopted the Statute of Anne. Moreover, it can no longer be said that copyright is simply a Western model. This is especially true as the U.S. increasingly uses trade negotiations and international trade organizations such as the WTO to export U.S. intellectual property policy around the world. Consequently, understanding the promise and limits of U.S. copyright law and policy will help us to appreciate the source of current intellectual property and trade flash points and to better understand how to achieve the CCD's goal of creating an environment which encourages individuals and social groups:

- (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups including persons belonging to minorities and indigenous peoples;
- (b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.<sup>2</sup>

In light of these goals, it is fair to ask whether copyright law, and in particular, copyright's creation of exclusive rights in cultural expression, is the best model for sustaining such an environment.

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<sup>1</sup> See United Nations Educational, Scientific and Cultural Organization, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 4, Mar 18, 2007 .

<sup>2</sup> See *id.* art. 7.1.

As I have written elsewhere, one of the fundamental problems associated with copyright law today is the need to differentiate between the interests of the creators of cultural works and those who were responsible for distributing those works to the public.<sup>3</sup> In other words, whose interests does copyright law protect? Or, whom does copyright law protect? For most of copyright's history, the interests of creators and distributors were considered one and the same, and for the most part, were largely aligned with those of the public or audience. However, new technologies, especially digital technology have always challenged a legal regime created in response to a specific technology and means of distribution – the printing press.<sup>4</sup> Once unbundled, the assumption that the exclusive rights created by copyright serve the interests of creators, distributors, and the public becomes less clear. Many of the copyright controversies making headlines today, from the litigation and threats of litigation against Grokster, Google's Books Project, MySpace, and YouTube, among others, involve copyright owners attempting to use copyright to prevent the emergence of new distribution models and uses of their works. In other words, the middlemen of old are using copyright to preserve their status in a world in which many of these middlemen are not only unnecessary but also stifle an environment for creating, producing, and disseminating diverse cultural expression. I highlight the distributor/creator dichotomy because any discussion of extending intellectual property protection in the context of global trade must recognize precisely what interests are being protected and promoted. As such, we must look beyond the rhetoric of "piracy" and evaluate the underlying merits of copyright claims and calls for its expansion.

Obviously, how to best create an environment for the creation and dissemination of cultural expression is an important question for both international and domestic law. More importantly, however, the choices we make will shape the future of human creativity and our collective access to creative works. In this respect, we have two very clear choices. The first is very much like the world to which we are currently accustomed. Individuals create expression and large companies distribute those works to the public at a price based upon legally created exclusive rights. The price we pay for obtaining access to those works, however, goes beyond the dollars and cents that come out of our pockets. Under this model, we pay another price in the form of access to fewer works either because we are

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<sup>3</sup> See generally Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster & the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) [hereinafter *Creative Destruction*]; Raymond Shih Ray Ku, *Consumer Copying & Creative Destruction: Fair Use beyond Market Failure*, 18 BERK. TECH. L. J. 539 (2003) [hereinafter *Consumer Copying*]; Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217 (2005).

<sup>4</sup> See Ku, *Grokking Grokster*, *supra* note 3, at 1265-70.

unable or unwilling to pay, or because the distributor decides that some works are not appropriate or worthy.

In contrast, the combination of the Internet and digital technologies create an opportunity for countless individuals who would not otherwise have been able to express themselves to create in ways yet to be imagined. The personal computer and editing software make it possible for anyone to become their own publisher, recording studio, or even film studio. Likewise, many of these same technologies make it possible for individuals to obtain access to creative works that they would not have had access to before as the collective individuals connected to the Internet become distributors of digital works. In other words, today's technology allows anyone with access to a computer to become an author, recording artist, or filmmaker while at the same time holds the potential for providing everyone connected to the Internet with access to the collective creative expression of the world. This "world" or model is not without its challenges, not the least of which is how best to compensate creators when the law no longer grants them exclusive rights to control the reproduction, distribution, and use of their works. Let me emphasize that this choice will not be dictated by technology. Just the opposite, as Ithiel de Sola Pool observed, technology "shapes the structure of the battle, but not every outcome."<sup>5</sup> We must choose the model, and that choice will shape the technology to come.

## II. FIRST PRINCIPLES

Before we can evaluate calls for expanding copyright protection, particularly in response to changes in technology, a short summary of copyright is in order. Historically, copyright is derived from the monopoly privileges enjoyed by the Stationers Company in England, and the British Statute of Anne.<sup>6</sup> Originally, this monopoly privilege was used to suppress competition and free expression.<sup>7</sup> Despite its questionable origins and the fact that it maintains some of its original characteristics, copyright exists today for decidedly different reasons. In the United States, the U.S. Constitution empowers Congress, "[t]o 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."<sup>8</sup> With regard to music, books, and movies, Congress has chosen to promote progress

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<sup>5</sup> ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 251 (1983).

<sup>6</sup> See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 26-40 (2005).

<sup>7</sup> *Id.*

<sup>8</sup> U.S. CONST. art. I, § 8, cl. 8.

through the law of copyright<sup>9</sup> which grants authors certain exclusive rights in their works including, as the name describes, the right to copy.<sup>10</sup> As the Constitution provides, copyright does not protect a natural right of authors in their works, though it is influenced by the fact that content is produced by the author's labor.<sup>11</sup> Instead, copyright law represents a bargain between the public and the author in which the public grants authors certain exclusive rights in exchange for access to their creations. This access takes two forms: access to the work during the period of exclusive rights on terms generally dictated by the author or her assigns; and unfettered access to the work after those exclusive rights have expired.

This bargain is considered necessary because works of authorship share some of the characteristics of a public good. Public goods are generally defined by two traits: they are non-rivalrous, meaning that "it is possible at

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<sup>9</sup> See 17 U.S.C. § 102 (1996) (listing the types of works protected by copyright).

<sup>10</sup> See 17 U.S.C. § 106 (1996). Section 106 of the Copyright Act provides:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- to reproduce the copyrighted work in copies or phonorecords;
- to prepare derivative works based upon the copyrighted works;
- to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted 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 audiovisual work, to display the copyrighted work publicly; and
- in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

<sup>11</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). It states:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

See also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (recognizing the "economic philosophy" behind copyright); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("Copyright law ... makes reward to the owner a secondary consideration."). See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 *passim* (1993) (arguing for a natural law justification for protecting intellectual property); see generally Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. J. 517 (1990) (discussing the rejection of an absolute property right in intellectual property under Anglo-American law, and proposing an alternative interpretation of natural law).

no cost for additional persons to enjoy the same unit of a public good”;<sup>12</sup> and non-exclusive, meaning it is difficult to prevent people from enjoying the good. Thomas Jefferson described the public goods nature of ideas when he wrote:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea . . . . [T]he moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it.<sup>13</sup>

Jefferson considered these traits beneficial because “[h]e who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”<sup>14</sup>

Today, we tend to be more cautious about these traits, even skeptical, because while they facilitate the widespread dissemination of ideas, they also subject public goods to “free riding.” In other words, the non-rivalrous and non-exclusive characteristics of a public good increase the likelihood that some people will enjoy the benefits of the good without internalizing the costs of its production.<sup>15</sup> If the funding of public goods is left to the market, free riding may lead to underproduction of the good. As Professor Gordon notes, “[i]f the creators of intellectual productions were given no rights to control the use made of their works, they might receive few revenues and thus would lack an appropriate level of incentive to create.”<sup>16</sup> Likewise, “[f]ewer resources would be devoted to intellectual productions than their social merit would warrant.”<sup>17</sup> Unauthorized copying, therefore, may reduce the incentives for creating and distributing works of cultural expression.

Astute readers will note that, while the preceding description of public goods may describe ideas, songs, or poetry, it does not precisely describe CDs, DVD’s, books, or sculptures. While ideas may be non-exclusive, I can certainly keep people from reading my book or listening to my CD. As

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<sup>12</sup> See, e.g., RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 79-81 (1996); Harold Demsetz, *The Private Production of Public Goods*, 13 J. L. & ECON. 293, 295 (1970); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1661 (1988).

<sup>13</sup> SAUL K. PADOVER, *THE COMPLETE JEFFERSON* 1011, 1015 (1943) (quoting letter from Thomas Jefferson to Isaac McPherson, Aug 13, 1813).

<sup>14</sup> *Id.*

<sup>15</sup> See Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1611 (1982).

<sup>16</sup> *Id.* at 1610.

<sup>17</sup> *Id.*



such, the CD is a private good.<sup>18</sup> Nonetheless, we have traditionally protected not only the song, but the CD as well. The justifications for this protection are the obvious public benefits of embodying works of authorship in a tangible medium and the threat that copying poses to the initial distributor. While a song or story may spread by word of mouth, fixing those works in tangible form facilitates the dissemination of those works to larger portions of the public while preserving the artist's original expression. However, once copies are available, it is usually inexpensive for subsequent users to copy the work. If competition from copiers drives the price of a work down to the marginal costs of the copier, it threatens the incentives to distribute the work in the first place.<sup>19</sup> If distributors have no incentive to make new works available, the public's access to those works will be significantly reduced. In other words, even though a CD or book is a private good, copying still threatens the markets for these goods because their content is so easily disseminated.

Copyright, therefore, is designed not only to promote the creation of cultural works, but to promote their distribution as well. Traditionally, this has been accomplished by granting the creators of works a bundle of legally enforceable rights in their works similar to property rights in tangible property. Copyright owners utilize these rights to control copying, distribution, and other uses of the protected works. For instance, the author can assign or license the right to distribute to a distributor, which serves to protect the interests of both the author and the distributor. Granting copyright holders exclusive rights promotes a private market by artificially creating scarcity and exclusivity in works that would otherwise be public goods.

Copyright, however, is not without its costs. Because copyrights are exclusive, the law creates some of the same market distortions as a monopoly. One of the most important distortions is the ability to charge "monopoly" prices or prices that are higher than would otherwise exist in a competitive market. While there is some competition from similar works to temper monopoly pricing of copyrighted works, this competition is imperfect because *Finding Nemo* simply is not *Casablanca* or even *The Little Mermaid*, and *Bach* is not *Mozart*. If one wants to enjoy a specific work or artist, one must pay the copyright holder's price. Because these prices are higher than competitive prices, some people who would

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<sup>18</sup> See BETTIG, *supra* note 12, at 80.

<sup>19</sup> See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 153 (2001); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); see also *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 927 (2d Cir. 1994) ("Ultimately, the monopoly privileges conferred by copyright protection and the potential financial rewards there from are not directly serving to motivate authors to write individual articles; rather, they serve to motivate publishers to produce journals, which provide the conventional and often exclusive means for disseminating these individual articles.").

otherwise have paid the competitive price will be excluded because they are unable or unwilling to pay the monopoly price. In general, we consider this deadweight loss acceptable because without copyright, fewer works would be created and fewer people would enjoy them.

The monopoly problems associated with copyright are further compounded when one recognizes that this model gives tremendous power to distributors. While copyright initially vests its exclusive rights in creators, these rights are routinely assigned away to the distributor of the work in order to gain access to the channels of distribution and their audience.<sup>20</sup> Unless an author has significant bargaining power, which typically occurs only after achieving a degree of commercial success, distributors set the terms and determine which works will be made available to the public. As such, the distributors of cultural expression whether record labels, film studios, cable operators, or Internet service providers have significant power to “censor” cultural expression even if that censorship is simply based upon the judgment of executives as to whether a work will be commercially successful. Obviously, the distributors’ decisions may not perfectly reflect the preferences of the market let alone the collective members of the public (to the disadvantage of unknown artists, works that do not reflect mainstream taste, and the public). As such, many creative works specifically highlighted for promotion under the CCD are not created or distributed because of the business judgments of distributors. Once again, these costs are considered acceptable because distributors largely shoulder the financial risk of turning stories into books and motion pictures, songs into records, and unknown artists into superstars. The question remains, however, whether this old world order should continue in a digital world.

### III. THE DIGITAL WORLD ORDER

By this point, we are all quite familiar with the characteristics of digital technology at the root of the information revolution. At the heart of this revolution is the ability to reduce information to binary digits. Unlike traditional analog, print, or video, in which music, writings, and images respectively were captured and conveyed as physical representations of what was recorded, digital technology reproduces those same sights, sounds, and words as numbers.<sup>21</sup> The widespread adoption of technologies

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<sup>20</sup> See Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1889 (2000) (observing that “those seeking to reach a mass audience will need to do so through conglomerate-controlled outlets”).

<sup>21</sup> See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL*

that make digitization of expression has significant implications for the creation and distribution of creative works.

By reducing information to ones and zeros, digital representation revolutionizes the characteristics of content. First, digital representation frees content from the need for a tangible medium to distribute it. In the past, content could be conveyed to the public only through physical media such as film, paper, plastic, etc., and the physical media limited its distribution and copying. Distributing copyrighted works in the form of books, CDs, and videos is similar to the distribution of wine.<sup>22</sup> In order to distribute wine to the public, one needed bottles. Even if wine was plentiful, bottles were not. In contrast, the data representing a recent hit song, a newborn's picture, or a scholar's work in progress no longer need to be carried in plastic or on paper. Digital information can be conveyed without the need for a bottle.<sup>23</sup> Reduced to ones and zeros, digital information can be transmitted through the radio waves of the electromagnetic spectrum, as electrical impulses through telephone and cable wires, and as light across fiber optic networks with the information alone traveling to the recipient.<sup>24</sup> To the extent that one desires permanently to bottle digital information for either transportation or storage, one can preserve it across media ranging from computer hard drives to CDs, memory sticks, and even iPods.

Another revolutionary characteristic of digital reproduction is the ability to make perfect copies. An analog recording of a CD, radio broadcast, or a photocopy of a book is not the same as the original, and the quality of subsequent copies continue to degrade. In contrast, digital copies are identical to the original digital master.<sup>25</sup> A digital copy can therefore be used to produce countless subsequent digital copies, all identical to the original.<sup>26</sup>

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PROPERTY IN THE INFORMATION AGE 28-29 (National Academy 2000); *see also* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 12 (1995) ("White Paper") ("Any two-dimensional work can be readily 'digitized' - i.e., translated into a digital code (usually a series of zeros and ones).").

<sup>22</sup> *See* John Perry Barlow, *The Economy of Ideas* (1994), <http://www.wired.com/wired/archive/2.03/economy.ideas.html> (last visited Aug 20, 2007) (analogizing copyright to the distribution of wine in bottles).

<sup>23</sup> While the Internet eliminates the need for the bottle, there may still be significant value in making old bottles. For example, while a digital book may be a less expensive, more versatile product compared to a hardbound edition, the two are not perfect substitutes. Many people may prefer the tactile sensation of paper and leather to reading on a computer screen or handheld device. Similarly, there will still be markets for compact discs in the foreseeable future given the ubiquity of compact disc players, the convenience of purchasing rather than burning discs, the reliability of the data stored on purchased CDs, and the selection of music on CDs.

<sup>24</sup> *See* NATIONAL RESEARCH COUNCIL, *supra* note 21, at 32-33. In this respect, digital information shares the same characteristics with analog information.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Digital technology also changes the economics of copying. Unlike the manufacturing of bottles or books, copying digital information is both inexpensive and simple. Reduced to ones and zeros, information can be copied by any home computer and stored on the hard drive or a CD in minutes or seconds. Consequently, to copy an entire encyclopedia collection, one no longer needs to have the financial resources to invest in printing presses, warehouses, and employees to reproduce each volume, when the entire collection can be copied and stored so easily. Combined with the Internet, digital reproduction makes it possible for every home computer to make and distribute perfect copies worldwide at billions of bits per second.<sup>27</sup> The only costs of becoming a global distributor (or pirate) of digital content are the price of a computer, Internet access, and electricity.

Combined, the characteristics and economics of digital reproduction eliminate some of the most important obstacles to copying. Traditionally, the investments needed to reproduce and distribute content in a physical form, the physical form itself, and the poor quality of reproductions deterred copying.<sup>28</sup> The size of the investment needed to make bottles and distribute those bottles limited the number of copiers. Likewise, the physical bottles made it possible to find and seize copies, and the quality of copies made them less than perfect substitutes.<sup>29</sup> These obstacles were the natural outgrowth of the way in which content was distributed and the economics associated with distribution. Digital technology is not bound by these restraints.

The digital music experience illustrates the impact of digital technology on the copying and distribution of content. A typical song can be digitally recorded and then stored as an MP3 file approximately three megabytes in size with CD quality sound.<sup>30</sup> The music either can be saved as an MP3 directly by an artist or can be converted from a CD. The music file can then be distributed quickly and easily to others over the Internet through World Wide Web pages, posted in newsgroups, shared in chat rooms, or attached to e-mail.<sup>31</sup> Once downloaded from the Internet, a user

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<sup>27</sup> See *id.* at 38; see also INFORMATION INFRASTRUCTURE TASK FORCE, *supra* note 21, at 12 (noting that the Internet “makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to scores of other individuals - or to upload a copy to a bulletin board or other service where thousands of individuals can download it or print unlimited ‘hard’ copies”).

<sup>28</sup> See NATIONAL RESEARCH COUNCIL, *supra* note 21, at 32-33 (“For every form of digital information, every copy is as good as the original and can therefore be the source of additional perfect copies, which greatly reduces what was once a natural impediment to copyright infringement.”).

<sup>29</sup> See *id.* at 32 (noting that the copy quality decreases with each successive generation of a “traditional form” of information).

<sup>30</sup> See Ku, *Creative Destruction*, *supra* note 3, at 272.

<sup>31</sup> See NATIONAL RESEARCH COUNCIL, *supra* note 21, at 78; INFORMATION INFRASTRUCTURE TASK FORCE, *supra* note 21, at 12 (noting that the establishment of “electronic systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to

can save MP3s on a computer's hard drive, burn them onto a blank CD, or save them on some other storage device.

Napster, Grokster, BitTorrent, and other peer-to-peer networks facilitate the distribution of digital content by allowing individuals not only to search for MP3s on the Web, but also to search for MP3s and other files stored on other people's hard drives.<sup>32</sup> As such, p2p networking dramatically expands the universe of available music. Before p2p, music and other content were only available if someone posted the content to a centralized computer server represented by a web page or newsgroup or attached it to an e-mail. Peer-to-peer networking streamlines the distribution process by making information residing on a user's computer hard drive directly available to other users of the network. Using a peer-to-peer network, an individual who has recorded a favorite CD onto her computer's hard drive need only log on to the network to make those songs available to millions of others to download.

The ease and popularity of peer-to-peer networking is illustrated by their growth even during Napster's and Grokster's well-publicized lawsuits, and the Recording Industry Association of America's much publicized effort to bring lawsuits against tens of thousands of individual p2p users.<sup>33</sup> According to the research firm BigChampagne, in the United States, 6.9 Million people were simultaneously logged onto p2p networks at any given time. This was up from 5.5 Million in 2004 and 3.2 Million in 2003. Globally, 9.5 Million users were logged on at the same time in 2005, up from 7.56 Million in 2006 and 5.6 Million in 2003. More recently, social networking sites such as MySpace and FaceBook and video sharing sites such as YouTube have eclipsed p2p use with YouTube reaching a monthly audience of approximately 20 Million unique visitors in 2006.<sup>34</sup> Nonetheless, copyright issues remain because these services allow users to upload digital files including copyrighted music and videos making them available to millions of online users.

Not only has technology made it easier to copy music, it has also dramatically reduced the costs of copying. When I first wrote on this topic in 2001, for less than \$900, one could purchase a home computer with a high-speed processor, forty gigabyte hard drive, and CD-RW drive capable

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scores of other individuals"); KIERSTEN CONNER-SAX & Ed Krol, THE WHOLE INTERNET: THE NEXT GENERATION 361 (1999).

<sup>32</sup> See generally *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 125 S.Ct. 2764 (2005).

<sup>33</sup> See <http://www.eff.org/IP/P2P/riaa-v-thepeople.php> (last visited Aug 20, 2007) (collective legal documents and information related to these suits).

<sup>34</sup> According to a 2006 study, web traffic to sites such as YouTube accounted for 46% of network traffic with YouTube alone accounting for nearly 10% of all Internet traffic. In contrast, p2p usage accounted for 36% of total network traffic. See HTTP Overtakes P2P Traffic, <http://www.dslreports.com/shownews/85022>.

of burning CDs for less than \$900.<sup>35</sup> Blank CDs with a storage capacity of seven hundred megabytes could be purchased for approximately \$0.40 each. Depending upon the speed, users could obtain Internet access for free or by paying up to \$40 per month. A single CD could hold approximately twenty albums worth of music, and the hard drive could hold over one thousand albums. Under these circumstances, the marginal cost for a user to download or copy an MP3 is effectively zero.<sup>36</sup> Since then, prices for both computer and storage technology have only continued to fall. In 2007, one can purchase a Mac mini with a 60 gigabyte hard drive, and a drive capable of burning CDs and DVDs for \$600.<sup>37</sup> To many involved in the copyright industry, the Internet's potential for distributing content through p2p networks or other online services and the reduced costs of copying represent the dark side of digital technology. Unbounded by the restraints of brick-and-mortar economics, anyone with a computer and Internet access is now a potential copier and distributor of music.

#### IV. A NEW WORLD ORDER?

In the United States, copyright protection is justified solely as an incentive for the creation and distribution of content. As discussed in Part II, the protection of music, literary works, and other content is not based upon the moral or natural rights of authors.<sup>38</sup> Instead, copyright exists to ensure that content will not be under produced as a result of the public-good characteristics of intellectual property.<sup>39</sup> The artificial scarcity created by copyright is justified to the extent that the incentives it creates are needed to make works available to the public. This means that if adequate financial incentives or market conditions exist to inspire the creative activity of authors and encourage them to make their works available to the public without copyright, copyright protection should not be recognized.<sup>40</sup>

Today, the economics of digital technology renders copyright both unnecessary and inefficient. In general, discussions about the optimal level

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<sup>35</sup> See Ku, *Creative Destruction*, *supra* note 3, at 273-74.

<sup>36</sup> *Id.* at 274.

<sup>37</sup> See <http://www.Apple.com/macmini/> (last visited Aug 20, 2007).

<sup>38</sup> See *Sony Corp. of Am. v. Universal City Studios*, *supra* note 11, at 429.

<sup>39</sup> See Part II.

<sup>40</sup> See Glynn S. Lunney Jr., *Reexamining Copyright's Incentive-Access Paradigm*, 49 VAND. L. REV. 483, 487-88 (1996) (noting that overbroad copyright protection imposes a cost represented by "the lost value society would have associated with alternative investments to which these resources would otherwise have been devoted"); Landes & Posner, *supra* note 19, at 332 (recognizing that "beyond some level copyright protection may actually be counterproductive by raising the cost of expression"); see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 322 (1970) (arguing that copyright's protection of books is not justified).

of copyright protection ignore distinctions between the incentives for creation and distribution.<sup>41</sup> In part, the bundling of these interests was strategic. Distributors found that it was to their political advantage to have their interests treated as inseparable from the interests of creators.<sup>42</sup> In addition to the rhetorical power of equating the interests of distributors with creators, until now the bundling of interests was acceptable because the cost of producing the vessels – CDs, books, and DVDs – for content, and distributing those vessels, was an essential component of making content available to the public. As a result, both sets of costs had to be considered if the public was to enjoy and have access to the products of human creativity.<sup>43</sup> However, as the following demonstrates, because the Internet and digital technology have revolutionized the ways in which we disseminate information, it is no longer appropriate to treat these interests as interchangeable. Once they are unbundled, it becomes clear that copyright protection cannot be justified as a means of ensuring distribution and is an impermissibly inefficient means for ensuring creation.

### A. *Distribution*

Digital technology and P2P networks represent a challenge to copyright because the economics of creation and distribution may no longer reflect the economic realities of today's technology.<sup>44</sup> If so, copyright and the costs associated with copyright may no longer be justified. Consider what copyright owners such as the RIAA fear: digital technology enables individuals to make an unlimited number of perfect copies of sound recordings at virtually no cost. Because each copy is identical to the original, each is a perfect substitute for the original. Once a copy is available on the Internet, anyone connected to the Internet may obtain a copy (once again, at virtually no cost) to listen to once, to keep permanently, or to take with him or her and enjoy on any number of

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<sup>41</sup> See Landes & Posner, *supra* note 19, at 327 (“To simplify the analysis, we ignore any distinction between costs incurred by authors and by publishers, and therefore use the term ‘author’ (or ‘creator’) to mean both author and publisher.”); Breyer, *supra* note 40, at 292 (focusing primarily on the costs of publishing).

<sup>42</sup> As developed in England, the efforts of booksellers to obtain copyright were initially unsuccessful until they tied their interests to the interests of writers. See BETTIG, *supra* note 12, at 15-19 (noting that copyright originally developed to serve the interests of printers--authors still had to rely upon patronage); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH L REV 1197, 1197-98 (1996) (challenging the rhetoric claiming that copyright expansion is in authors' best interests); GOLDSTEIN, *supra* note 6, at 41-44 (discussing how printers secured copyright protection in England for their own interests); Yen, *supra* note 11, at 525-26. See JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS SHAMANS, SOFTWARE AND SPLEENS : LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY , at 81 (1997) (discussing the use of the “romantic author” to justify copyright protection).

<sup>43</sup> See Landes & Posner, *supra* note 19, at 326-27.

<sup>44</sup> See Ku, *Creative Destruction*, *supra* note 3, at 300.

devices. “Low costs, combined with the ease of distributing and finding content through Napster and other online technologies, mean that content is capable of spreading over the Internet like an unstoppable viral outbreak, or, to borrow a phrase from Thomas Jefferson: a ‘fire expandable over all space.’”<sup>45</sup> This is of course the RIAA's worst nightmare: if music were freely available, why would anyone pay them for it? In contrast, from the public's perspective and the perspective of copyright policy, this may be ideal. The preceding is not an example of free riding that leads to market failure but an example of technological innovations curing market failure. By purchasing computers, Internet access, and storage media, members of the public bear the full cost of distribution and become distributors themselves. “From the perspective of intellectual property theory, this is revolutionary because content can now be disseminated to consumers without the need for anyone other than consumers to invest in distribution.”<sup>46</sup> Because the public builds and maintains the distribution channels and mechanisms for distributing digital content, once a work is created, with a few clicks of a mouse anyone connected to the Internet may enjoy that work. As Internet access grows, eventually, the entire public may enjoy that work. Under these circumstances, enforcing exclusive rights to reproduce and distribute works would mean that fewer, not more, people would have access to the work. While copyright may have increased the availability of creative works in the age of the printing press, in today's digital world, copyright results in under distribution.

### ***B. Creation***

Distribution, however, is only half of the copyright equation. The revolution in distribution would do little good if there were nothing to distribute (or if there were nothing new to distribute). While digital technology and the Internet may make CD distributors unnecessary, music still suffers from the problems associated with public goods, and we still want people to create and perform music. “Once unbundled from distribution, however, copyright's role in promoting creation by prohibiting consumer copying is neither clear nor absolute.”<sup>47</sup> Copyright's role is unclear because it is difficult to determine what impact, if any, file sharing has on the actual incentives available to creators. Arguably, because problems associated with distributing public goods were considered

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<sup>45</sup> *Id.*

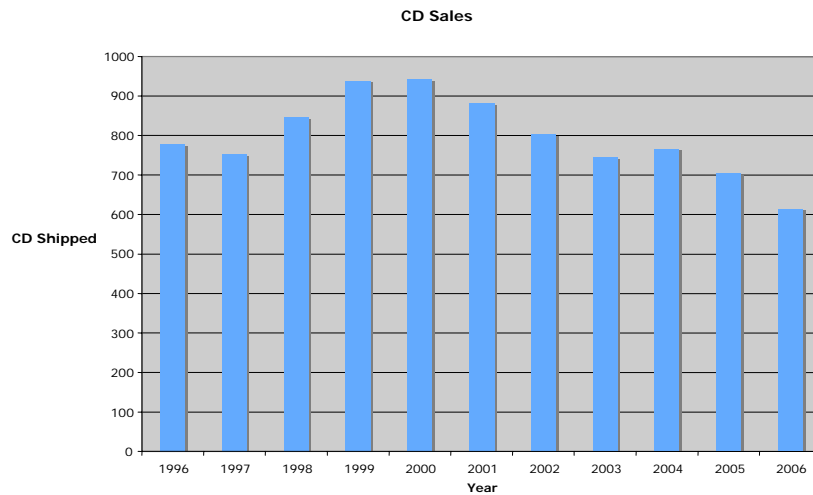
<sup>46</sup> *Id.* at 301.

<sup>47</sup> Ku, *Consumer Copying*, *supra* note 3, at 566. This is partly due to the fact that, as with distribution, digital technology reduces the costs of creation, lowering the financial investments necessary for creators to create the original digital master copy. Cost reduction, however, is not the most compelling challenge to copyright. *See* Ku, *Creative Destruction*, *supra* note 3, at 305-06.

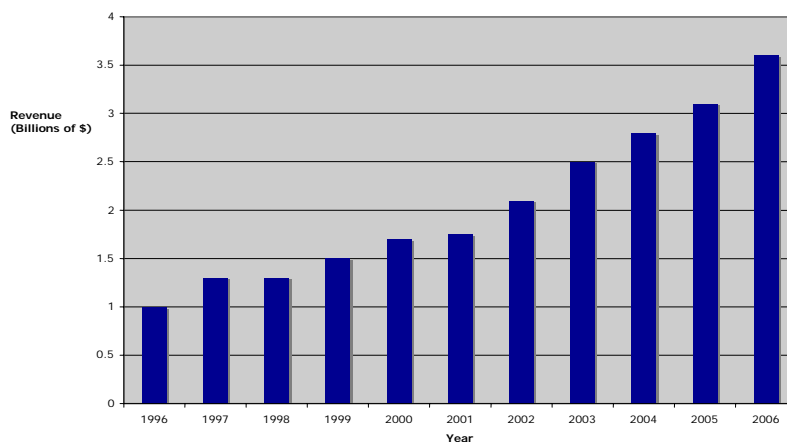


comparable regardless of whether one was distributing books, records, or DVDs, copyright policy generally assumed that restrictions against unauthorized reproduction and distribution should be expanded beyond their original purpose – promoting book publishing – to other creative endeavors despite differences in the markets for such works. This assumption generally ignored or discounted the fact that some of these endeavors did not suffer from the inability to exclude nonpayers from enjoying the underlying work. For example, while Stephen King may have difficulty excluding nonpayers from enjoying a published novel, Shakespeare, or more importantly, the owner of the Globe theater who commissioned Shakespeare's play, certainly could exclude nonpayers from entering the theater to enjoy a performance of *Romeo and Juliet*. In other words, the box office was and remains an important source of income for some creative endeavors. If distribution is no longer a concern, whether the exclusion of those unable or unwilling to pay for access to creative expression is justified as a means of providing additional financial incentives for creators should be an endeavor specific empirical inquiry. Whether the law should protect composers, musicians, poets, novelists, screenwriters, and motion picture producers through copyright law or another legal regime should be judged in light of the revenues available to these groups of creators from noncopyright sources.

Once again, consider the music industry in the United States. When one recognizes that noncopyright sources of revenue are not only significant, but in many cases, the principal source of income for performing artists, the argument that file sharing threatens the incentives to create becomes much less clear. Consider the music industry in the United States. As illustrated by Chart 1, despite an initial increase in sales, the recording industry has experienced a general decline in CD sales since the introduction of the Internet.

**CHART 1.**

Assuming that this decline is entirely the result of unauthorized downloads substituting for authorized sales, as opposed to the poor selection of artists or music by the recording labels, ineffective marketing, or a shift in consumer demand away from pre-recorded music to other forms of entertainment, this is bad news for the business of distributing recorded music. In contrast, the availability of unauthorized copies, however, appears to have had a very different impact upon the revenues available to the typical performing artist and consequently, the incentives of those performing artists. As illustrated by Chart 2, according to Pollstar, an industry trade publication, U.S. concert revenues have risen to record totals in the decade following the Internet.

**CHART 2.****Concert Revenues**

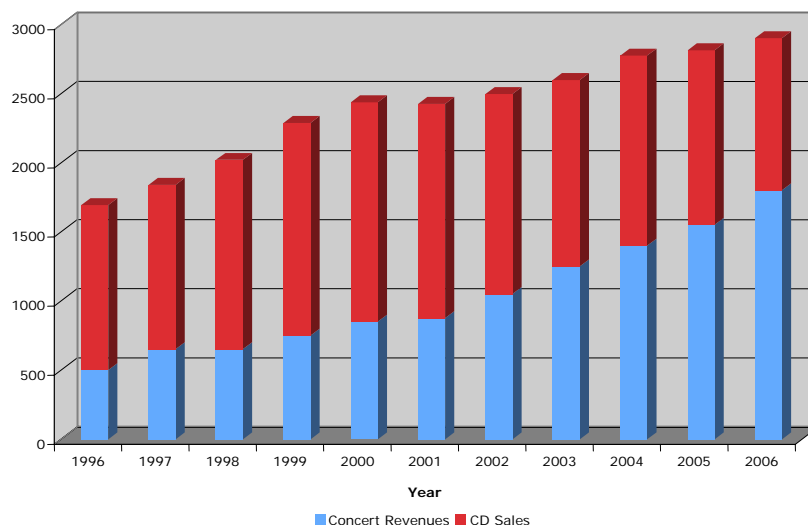
As the limited amount of publicly available information on the workings of the industry suggests that live performances are the principal source of income for the vast majority of recording artists,<sup>48</sup> this increase in concert revenues is particularly important when evaluating the impact of unauthorized downloading upon artists' incentives to create music. As illustrated by Chart 3, the revenue available to artists' has clearly increased in the decade since the introduction of the Internet.<sup>49</sup>

<sup>48</sup> See Ku, *Creative Destruction*, *supra* note 3, at 306-09. In contrast, songwriters do earn income from the sale of recorded music in addition to revenues from radio play, and other sources. How downloading impacts CD sales and the incentives of songwriters is another empirical question that must be answered.

<sup>49</sup> These figures are based upon the RIAA reports of CD sales and Pollstar's reports of concert revenues, and reported estimates that artists generally receive 12% of CD sales and 50% of concert revenues. See James Surowiecki, *Hello, Cleveland*, THE NEW YORKER, May 16, 2005, available at [http://www.newyorker.com/archive/2005/05/16/050516ta\\_talk\\_surowiecki](http://www.newyorker.com/archive/2005/05/16/050516ta_talk_surowiecki) (last visited Aug 20, 2007) ("An artist, if he's lucky, gets twelve per cent of the retail price of a CD. But he doesn't get any royalties until everything is paid for — studio time, packaging costs, videos — which means that he can sell a million records and make almost nothing. On tour, though, he often gets more than half of the box-office, so even if he grosses less he can profit more.").

**CHART 3.**

**Artists' Share  
in Millions of Dollars**



Adjusted for inflation, performing artists have enjoyed a 229% growth in concert revenue and a 40% growth in the combined revenue available from CD sales and ticket sales. Even assuming that file sharing will destroy all economic value in distributing CDs, we would need to determine whether the overall financial incentives available to artists are sufficient to promote the writing, recording, and performing of music.

One possible explanation for the growth in revenues for artists is that file sharing is an effective form of free advertising. File sharing exposes new or independent artists and works to the public based upon the actual preferences of the public rather than what distributors guess to be the public's preferences. As the chief of one independent record label described, is akin to "grass-roots promoters whose efforts eventually increase sales."<sup>50</sup> After all, musicians have always given away music to build a fan base; they are just accustomed to giving it away to record labels. And, while CD sales have fallen since the introduction of file sharing, as discussed above concert revenues have broken records and the artists share of the revenue pie has increased significantly. While correlation is not causation, this degree of correlation certainly requires serious consideration. And this may

<sup>50</sup> See Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. Times, Sep 22, 2003, at C1, available at <http://query.nytimes.com/gst/fullpage.html?sec=technology&res=9A01EEDF1E3AF931A1575AC0A9659C8B63>.

even be true for the sale of CD's. Some studies suggest that file sharing may improve CD sales.<sup>51</sup> A recent study conducted by Felix Oberholzer and Koleman Strumpf found that file sharing had little effect on record sales in general, which suggested that most file sharers "are likely individuals who would not have bought the album even in the absence of file sharing."<sup>52</sup> The study also found a slight positive effect for high selling albums.<sup>53</sup> And, similar anecdotal evidence abounds.<sup>54</sup>

Moreover, the assumption that people will stop buying music or other creative works if they can obtain it for free is not supported by experience. Not only do people pay for bottled water when they can get water for free, but people are paying to download music. To date, Apple has reportedly sold 2.5 billion songs through its iTunes store despite the availability of "free" downloads, and iTunes is only one of the many commercially licensed Internet music distributors.<sup>55</sup> Economists may explain this behavior as a function of opportunity costs. With all endeavors, whether mowing the lawn, growing food, or now downloading music, people have the choice of doing things themselves. That choice, however, entails certain costs: costs to acquire a skill, costs to acquire any necessary tools, and costs associated with foregoing other opportunities or engaging in other activities. In general, we choose to pay other people to do something we are capable of doing ourselves when the costs of self-help outweigh the value of doing it ourselves. In other words, people will pay for music if what they receive for their payment – convenience, reliability, and quality – is greater than the benefit of downloading the same music themselves. When one considers that the marginal cost for reproducing and distributing digital works is zero,<sup>56</sup> it is not hard to imagine that some price above zero will satisfy all but the most indigent or disinterested customers. Provided that the price is right, music sales and the sales of other copyrighted works will

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<sup>51</sup> See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (noting that some studies suggest that file sharing increases CD sales); John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 74 (2003) (noting recent economic literature that demonstrates that the sharing of information can generate increased profits); see also Reuters, *Survey: Music swappers are music buyers too*, May 7, 2003, <http://www.zeropa.com/news/2878/Music+swappers+are+music+buyers+too> (noting that, while record labels blame the popularity of free services like KaZaa for declines in CD sales, industry watchers argue that declining sales are the result of fewer hit albums and a weak economy).

<sup>52</sup> Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* 3-4 (Mar 2004) (unpublished manuscript), [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf) (last visited Aug 20, 2007).

<sup>53</sup> *Id.* at 3.

<sup>54</sup> See Ku, *Grokking Grokster*, *supra* note 3, at 234. This increase in sales may be closely connected to the increase in concert revenues with individuals purchasing CD in the period preceding and following a concert.

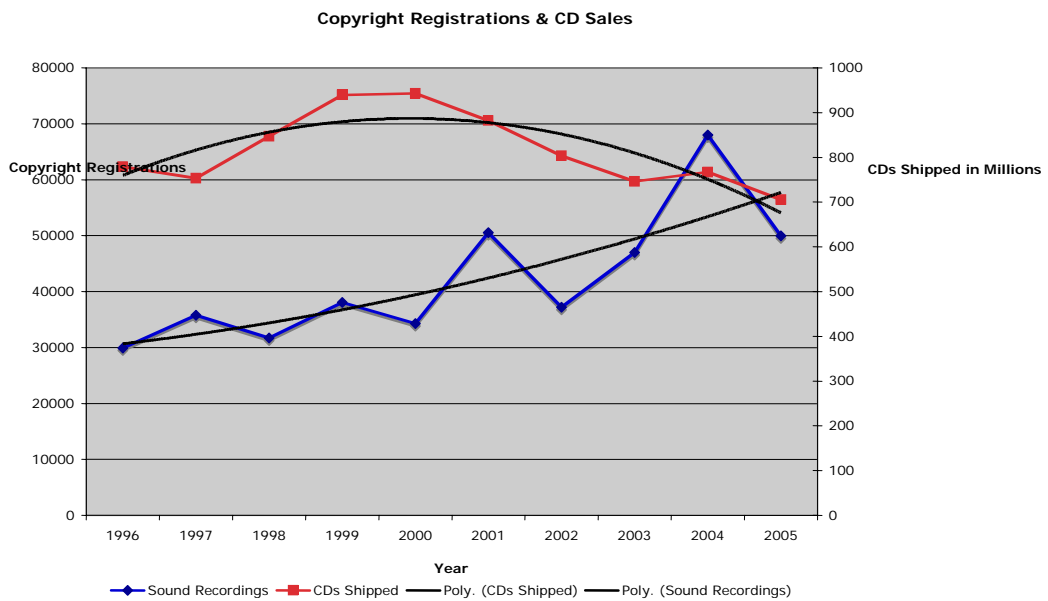
<sup>55</sup> See 100 million iPods Sold (Apr 9, 2007), <http://www.apple.com/pr/library/2007/04/09ipod.html> (last visited Aug 20, 2007).

<sup>56</sup> See Ku, *Creative Destruction*, *supra* note 3, at 274.

continue to be a significant, if not greater, source of compensation to artists once distributors can no longer demand the lion's share.

A growth in the revenue available to performing artists, however, does not necessarily lead to an increase in creativity. For example, would be artists may see any “losses” attributed to unauthorized reproduction and dissemination of their works as a deterrent or offense to their creativity. Likewise, the revenue available may be disproportionately awarded to superstars, thereby decreasing the rewards available to vast majority of performers or individuals with little or no interest in popular stardom. Once again, the empirical evidence over the last decade is quite provocative. If one uses U.S. copyright registrations as a measure for the creation of new sound recordings in the United States, the evidence suggests that during a period of increased “unauthorized” reproduction and distribution of sound recordings, the number of new works created actually increased as illustrated by Chart 4.

**CHART 4.**



So while the number of CDs sold has declined as illustrated by the number of CD's shipped as reported by the RIAA, the number of new sound recordings created has increased over the same period of time.

It may be suggested that because artists will avail themselves of the benefits of this technology and self-distribution, concerns about copyright may be premature because the “market” will correct itself over time. While

this may change the balance between creators and distributors going forward, it still remains an important public policy concern. Even if individual artists successfully take advantage of the benefits of the Internet and digital technology and bring their works to the public without having to put themselves in thrall to traditional intermediaries, applying exclusive rights for existing works to non-commercial public copying gives current copyright owning intermediaries considerable influence, if not veto power, over technological and economic development until their interests expire. Following the U.S. Copyright Term Extension Act, existing copyrights will not expire until seventy years after the death of the author, or in the case of works made for hire, 120 years after creation or ninety-five years after publication.<sup>57</sup> As such, these copyright holders, many of whom have every incentive to hold up and block the emergence of any new world order, will not see their copyrights expire in our lifetime or even in this century.

Before concluding that producers of valuable technology and the millions of users of those technologies should be declared criminals, any thoughtful economic justification for copyright must examine the complex role that these sources of revenue play in providing incentives to create works, their relationship to the incentives generated by copyright, the impact of file sharing on copyright and noncopyright sources of income, and most importantly, how file sharing impacts the decision-making process of would-be artists. In the case of music, assuming that individuals are capable of making rational fine-tuned decisions about the potential rewards of becoming a musician, and that financial reward is a substantial motive, unrestricted file sharing may have actually increased the financial incentives available to musicians.

In contrast, for some creative endeavors the supplemental financial rewards provided by selling copies of works to the public may be essential in order for a market for those works to function. For example, given the high cost of producing a motion picture, downstream revenues from the sale of DVDs may be necessary to ensure investment in films, especially if we desire investment in “riskier” works that may not appeal to a mainstream audience. Likewise, while writers such as Mark Twain historically made money on the lecture circuit,<sup>58</sup> if authors were dependent upon ticket sales alone, some might choose to continue to practice law or sell insurance rather than write. As an empirical matter, we simply do not know.

Moreover, even if we assume that file sharing has some negative impact upon the financial incentives available for creation and that artists behave rationally like *homo economicus*, resulting in the creation of fewer works, we would still need to answer the difficult policy question of

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<sup>57</sup> See 17 U.S.C. § 302 (2000).

<sup>58</sup> See The Literature Network, Mark Twain – Biography and Works, <http://www.online-literature.com/twain/> (last visited Aug. 20, 2007).

whether encouraging the creation of additional works is worth the price of denying the entire public unlimited access to all the works already created and the works that would be created without additional restrictions. If only one in ten motion pictures might not be made, the price of denying the public access to the other nine, as well as all other motion pictures already in existence may simply be too high. Correspondingly, if only one in three books would be written, we might readily find the trade-off acceptable. Because distribution has dominated the analysis for hundreds of years, we have not confronted these difficult questions.<sup>59</sup>

### *C. Alternatives to Monopoly Privileges*

Even if we conclude that additional revenues derived from the reproduction and distribution of copies are desirable for encouraging a particular creative endeavor, or because it is fair and just, copyright may no longer be the preferred method for generating that revenue. Within the community of legal scholars in the United States, there is growing support for creating a levy system to respond to any diminution in financial incentives caused by file sharing rather than enforcing exclusive rights in reproduction and distribution. Proposed such an alternative years ago by suggesting that society could resolve the digital dilemma by funding creation through a levy system similar to the one enacted by the Audio Home Recording Act of 1992.<sup>60</sup> More recently, Neil Netanel and William Fisher have put forward detailed proposals of their own for similar levy regimes.<sup>61</sup> Without going into the details of these proposals, the basic idea is straightforward. Government would tax various products and services used for file sharing, and distribute that revenue to the content creators.<sup>62</sup> (Fisher goes on to explore the costs and benefits of funding creation through an income tax as well.)<sup>63</sup> Unlike traditional government support for the arts in which government officials determine who should receive the funding, funds under these proposals would be distributed on either a per download or per use basis, thus tying compensation to actual public demand.<sup>64</sup>

While there will clearly be costs associated with administering such a

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<sup>59</sup> See Breyer, *supra* note 41 (examining whether alternative business methods could provide adequate financial incentives to publishers and computer programmers).

<sup>60</sup> Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-1010 (2000)); see Ku, *Creative Destruction*, *supra* note 3, at 312-15.

<sup>61</sup> See WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 202 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1, 4 (2003).

<sup>62</sup> See Ku, *Creative Destruction*, *supra* note 3, at 312-15; FISHER, *supra* note 61, at 202; Netanel, *supra* note 61, at 4.

<sup>63</sup> See FISHER, *supra* note 61, at 216-17.

<sup>64</sup> See *id.* at 202-03.



regime, this approach has significant advantages over the traditional copyright regime. First, because it does not rely on a private property model, no one would be denied access. In other words, the entire public would have unlimited access to and enjoyment of every work ever created. Second, artists would have greater freedom because they would be less reliant upon intermediaries to distribute their works. Third, by distributing funds based upon downloads or use, consumers rather than government would guide investment by signaling which works merit further investment. Fourth, a levy would reduce or eliminate various costs associated with attempts to enforce copyright in a digital world. These costs include the high cost of enforcing copyright against millions of individual defendants, engaging in an ever-escalating technological arms race locking and unlocking such works, and deterring investment in innovation because of fear of secondary and vicarious liability.<sup>65</sup> Fifth, a levy along these lines would avoid privacy concerns raised by current and proposed efforts to use copyright to create a pay-per-use regime.<sup>66</sup> Because such a levy need only consider the total (actual or estimated) number of times a work was downloaded or used, there would be no need to determine or record the identity of individual users. Under such a system, Fisher writes:

Consumers would pay less for more entertainment. Artists would be fairly compensated. The set of artists who made their creations available to the world at large – and consequently the range of entertainment products available to consumers – would increase. Musicians would be less dependent on record companies, and filmmakers would be less dependent on studios, for the distribution of their creations. Both consumers and artists would enjoy greater freedom to modify and redistribute audio and video recordings. Although the prices of consumer electronic equipment and broadband access would increase somewhat, demand for them would rise, thus benefiting the suppliers of those goods and services. Finally, society at large would benefit from a sharp reduction in litigation and other transaction costs.<sup>67</sup>

In light of these potential benefits, the argument for maintaining the old world order is far from clear.

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<sup>65</sup> See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1349 (2004).

<sup>66</sup> See Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L. J. 575 (2003) (discussing the privacy concerns raised by digital rights management technology).

<sup>67</sup> FISHER, *supra* note 61, at 203.

Lastly, allowing the public to reproduce and distribute creative works does not mean that a similar immunity should apply to individuals or businesses that seek to commercially reproduce and distribute creative works without the creator's authorization. As the U.S. Supreme Court recognized in *International News Service v. Associated Press*, the law may regulate the ability of competitors to copy from one another under principles of unfair competition even when the general public would not be subject to similar restraints.<sup>68</sup> To the extent that there is money to be made in the reproduction and distribution of expression, it stands to reason that creators should be entitled to such rewards.

## V. CONCLUSION

There is no doubt that the CCD's goal of promoting domestic and global environments that encourage the creation, dissemination, and access to diverse forms of cultural expression is critical in an information age. The challenge that lawmakers and policymakers must confront is how best to create that environment. This paper has focused upon one dimension of that question – copyright law – with its emphasis on creating and protecting property rights in expression as a means for creating incentives to create and disseminate cultural expression and how that focus can be questioned in light of advances in technology. I do not mean to suggest that copyright is the only, or even the best means for achieving the goals of the CCD, only that understanding the relationship between copyright, creativity, and technology is an important part of the discussion.

Along these lines, several points deserve emphasis in light of the papers and discussions presented at this conference. First, we must be mindful of whose interests are being protected in the name of “promoting” diverse cultural expression. As the copyright and p2p problem exemplifies, the interests of intermediaries are often erroneously treated as the equivalent of the interests of creators and the public. In the context of global trade and the WTO, we should be similarly mindful of whose interests are actually being served by trade policy. Are they the interests of intermediaries seeking to protect themselves from global competition? If so, are those interests consistent with the interests of creators and the public? While these questions may not be relevant in a general discussion of trade, they become increasingly relevant when juxtaposed with a policy of promoting diverse cultural expression.

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<sup>68</sup> See *Int'l News Service v. Associated Press*, 248 U.S. 215, 235 (1918) (recognizing a claim for unfair competition even in the absence of a property right in news).

Along these lines, the copyright example raises another important question for policies seeking to promote a diversity of cultural expression. Who defines culture? Is culture defined from the “bottom up” based upon the collective choices of individuals? Or, is cultural defined from the “top down” based upon the opinions and preferences of governmental, corporate, or social elites? In theory, copyright has been described as serving the “bottom up” or “democratic” view because it facilitates a market for cultural expression based upon the preferences and tastes of individuals rather than those of wealthy patrons or the emperor. In practice, however, copyright has created a regime of corporate patronage in which the opinions and preferences of corporations and wealthy individuals have a significant influence over culture because they determine what works of cultural expression will be disseminated to the public and on what terms. Changes in technology may reduce the power exercised by such intermediaries and connect the creators of cultural expression more directly with their audience, however, whether this will occur will depend, at least in part, upon one’s answer to normative question of who should define culture?

Lastly, as my discussion of the challenges and promises technology poses for the creation of cultural expression hopefully makes clear, one size does not fit all. In the context of copyright law this means that our answer to whether we should continue to provide legal protection and/or how to provide such protection to sound records may very well be different than our answer for books, motion pictures, and other creative endeavors and works of cultural expression. Our answers will be different because the economics behind these different creative endeavors may differ both in kind and degree. As such, whether technology has eliminated the need to preserve shelf-space in order to promote cultural diversity will depend upon how we choose to fund the creation of such works. If we decide that the primary source of funding for motion pictures should be box office ticket sales rather than exclusive rights to control the digital distribution of those works, screen quotas will remain important. However, our answers will also differ from Nation to Nation, society to society, and culture to culture based upon how we balance the interests of creators of cultural expression with the interests of the public in obtaining access to that expression. While this diversity may be frustrating to those seeking simplicity or efficiency through uniformity, it is important to recognize that there will be legitimate differences of opinions and approaches even when the goals are the same. In short, global cooperation with respect to promoting diverse cultural expression will only be achieved when we move beyond the rhetoric of piracy and hegemony and separate those conflicts that are based upon legitimate differences in opinion on how best to achieve our shared goals from those generated by efforts to promote our own self-interest.

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