2005

Even Non-Extremists Get the Blues: The Rhetoric of Copyright

Wendy J. Gordon
Boston University School of Law

Lois Wasoff

2005-01-01

Even non-extremists get the blues: the rhetoric of copyright

EVEN NON-EXTREMISTS GET THE BLUES: THE RHETORIC OF COPYRIGHT*

by Wendy J. Gordon and Lois F. Wasoff**

Introduction

The participants in this dialogue are Wendy Gordon and Lois Wasoff. Each is an intellectual property expert who has immersed herself in copyright law and policy for over twenty years. Neither sits at an extreme end of the policy spectrum, yet the two disagree over a wide range of issues. The editors of this volume thought their discussions could prove useful to others struggling with copyright dilemmas. Accordingly, Gordon and Wasoff sat down with a tape recorder for us. In edited form, their dialogue follows here.

Dialogue

Wendy Gordon (WG):

We are addressing the great divide in today's copyright debate. One side identifies itself more with the public domain and a greater freedom to use copyrighted materials. The other has been accused of identifying itself more with media industries and emphasizes greater incentives to disseminate copyrighted materials. Both sides contend they are on the side

** Wendy J. Gordon is Professor of Law and Paul J. Liacos Scholar in Law at Boston University School of Law, and Visiting Scholar, Department of Comparative Media Studies, MIT. Lois F. Wasoff is the former Vice President and Corporate Counsel of Houghton Mifflin Company and now has a private legal practice specializing in copyright policy issues, particularly as they relate to publishing. Her clients include commercial and nonprofit publishers and publishing trade associations as well as authors. The authors thank Brandon Ress, BU Law '05, and Jessica Tripp, Suffolk Law '05 for their excellent research and editorial assistance, and Benjamin Kaplan, Henry Horbaczewski and Iris Geik for their inspiration. Wendy Gordon wishes to wishes to thank Richard Stallman, Rebecca Tushnet, and David McGowan for helpful comments. She emphasizes that none of them are responsible for her errors or her views. Lois F. Wasoff thanks James Catterton for his patience and support. The authors also note that their shared intention in this dialogue was to talk about how people talk about copyright. They did, of course, stray into substance, but neither of them intends this dialogue to be the definitive statement of their views on any of the many topics mentioned.

of bettering American lives. What ideas and interests truly underlie this debate?

Lois Wasoff (LW):

The question we want to explore is whether we are so caught up in rhetoric and disagreement that we can't see our common interests. If we speak more plainly about what really worries us, might we find at least some convergence?

WG: Rhetoric sometimes gets in our way. For example, proponents of giving greater power to copyright owners sometimes trumpet 'natural rights' as if John Locke led directly to the Digital Millennium Copyright Act. But audiences have natural rights, too. As Professor Benjamin Kaplan wrote, "[I]f man has any 'natural' rights, not the least must be a right to imitate his fellows . . . Education, after all, proceeds from a kind of mimicry, and 'progress', if it is not entirely an illusion, depends on generous indulgence of copying."[1]

So how did 'natural rights' become the clarion call of the propertarians? You and I come from different ends of the copyright policy spectrum. I tend to favor more limits on copyright than you do. Yet, our underlying interests converge in the idea that copyright is about *creativity*. We both are interested in the question of whether, in the big picture, copyright law is becoming more of a threat rather an incentive to creativity.

LW: We would imagine that this kind of inquiry would be a common ground for those involved in copyright policy debates. But many people do not believe that good policy and historical developments fundamentally link copyright to creativity. They believe that copyright is an institution designed to serve only the publishing and entertainment industries. I think this helps to explain the heat and the anger in some of the rhetoric: the belief that copyright has come to stand for corporate ownership rather than creativity.[2]

---

[1] BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT at 2 (1967), reprinted above at page 2. That Locke would not have supported unlimited private rights is shown by his famous "proviso" (John Locke, Locke's Second treatise of civil government at Ch. V §§ 26-32), and by the document in Lord King, *The Life and Letters of John Locke* (London 1884) 202-09 (memorandum from 1693 in which Locke expresses inter alia the view that rights over copying should be limited in time.) For explication of the proviso's implications for copyright, see Wendy J. Gordon, A Property Right in Self Expression, 102 Yale L.J.1533 (1993) (arguing that the Lockean proviso entitles the public to significant liberties to use others' creative labor).

[2] For a discussion about copyright and authors, see Jane C. Ginsburg, Authors and Users in Copyright, 45 J. Copyright Soc'y U.S.A. 1 (Fall 1997).

WG: Yes. Many who favor fewer copyright restrictions believe, as a *de*scriptive matter, that copyright only serves the interests of the publishing and entertainment industries, and that makes them angry. On the other side, many who are angered by unauthorized copying believe, as a *pre*scriptive matter, that it's dissemination and marketing that most needs copyright's support. Our hope is to help defang some of the surrounding rhetoric so the two sides can begin to talk to each other a little more productively.

LW: We should also mention something that you put on the agenda when we were planning this project: namely, that the debate tends to be conducted on the fringes, in terms of nightmare scenarios. So that those who are on the lower protectionist side will talk about all the information being locked up with contractual restraints preventing the reuse of even public domain material — that's their nightmare. And those who are on the side of stronger protection will talk about a wholesale invasion of the rights of authors under which nothing will be able to be created and distributed publicly.

WG: So in one nightmare, a combination of law and technology prevents tomorrow's Tom Stoppard from writing disrespectful versions of *Hamlet*.[3] In the flipside nightmare, copying makes publishing so unprofitable that tomorrow's Hemingway has to spend his days flipping burgers at McDonald's.

LW: Exactly. And it will be interesting in our conversation to see how much of the polarity in the debate comes from these fears, and from underlying definitional issues.

WG: Some of the debate's polarization happens because people *want* bad guys to pursue. Whether they know it or not, they create straw men to meet this need. As a result, sometimes one side ends up doing the other side's dirty work — creating nightmare scenarios that drive the debate further to extremes.

For example, the movie industry has been criticized for trying to make people think that downloading a movie is as bad as stealing physical property. The law doesn't take that view, and it would be a tragedy if people started to believe that all copying was stealing. Yet Jed Rubenfeld,

[3] See TOM STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD (1967). For discussion of whether copyright and technology could ever lead constrain the public's use of public domain materials such as Shakespeare's plays, see *infra* at 23-24 (discussion of *West Side Story's* adaptation of *Romeo and Juliet*).

a proponent of very limited copyright, reinforces a related error when he writes:

> In some parts of the world, you can go to jail for reciting a poem in public without permission from state-licensed authorities. Where is this true? One place is the United States of America.[4]

As a metaphor, that's interesting. But as a statement of law, it reinforces an erroneous and pernicious myth about how restrictive copyright is.

The first problem with the claim is the reference to getting permission from "state licensed authorities." That implies that a government agent decides who can or cannot recite a particular text. Copyright does not work this way. Permission need be sought only from the private person who owns the copyright, and anyone can be a copyright owner — you don't need to pass some kind of governmental review approving your content.

Second, as a matter of ordinary copyright law, no one violates copyright simply by "reciting a poem in public" without permission. For nondramatic literary and musical works, copyright law requires a live performer to obtain permission from the copyright owner only in a narrow range of circumstances — circumstances quite different from the poetry reading in Professor Rubenfeld's's example. The interrelation of Sections 106 and 110(4) of the Copyright Act make the freedom for noncommercial in-person performance very clear.[5] I find other problems with Professor Rubenfeld's statement. It suggests that criminal infringement will become an issue when you recite a copyrighted poem in public. That ignores the statutory requirements for criminal infringement[6] and the strong *scienter* requirement.[7] If believed, this kind of rhetoric can distort cultural activity as much as overbroad copyright law can — for instance, making someone who loves Eliot or Larkin, instead recite Marvell or Donne, out of fear

---

[4] Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1, 3 (2002).

[5] See 17 U.S.C. §§ 106, 110(4). Section 106(4) gives the copyright holder the exclusive right to perform the copyrighted work publicly. Yet the right is subject to the provisions of Sections 107-122. Section 110(4) sets forth circumstances under which a public performance will be free of any control by the copyright owner. Most relevant to Professor Rubenfeld's example, Section 110(4) provides there can be no copyright infringement for live public performances of a nondramatic literary work so long as there is no admission charge, no payment to the performer or others, and no other direct or indirect commercial advantage. Sec. 110(4). There are even exemptions sheltering some public performances where admission is charged. Id.

[6] See 17 U.S.C. § 506(a)(1997).

[7] See § 506(a); United States v. Moran, 757 F. Supp. 1046, 1048 (D. Neb. 1991) (defendant acquitted on the ground that he acted out of an honest belief that his acts constituted "fair use".)

that reciting a *recent* poet will bring a jail term. So Professor Rubenfeld is using a straw man to make copyright seem much worse than it really is. The belief that copyright is this restrictive may constrain people's use just as real copyright does. It scares people into a mistaken belief about what they must do to remain law-abiding citizens.

LW: I'm glad we've begun by finding something we basically agree on. I also think setting up straw men is unproductive, although I do take issue with your characterization of the positions taken by the film industry. All copying is not theft, but in my view most film downloading is either theft or civil infringement, as is most music downloading. Recent court decisions support this. Direct infringement was not an issue in the 9th Circuit's Grokster opinion,[8] which was about whether P2P services were liable for vicarious or contributory infringement, but the District Court decision it upheld acknowledged that the downloading itself was often infringing.[9]

On the question of straw men, I can give you another example. I have been told as though it is gospel fact that the DMCA[10] simply ended fair use. Now you can argue, and we may in the course of this discussion, about whether or not the anti-circumvention provisions of the DMCA have had or will have a negative impact on the exercise of the fair use privilege in certain circumstances, but it didn't end fair use. And the statute says quite clearly that 107 (the fair use provision)[11] survives. But that is the myth. Now, even in circumstances in which uses were obviously fair in the past, people are concerned because they think there has been a wholesale change in the fair use doctrine that affects traditional uses.

WG: I am not sure that the DMCA causes no wholesale change. Even if a consumer would only make a fair use of copyrighted material, he's not allowed to decrypt an encrypted copyrighted work. The DMCA puts us all under a duty not to circumvent technological barriers to see or hear what's behind them. So a technological barrier can defeat both access and fair use.

---

[8] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 280 F.3d 1154 (9th Cir. 2004)

[9] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 259 F.Supp.2d. 1029 (CD Cal. 2003)

[10] Digital Millennium Copyright Act, 17 U.S.C §§ 1201-1205 (1999). Several courts have considered the effect of the DMCA on fair use. These courts have agreed that a fair use reason for circumventing access controls is not a defense to a DMCA cause of action. See e.g., Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001); United States v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D.Cal. 2002).

[11] See 17 U.S.C. § 1201(c)(1).

Admittedly, as a doctrinal matter, fair use remains a defense to traditional copyright infringement. If you somehow get access without violating the DMCA, any copies or derivative works you then make are eligible for fair use treatment.

But how much is that worth?

To put this into an example, say a film critic on a local access cable channel wants to make a digital copy of a short scene from an encrypted DVD — say he needs to manipulate the lighting to explain what he doesn't like about the movie's cinematography. If the encryption allows the DVD to be played but not copied, the critic will need to bypass the encryption to prepare the demonstration for his audience. In the process he violates the DMCA, and he can't cite fair use as a defense to the bypass. Sure, as to the copy he made and the manipulation he did *after* violating the DMCA, the fair use doctrine is applicable. But I'm not sure the doctrine is very effective at that point. The critic is already in legal trouble.

If he didn't want to worry about the DMCA, he could play the movie on his television screen, get out his video camera, and simply film what appears on the TV screen. In this instance, there would no need to mess with the encryption.

LW: That is the example that the court gave in the *Reimerdes*[12] case, when it upheld the DMCA.

WG: Yes, that case is the source of my example. But it's going to be very hard for the critic to make the point that he wants to make, with only a blurry analogue video to use.

So yes, traditional fair use remains — even things behind these electronically locked doors can be used in some way — but only so long as the critic does not break through the door, and only so long as he hasn't had to waive the fair use doctrine as part of the price of entry. If these conditions are met, the doctrine is still available when he makes a copy.

The people who make the claim you are concerned with — that the DMCA ended fair use — are probably thinking of an additional scenario. They fear that a time will come when virtually everything is online. Paper storage will be expensive and become incredibly infrequent. Maybe Shakespeare's plays and other public domain works will cease to exist

[12] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294 (S.D.N.Y. 2000). In *Reimerdes*, defendants posted on their website (and linked to other websites with) the source code to DeCSS, a program used to circumvent copy protection on DVDs. Universal and other motion picture studios filed suit under the DMCA's trafficking provisions to enjoin the defendants' activity.

in paper copies, except the rare ones that the public can't touch, and one or two regular copies in a basement archive somewhere. People would have access to Shakespeare — the folios and various other versions of his works — only online.

I'm among the people who worry about the abuse of the DMCA should that day ever come, since virtually all online works can be encrypted.

LW: I think its worth noting that, in the real world, publishers and other copyright proprietors have permissions departments that exist to consider and often grant requests for uses that go beyond fair use.

WG: To secure our rights, we shouldn't have to depend on the kindness of strangers. Even strangers who really are kind.

LW: I don't think "kindness," for good or ill, is particularly relevant here. Permissions decisions are made on the basis of a number of factors, including the need to accommodate customer concerns and evaluations of the financial impact of the proposed use on the proprietor. But, to return to your hypothetical, it implies that manipulating the digital version is the only effective way to demonstrate the concept. It may be the most convenient for the critic, but I don't think that should be the controlling factor.

WG: It should indeed make a difference, whether the copying is essential or a mere convenience. But I'm not sure that's the sort of question that interests most permissions departments; I expect that typically they are making a business decision. By contrast, that's what the fair use doctrine is for: to examine how compelling a need the defendant has, and to examine whether fulfilling his need will on balance help society or hurt it.

LW: Actually, I don't think that is what "fair use" does. Societal considerations are obviously built into the structure of fair use, but what fair use does is evaluate a particular use in a specific context. You are defining "good use" not "fair use" and not all "good" uses are fair under the copyright law.

WG: To the extent the courts apply the fair use doctrine as you describe it, that's one of the reasons a First Amendment defense to copyright infringement needs to be explicitly recognized. But I'd like you to respond to my concern that all information will eventually be delivered digitally, encrypted, and accessible only to people who click 'yes' to a contract.

LW: First, I view that as a "nightmare scenario." That day is not in our lifetimes. Legislation can barely keep up with what is happening now, let

alone attempt to contemplate a parade of horribles that may or may not occur twenty or thirty years from now. This idea that all information is going to be online and locked up behind encryption is one of the most popular but also, in my view, one of the least convincing nightmare scenarios.

Secondly, I think it ignores the policy behind the DMCA, which was to increase the availability of information in digital form, not limit it. Congress decided that to induce copyright proprietors to make their works available in new technological forms, it had to give them a way to protect their rights to those works against wholesale authorized copying and distribution.[13] And in my view, the policy is working. It is not a coincidence that movies started being distributed in large numbers on DVDs only after the DMCA was passed. Of course, it didn't take long for a Norwegian teenager to break through the CSS encryption and make DeCSS available on the Internet. But the law gave the copyright proprietors the legal recourse they needed to try to keep the inevitable leakage down to a tolerable level, instead of the hemorrhage they would have encountered otherwise.[14] On top of that, even if present trends continue and more and more information becomes available digitally, why should we assume that analogue and paper copies will completely disappear? Finally the present trend toward digitization is not exactly continuing as anticipated. Just talk to anybody in the publishing industry about the "promise" of the e-book market and how that promise has not been kept.

WG: As we're having this conversation, Professor Kaplan's UNHURRIED VIEW is still out of print, so you are holding a copy purchased from the Internet. You're essentially using an e-book version.

LW: [Holding up 135 pages of print.] No, we're using a print-on-demand version of the book. Why are you and I holding this printed copy? Not just because we are of an age where we prefer to read things in print rather than on the screen, at least those things that we want to spend some time thinking about. The copy of Jed Rubenfeld's article you referred to was delivered to you in digital format and printed by you, because the physical, paper printout was the more convenient form.

---

[13] See, e.g. S. REP. NO. 105-190, at 8 (1998) ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.")

[14] Universal City Studios, Inc., 111 F. Supp.2d 294.

WG: I think you are proving my point. There is a push toward the use of digital formats and away from delivery through traditional tangible copies.

LW: That is certainly true, although I think I should note that even though the book and the article came to us through the use of digital technology, we are able to make fair use of their content. But I am making a different point, which is that whatever the mechanism by which the content is finally delivered to the end user, whether it remains in a digital format and is used and manipulated that way or whether it is translated to a print format and is used and manipulated that way by the end user, the object is to make it available.

WG: You mean to do precisely that, to make it available?

LW: Yes. Publishers are called publishers because they are in the business of publishing, meaning they are in the business of actually giving people access to materials. They are not in the business of locking things away, of denying access. That's one of the reasons why I don't find the nightmare scenario of all content being digitally locked up to be convincing.

WG: I'm glad to concede that if unencrypted books remain, then fair use of those books would also remain. At least that would be the case under the current version of the DMCA. But I'm not as sanguine as you are about the playing field that old-fashioned books and prints will face in the future. Let's imagine a young cartoonist or painter who goes online looking for interesting images to experiment with. Or the young writer who's given an assignment to burlesque an existing story. The works that are *easy* to copy are the ones that are likely to influence the artistic development of these young people. Online access is convenient, and often convenience rules.

On your more fundamental point, regarding publishers wanting to make books available, I don't see why you assume a convergence of interest between publishers and the public. Of course publishers want to give people access. But on what terms? We have antitrust law not because price fixers want to make widgets unavailable — they get no pleasure or profit from hoarding widgets — but because the companies want to sell the widgets at high prices. Making something available doesn't mean making it available at the lowest price consistent with incentives, or making it available in an unrestrictive manner.

LW: We're talking about copyright, not illegal restraints of trade or antitrust conspiracies. Making things freely available doesn't carry with

it an obligation to make them available free. Nor should it — copyright is based on an economic incentive system.

WG: And the way the incentive system works is to give copyright owners the potential to attain a kind of market power. So it's extremely relevant to look at competition policy. We can't talk about copyright without talking about other relevant laws. Contract law is another example.

Sellers of online works can place contractual restrictions on what users do with what they download. Consider a case like *ProCD*,[15] where a contract prohibiting commercial use of a database was enforced, even though the database was in the public domain. If *ProCD* is followed, and licenses of the shrink-wrap and click-through form survive — along with their restrictions — we may as a society be in big trouble. Five years from now, you may not be able to access an electronic copy of *An Unhurried View* without clicking a box that says that you agree to give up your fair use rights.

LW: *ProCD* is being followed now, and the world has yet to come to an end. As you said, *ProCD* did not involve a copyrighted work, but the distribution of copyrighted works has always been managed through contracts, and the protections of state contract law have been adequate to prevent serious abuses.

WG: I'm not sure of that. Look at the restrictive legend that Westlaw makes appear on printouts.[16] There can be overreaching contracts.

---

[15] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). In *ProCD*, the court held that plaintiff's shrink-wrap license was enforceable. The holding has been questioned both on grounds internal to contract law, and on the ground of pre-emption: the mass-market contract, whose force arises out of state law, essentially changed the public domain status that the database possessed under federal law. See, e.g., Wendy J. Gordon, Intellectual Property as Price Discrimination: Implications for Contract, 73 Chi.-Kent L. Rev. 1367 (1998). *ProCD* nevertheless remains a leading case.

[16] On October 26, 2004, Professor Gordon downloaded one of her own articles from Westlaw. Although she owns the copyright to it, she found each page of the printout bore a West copyright notice, and the following restrictive legend was attached:

> "(C) 2004. Copyright is not claimed as to any part of the original work prepared by a U.S. government officer or employee as part of that person's official duties. All rights reserved. No part of a Westlaw transmission may be copied, downloaded, stored in a retrieval system, further transmitted or otherwise reproduced, stored, disseminated, transferred or used, in any form or by any means, except as permitted in the Westlaw Subscriber Agreement, the Additional Terms Governing Internet Access to Westlaw or by West's prior written agreement. Each reproduction of any part of a Westlaw transmission must contain notice of West's copyright as follows: "Copr. (C) 2004 West, a Thomson business. No claim to orig. U.S. govt. works."

LW: The contracts can also be permissive and fair, and often are. One of the many things that is consistently ignored in the rhetoric about license agreements is the fact that most license agreements for content give licensees more rights than they would have if they simply acquired a copy of a work covered by copyright — rights, among others, to share access, to make additional copies in different formats. The licenses that are overreaching, and I concede that those kinds of licenses do exist, are changing, as they have to, in response to the needs of the customers.

WG: I continue to see contracts with overreaching terms. However, since I don't have data at hand and this is an empirical question, let me simply refine the logical structure of my position here: First, there is a reasonable fear that the DMCA gives extra leverage to disseminators who may find it in their interest to impose contractual restrictions that abrogate existing rights and liberties. These rights could come from fair use, the public domain status of the materials (such as legal opinions and classic literature), or general rights under the First Amendment. The concern is that these liberties might be contracted away. Second, there is a fear that even if the public retains its ordinary fair use rights and its ordinary right to copy judicial opinions and other public domain materials, the public will only be able to make those uses in a second-class manner. Remember the film critic; how is he going to show the great difference that subtle lighting effects can make, if he can't manipulate a clear digital image?

People who pay for licenses can use these wonderful new technologies to create new forms of art or take notes by cutting and pasting. All of the great stuff — the use of the Internet to access materials, the use of new media in music or text or other areas, the ability to email digital copies to each other — can be restricted to those who agree to licenses and pay the price.

LW: In the debate about shrink-wrap and click-wrap licenses, I think that many participants remain willfully ignorant about market place forces and the need to be flexible and to respond to customer demands. To use a publishing example, when articles from scholarly journals began to be distributed in digital form licenses were much more restrictive. Journal publishers were concerned that they were going to gut the market for the paper versions and destroy their ability to sell things like printed reprints of their works and so they were protective. Journal articles are now primarily distributed in digital form. The business need to protect the print version has for the most part disappeared. Journals still exist in print, though many of them have their primary existence, in terms of the number

of users that get access to them and in terms of the amount of money that is generated, through their use in digital form. And licenses have not become more restrictive — they have become less restrictive. What is common now in the area of journal publishing are "repertory licenses," which are a single license agreement that gives access to every journal published by a particular publisher for a single fee for a broad range of uses. Journals are also being distributed under site licenses that let everybody at a university or institution or everybody coming from a particular set of IP addresses use the materials in a very broad and straightforward way. So the market in that instance opened up the licensing practices, because the market forces are critically important. But I think they are underestimated in the debate. The horror stories about the contractual barriers that are going to be created are way too common and not supported by reality.

The issue of licenses is an important one, and it will continue to be debated. But I think it is worth noting here that these licenses have been and are being upheld. For example, in a recent case involving *Miramax,* the court rejected a claim that a contract was pre-empted by the Copyright Law, on the basis that "the bargain is not for the idea itself but for the services of conveying the idea," the point being that the publishers' providing access to works in a digital form is an extra service that justifies permitting additional contractual restrictions.[17]

WG: Private contracts can upset the balance that makes copyright work. What serves a private person has impact for the rest of us. For example, Galileo got a benefit by recanting his theory about the solar system — namely, the Inquisition lifted its threat of imprisonment — but his recantation could have retarded the science of astronomy for many years. We all could have lost out.

LW: That's a nice rhetorical argument, but I'm not convinced. Contracts are agreements between individual parties; they generally manage relationships only between private entities, and should be evaluated in terms of the relationship between those parties. But I accept your point that there are some provisions in agreements that can and do implicate public policy concerns.

I'd like to follow up on something else you said. "Fair use rights?"

WG: Absolutely. Or more precisely, fair use liberties are a subset of rights, just as all entitlements are a subset of that grand category.

---

[17] Grosso v. Miramax Film Corp., 383 F.3d 965 (9th Cir. 2004)

LW: That seems like an overstatement to me, and a distortion of the history. Fair use began as a judicially created doctrine and wasn't even part of the Copyright statute until the 1976 Act. Fair use is a defense to infringement claim, or perhaps could be characterized as a "privilege," not a "right."

WG: To the contrary, what we call "fair use" is actually what's left of an immense statutory liberty, namely, the liberty resulting from the narrowness of the copyright owner's rights in the early days of copyright.[18] The issue decided in *Folsom v. Marsh*, usually cited as the first fair use case, was in reality the question of whether or not the defendant had produced 'a fair and bona fide abridgement'[19] — for producing such abridgements was something the public under then-current law had a right to do without the permission of the copyright proprietor.[20] When the early copyright statutes declined to give copyright owners a broad derivative work right, they provided to the public the same kind of "federal right to "copy and to use' " that Justice O'Connor spoke of in Bonito Boats.[21]

As a technical matter, I don't see any problem with calling any defense, including fair use, a 'privilege'. However, the word 'privilege' has the unfortunate connotation of something 'undeserved'. The word has also been a battleground historically, with many commentators claiming that copyright itself is a 'privilege'.

This may be an example of how the rhetoric creates misunderstandings. The word 'right' is a capacious term. It's used to embrace any legal entitlement, or even moral claims. The person who did the most to clarify the many ways in which we lawyers use the term 'right' was Wesley

[18] The first American copyright statute, in 1790, gave a copyright proprietor rights over printing, reprinting, publishing, vending, and importation; no right over derivative works was mentioned. Act of May 31, 1790, ch. 15, 1 Stat. 124.

[19] Folsom v. Marsh, 9 F.Cas. 342 (1841). See, e.g., L. Ray Patterson, Understanding Fair Use, 55 Law & Contemp. Prob. 249 (1992) (arguing that *Folsom* contracted rather than expanded the then-existing 'abridgement' defense). Whether the courts were correct to read the early statutes as creating a 'fair abridgement' defense has been questioned. See EATON S. DROSE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRETAIN AND THE UNITED STATES, 433-45 (Rothman Reprints 1972) (1879).

[20] Under the copyright law then in force, the copyright proprietor's rights in books were still limited to "printing, reprinting, publishing, and vending", sec. 1, as well as importing and "expos[ing] to sale", sec 6. By contrast, for some visual and musical works (including prints, maps, and musical compositions), the 1831 law made unlawful "varying, adding to, or diminishing the main design with intent to evade the law." (Sec. 7). 4 Stat 436, 21st Cong, 2d Sess., c 16 (Act of February 3, 1831).

[21] Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 165 (1989).

Hohfeld.[22] He came up with a typology that gave separate names to each of the various rights we have. So in the terminology that's developed after him, the 'right' to contract has come to be called a 'power' to contract. The 'right' to obtain redress through the courts is called a 'claim right' to sue.[23] The 'right' to fight back against an attacker is called a 'liberty' or 'privilege,' as in the privilege of self-defense.

Hohfeld is probably most famous for distinguishing between 'claim rights' on the one hand, and 'privileges' or liberties on the other. I do not think anyone believes fair use is a claim right. Having a claim right means you can get the government to act on your behalf. But at most, a defendant employs fair use to keep the government from impounding the derivative works he's made or demanding damages or a fine from him. Nobody imagines that fair use can be used to have the government force someone to give you access. Fair use can only be used to stop people from suing you.

LW: You see that distinction, but I think there are some people from the "low protectionist" side who feel differently, and who are making the argument that fair use "rights" carry with them an implication of a right of access.

WG: Are you thinking of the DMCA context, where the statute prohibits users from bypassing encryption to get access? If 'fair use' were applicable under the DMCA, it wouldn't give consumers a claim right — they couldn't go to a judge and demand she order a copyright owner to publicly post decryption keys. Fair use would simply protect people from jail or lawsuits when they figured out a decryption key on their own, or obtained a decryption key from some other willing provider.

But that doesn't mean it's wrong to talk about "rights of access." Liberties are rights. People who argue that the DMCA improperly restrains fair use are really arguing that the government should restrain itself from making the exercise of this liberty — the right of fair use — less frequent. Regardless of categories, I think that is a coherent policy argument. We value fair use not only as a legal doctrine, but also because it allows creative and wonderful things to happen. Therefore the government should not do anything that will make it more difficult to do the kinds of things

---

[22] See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913), *reprinted in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 23 (Walter Wheeler Cook ed., 1923).

[23] Hohfeld used the term 'right' to identify the power to call upon government for affirmative assistance. Later writers have used the term 'claim right'.

with text, images and sound that were allowed under fair use prior to the DMCA. The DMCA does make copying we'd consider "fair" more difficult.

LW: In the pre-DMCA days, "fair use" didn't give you the right to take a book from a bookstore without paying for it, just so you could make "fair use" of its contents.

WG: When you lock the door to your house or your store, you're locking up things you own. When you lock up knowledge that's partly in the public domain, or that is common property when used fairly, you're locking up more than you own.

LW: You can lock your door to protect the Rembrandt on your wall, and you don't have to permit the public into your house to view it just because it is a public domain work. I think there is an assumption underlying your argument, which is that the public is entitled to the most convenient or most financially advantageous means of accessing and using copyrighted expression. There is a recognized Constitutional right to interstate travel, but that doesn't mean you have a right to demand to fly first class, or even to get a seat on a bus. The only mode of interstate travel guaranteed to all citizens for free is walking. I don't see why the fair use of copyrighted material should be treated differently.

WG: Laws serve human purposes. Physical property has greater exclusion rights than copyright does because people need predictability, security, and privacy in their physical surrounds. Those needs are immensely reduced — they're not even of the same kind — when the threat isn't strangers invading your vehicle or your home, but rather the possibility that strangers will use your work of authorship without permission.

So the question is not whether homeowners should lose the ability to call the cops when someone breaks in to look at their Rembrandt. The question is whether a copyright owner should have the ability to call the cops when someone breaks an encryption key to look at the portion of a website that's public domain or otherwise fairly used.

LW: So far the courts looking at the question you're raised have determined that the DMCA does not unreasonably interfere with fair use.[24] And of course the DMCA has a sort of safety valve built in, in the form of the Copyright Office's triennial review, to see if certain categories of works should be exempted from the prohibitions on circumventing access

[24] See United States v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D.Cal. 2002); see also Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001).

controls.[25] There have been two rule-making procedures so far, and the Copyright Office has defined some concededly narrow categories of exempt works.[26]

WG: An approach to fair use that abandons context, and looks only at types of works, misses the point. Works can be rightfully subjected to a copyright owner's control in some contexts, but in other contexts such control may be wrongful.

LW: The Copyright Office has a very clear mandate in this area, and it isn't to do a "fair use" analysis.[27] Every 3 years, the U.S. Copyright Office, in consultation with the U.S. Department of Commerce, is required to review the effect of the prohibition on circumventing access controls, and determine whether there should be new exceptions created for users of a particular class of works if non-infringing uses (such as fair use) are being or are likely to be adversely affected by the prohibition. I don't see how you can say that "context" has been "abandoned."

WG: That's a good point; I exaggerated. But context only matters as to classes of works; the Copyright Office procedure certainly isn't individualized as to users.

LW: I think the triennial review does address some of the concerns you've been raising; apparently, you don't. We should just agree to disagree and move on. Instead, I'd like to talk about another thing you said earlier, when you were talking about technical tools creating two classes of users: those who can get access to the digital form of the materials and those who can only get access thorough an analogue form.

WG: We are talking about people who are prohibited from breaking encryption, so that even if they are doing something 'fair' they can only film the image as it flashes across the screen rather than copy the digital zeros and ones that generate the image. They may be able to access the digital material through licenses, but fair users should not have to buy licenses, except for some small set of fair uses that are based on high transaction costs.[28] I do not think we should require payment and a license just because it is possible to charge for a license.

---

[25] 17 U.S.C. § 1201(a)(1)(C)(1999).

[26] See 37 C.F.R. 201.40 (2000).

[27] 17 U.S.C. § 1201(a)(1)(B)-(E) (1999).

[28] See Wendy J. Gordon, Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only *Part* of the Story, 50 J. Copyright Soc'y U.S.A. 149 (2003).

LW: We're not talking about charging someone a license fee to make fair use. We're talking about license fees associated with giving access to materials in certain forms. Now I agree with you that there could be a conceptual problem down the road if and when material is only available in a form that is encrypted. But I do not see that as a likely, immediate event. And I don't think it is appropriate to be legislating about it right now. What I find troubling is the argument that is made about technological tools and how because certain technological tools exist changes have to be made in the copyright law to permit their use. I find that reasoning circular and unsupportable. Just because a technology exists does not mean that there is a requirement that everyone be able to use it or that there is a requirement that the user have access to whatever content she wants in whatever format is convenient for her. Just because there are technological tools that permit copying and distribution, I don't think that necessarily means that the copyright law needs to change to facilitate their use for purposes that would otherwise be prohibited or would require permission or payment. So I am really not persuaded by the "haves" and "have-nots" argument.

WG: What is the "haves" and "have-nots" argument?

LW: The idea that the analogue user is somehow at a disadvantage.

WG: Wait a minute. I don't understand. As a factual matter, it is true. What is it that you don't buy about it?

LW: I don't buy that therefore the law has to be changed so that everyone can become a digital user. We've talked about this before. You invited me to observe one of your classes at Boston University, when David Lange[29] was speaking. It made a real impression on me when he said that the downloading of entire songs is transformative use. It struck me as a way of using fair use to justify, in effect, changing the law to accommodate the technology — that the same behaviors that were infringing in the analogue world are supposedly non-infringing in the digital world, so that users can use all their new toys.

WG: I read Professor Lange differently. I think he fears that a commercially-oriented statute has the danger of dampening the spirit. But even if his view is as you depict, it hardly amounts to an argument that everything must be sacrificed in order to give the girls and boys their toys. So that returns us to the issue of seeing things in extreme terms.

---

[29] David Lange is Professor of Law at Duke University. For a discussion of some of his views on fair use and other issues, see Reimagining The Public Domain, 66 Law & Contemp. Probs. 463-483 (Winter/Spring 2003).

I want to make a psychological claim about what we are all going through. We are not just playing with nightmare scenarios. We are driven by things that truly scare us. An image that feels very real and very dangerous to me may feel unrealistic to you.

I am trying to convey that nightmare scenarios may sometimes be rhetorically deployed, but they are based in emotional truths. The fears are not faked. Also, we have spoken about one side setting up straw men. But we should also give examples of the straw men on the other side. There are people who say, "All you copyright academics want to destroy copyright altogether." In fact, the goal of almost everyone I know is to make copyright better; to help rather than hurt it.

LW: I think some of that comes from sloppy rhetoric. As an example, some of the same academics that you say want to help not hurt copyright will talk about copyright being used to lock up "information" and "ideas." But facts and concepts are not protected by copyright, and I believe that copyright law, even in the present form that you regard as too broad, doesn't impede their dissemination. But the rhetoric obscures the distinction between ideas and expression that is at the core of copyright.

Copyright survives constitutional scrutiny not just because of the fair use doctrine but also because of the idea/expression dichotomy. The idea/expression dichotomy is a fundamental element of copyright law, as are other doctrines like the merger doctrine[30] and the *scenes-a-faire*/stock character rules[31] , all of which are examples of how copyright law contains built in protections against the preclusion of future expression. I haven't taught copyright nearly as much as you have, but when I have I've tried to explain the differences between copyright and patent by describing copyright as being broad but thin and patent as being sort of narrow but deep, because it covers the underlying concepts, not just their particular expression in a specific work. I think that is an important distinction, but it is something that conveniently gets ignored.

WG: It's important to point out that the courts often fail to guard the public's rights in facts, ideas and concepts as zealously as they should. Nevertheless, downplaying that the courts often do indeed safeguard these rights could create another straw man. By telling people "don't copy anything" and downplaying idea/expression, you converge on a picture

30 PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 595-596 (4th ed. 1997).

31 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][4] (2004).

of copyright that has everyone cowering. This is only useful if you believe that the law needs a wholesale revision and Congress passionately responds to change the law. If this straw man does not lead to any changes, it makes things worse for everyone, with people imagining that they lack the liberties we have been discussing.

LW: There are things about copyright that could be changed. But this over-dramatic, "Big Brother" view of all of copyright is counterproductive. It has the impact, as you've said, of making copyright more intrusive than it actually is, because it has an effect on behavior. And I think it limits our ability to address, in a more surgical and appropriate way, things that really could be fixed. For example, there is a lot you could do to ameliorate the impact of the longer duration of copyright. There was some flexibility built into the statute, to help libraries and archives.[32] There could be other changes made too, to make it easier and less risky to use so-called "orphan works" — mostly older works for which it is difficult or impossible to locate an owner. Canada has a licensing system in effect for those situations;[33] the Copyright Office here in the U.S. is beginning to look at the issue too. But you are not going to be successful trying to throw a bomb into the middle of the whole system, by introducing legislation like the Public Domain Enhancement Act[34] that would reinstate limited copyright terms and formalities that are in clear violation of the U.S.'s obligations under the Berne Convention.[35]

One thing that some advocates of very low level of protection are now saying is that they want to go back to the act that Professor Kaplan was operating under when he was first practicing law, to something like the 1909 law.

WG: As long as we're talking about old copyright law, let's look back to the one the Founders adopted. Under the 1790 Act, if you made a creative use of somebody else's creative work and directed your work to a different market, you were not subject to liability.

LW: That's an interesting concept. I think it is impractical and actually, ultimately, unfair.

WG: I think for some uses it would be unfair. For example, if someone copies your book to make it into a movie, I think you should get money

---

[32] See 17 U.S.C § 108(h) (1998).

[33] See R.S.C., ch. C-42, § 77 (1985) (Can.)

[34] H.R. 2601, 108th Cong. (2003).

[35] See Berne Convention for the Protection of Literary Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

from it. But I think there are many contexts where unauthorized derivative works should receive more latitude than they currently do. Among other things, I would like to go back to the technique used in some earlier stages of the copyright law, of specifying particular derivative works that are covered.

LW: Derivative works are a complex topic, but there were good policy reasons behind the changes that have been made in how derivative works are treated; among other reasons, they were made with the intention of benefiting creators, to prevent "free-riding" on their works. I'd be cautious about using the 1790 law as a model for derivative work protection, if for no other reason than the fact that the types of derivative works that could be created then is so different from those that could be created even by 1909 and certainly by 1976 or today. I know you feel that the derivative works should be handled differently.

I think the purported appeal of the 1909 Act to others now, in 2004 remarkably enough, has more to do with the registration system and notice requirement than derivative works issues. The appeal, at least on the surface, of registration and notice is somewhat understandable, because it can get unwieldy when you have copyright automatically arising . . .

WG: . . . in the grocery list.

LW: Exactly. Therefore you have this issue of works all over the place that are putatively protected by copyright, the reuse of which might require permission or payment. But, still, I'm intrigued by and bemused by this desire to go back to that time.

WG: I do not think it is a movement back to an earlier time as much as it is a way to clarify that we are not asking for something unworkable. After all, we existed pretty well under that régime for a while.

LW: Yes, but in isolation in the world. The other thing that troubles me about the argument is that it ignores the fact that the system that the U.S. operated under was an aberration in the rest of the world and created aberrational effects. The "back door to Berne" process, for example, where works were simultaneously published in a Berne country to get Berne Convention protection. I think this is an example of an intriguing academic argument that can create problems when attempts are made to implement the argument through legislation, because it ends up by discouraging the investigation of more practical and ultimately workable solutions. I think we've all been missing the opportunity to make changes that could actually make life better for all concerned because we're arguing the extremes and

we're trying to legislate there as well. I'm not denying that the fears are real and I'm not denying that some of the nightmares might have a grain of truth in them. But, I don't think they're the right way to approach making the system work for all of the participants in it, including the individual creators, the users, and the publishers — all of whom, by the way, can be each other at various points in the process.

The real underlying question, as we've discussed before, is whether copyright is an incentive to creativity or an impediment to creativity. The premise that a lot of the discussion starts from now is that copyright is an impediment to creativity. I don't like starting the discussion that way. I don't want to be put in a position where I have to accept that premise in order to have the conversation. I'd like to go back and deny that I beat my husband, before I'm asked how many times I did it. I believe that copyright law is about authors and creativity.[36]

I think that there are some recent examples of places where incremental changes, responding to particular needs, have been made and are helpful. The addition of language to Section 107 regarding the use of unpublished works is one example — it's the only statutory addition to fair use since 1976, and was made at the suggestion of the publishing community.[37] The TEACH Act,[38] which was enacted in 2002, is another example. It addressed the legitimate needs of the academic community for an expansion of the copyright exemptions in Section 110(2) for certain uses of digital material in distance education and similar circumstances. The TEACH Act was the result of a cooperative effort by the academic community, the copyright proprietors and the Copyright Office, and grew out of the Copyright Office report on digital distance education prepared by the Copyright Office pursuant to the DMCA.[39] The statute as ultimately enacted balances the interests of both parties by providing teachers with

---

[36] See Jane C. Ginsburg, Authors and Users in Copyright, 45 J. Copyright Soc'y U.S.A. 1 (Fall 1997).

[37] The following sentence was added to the end of Section 107 of the Copyright Act in 1992: "The fact that a work is unpublished shall not itself bar a finding if fair use if such finding is made upon consideration of all the above factors." This change was made in part in response to the holding in Salinger v. Random House, Inc., 818 F.2d 252 (2nd Cir. 1987).

[38] Technology, Education and Copyright Harmonization Act of 2002, enacted November 2, 2002 (amending portions of 17 U.S.C. §§ 110(2) and 112). At the time that the language of the TEACH Act was being negotiated, Ms. Wasoff was the Chair of the Association of American Publishers Copyright Committee, and participated in that capacity in the development of the statute.

[39] Copyright and Digital Distance Education, http://www.copyright.gov/disted/ (Last visited Dec. 28, 2004).

access to copyrighted materials for use in their teaching activities, in digital form, under a copyright exemption rather than as fair use. To protect the interests of the copyright owners, there are specified limitations and requirements. The TEACH Act is an example of how problems can be addressed, and improvements made, if we talk to each other.

WG: Your example of the change to 107 has some merit, but I think the TEACH Act is as much an example of the problem as it is of a possible solution. In order to address a simple need — which was to enable educators to make non-commercial use of materials in digital form as part of teaching — the TEACH Act created a set of prerequisites, requirements and limitations that would be more appropriate for inclusion in the Internal Revenue Code than in the copyright law. If the current structure of our copyright law weren't problematic, one wouldn't need to go to such great lengths to provide an answer to such a straightforward and compelling need.

But I want to return to the creativity issue. First, my fear isn't that all copyright hurts creativity, but that expansionist developments do — and these developments aren't even aimed at inducing authorial effort but at assisting dissemination. Consider all the arguments that were being trotted out in defense of the copyright term extension that spoke in terms of encouraging digitization or film restoration, not authorship.

Second, about the role of nostalgia for the old law; I think it is an interesting movement that is occurring. I do not believe it is a bad thing to be different from other countries. One of the reasons we have succeeded as a nation is because we had a better policy of sharing information — freedom of speech — than other countries. I think the oddity of free speech has directly helped us, and indirectly helped everyone who has learned from the information we send out.

But in any event, let's talk about notice. I always felt that the copyright notice requirement served some useful purposes. It made it easier to find out what was copyrighted and who owned it. When people did not care about the copyright, and omitted notice when they published, the requirement automatically put a great amount of material in the public domain. I did, however, believe that the cure and forgiveness rules should be much more generous than they were. But I do not think that anyone actually wants to go back to 1909 or even 1978. I think people want a practical rule that says: "Are you in some way affected by lack of notice? If you are affected, you should get off the hook, at least for an injunction." So

it seems to me that instead of abolishing the notice requirement, we should have drastically expanded the liberties that attach to using an unnoticed work.

LW: I think that's a suggestion that makes the point I'm raising, which is if you think in terms of the structure that exists and of ways to make improvements within that structure, you can have a constructive dialogue. It doesn't polarize the debate and make compromises less likely, the way much of the current commentary does. I'll give you example of something I think is an impractical notion that tries to make law at the margins, instead of working to improve the system we have. That is the suggestion of an alternative compensation scheme for copyright owners, funded by imposing a tax on everyone who downloads, or who buys downloading media or machines. Copyright owners would have to register their works with the government, and the government would then tithe back a portion of the taxes collected to the copyright owners.

Not only would it be a nightmare to figure out what the appropriate amount of the "tax" should be, there'd be the nightmare of identifying what the relevant "work" is. Because works migrate and change, what's the relationship of the original work to the derivative work? How do you track what uses engender what payments?

WG: I think that tracking use and collecting tithes creates more than just administrative and privacy problems. It also poses the danger that everyone will start to think they must pay for everything they use. The whole point of a society is interdependence. A major symbol and instantiation of that interdependence is the existence of public goods. We all use them and feel grateful for them. It helps us recognize that we all benefit from things we do not ourselves create. We could end up in a system of total paralysis if all of the reciprocal (or sometimes not reciprocal), generous (or not so generous) acts of nonmarket interconnection vanish. It is not good to commodify everything — or to commodify so much that people start to *feel* that everything is cash and carry.

LW: I agree completely. I have some real problems with the taxing schemes, but I'll limit myself to only one more example. It's functionally a compulsory licensing scheme. You and I have talked about the idea that copyright is about money. But I think you and I both feel that copyright is, more importantly, about the creative process. The creator's ability to make decisions about how and where works are going to be presented or otherwise used, and in what context, should also be part of copyright.

Under a compulsory license scheme, there's no input from the creator into the subsequent uses made of his or her work.

WG: On this last issue I am really much split.

LW: Is that because you would like to see a broader privilege for the use of existing works to create derivative works?

WG: Yes; for example I'd like to see fewer injunctions against creative adaptations. Yet there are problems if monetary remedies are all that's available. I think it is very important that creators do not come to view their work in purely monetary terms. All sorts of problems appear when an artist comes to think of her work solely in terms of the cash it generates. When money comes into the picture too explicitly, people can begin to focus so much on the money that they rely less on their intrinsic motivations. I think a law that gave authors no control at all — where all they'd have is the right to get paid — could erode the personal connection an artist feels with her work and perhaps decrease its quality. I'm not minimizing the importance of money — no one wants artists to starve in garrets — but an injunctive right secures money in a way that's less potentially denigrating to the artist than restricting her recovery only to money damages. On the other hand, restricting injunctions but preserving money damages has the promise of compromise — of allowing defendants more freedom of speech without badly eroding plaintiffs' monetary incentives.

I am a strong proponent of what Steven Shiffrin calls the "romance of the First Amendment"[40] — the idea that the First Amendment should protect the rebel, the iconoclast, because that's where the most vital, leading edge of debate and perception will arise. Look at the word "iconoclast"; it is about breaking an icon, shattering the particular notions other people hold about an image. In other words, at the core of the First Amendment is the freedom to take an image that someone else has created and turn it to your own expressive devices.

LW: Or just smash it. But there is a balance to be struck here. The Court in *Eldred* discussed this when it said that the First Amendment protects your right to make your own speech, but it "bears less heavily when speakers assert the right to make other people's speeches."[41] If you do

[40] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE (Princeton University Press 1993).

[41] Eldred v. Ashcroft, 537 U.S. 186, 191 (2003).

need to use someone else's copyright-protected "icon" to make your point, you can, so long as you are doing that within the bounds of fair use.

WG: The First Amendment goes beyond what the courts now recognize as fair use — and as the quotation you gave indicates, the First Amendment does give you rights even when you quote from another person's creation. The Eldred Court said the amendment "bears less heavily", not "has no bearing".

LW: Isn't the iconoclast protected by existing law?

WG: No, because he must get a license. The copyright holder will likely not grant a license if he is doing something "nasty" to the work.

LW: But if it's parody or criticism, he gets to do his smashing without needing a license. Fair use says he can. It's not always a completely clear issue, I concede. Sometimes the line between an infringing derivative work and a transformative fair use can be hard to define; in essence, that's what the "Wind Done Gone" case[42] was about. But that case and others, like *Acuff-Rose*,[43] make it pretty clear that "icons" can be appropriate and permissible targets.

WG: If only fair use were that clear! The Air Pirates took on the classic 'icon' of pop culture, namely Mickey Mouse and family, and were enjoined.[44]

But let me go back for a minute. When we began this discussion about the right of control, we were not talking about what copyright does or does not do; we were talking about policies. I am trying to suggest that there are two strong and important policies, honoring the artist who is the icon creator, and honoring the iconoclast, who by altering the first icon may make a more valuable one, or at least teach us something valuable about the prior icon — perhaps demonstrating that an idol has feet of clay.

Our law makes a pretty good rough and ready division between these policies. We give special protection to the artist under the Visual Artists Rights Act when only a few copies exist.[45] When many copies exist, fair

[42] See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (overturning an injunction against the publication of a literary parody of "Gone With The Wind," on the basis that the use of characters, plot, major scenes and other copyrightable elements of the original work by the author of the parody was protected as fair use). At the time that the case was being litigated, Ms. Wasoff was Vice President and Corporate Counsel of Houghton Mifflin, and was responsible for managing Houghton Mifflin's defense of the action.

[43] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[44] Walt Disney Productions v. Air Pirates, 581 F.2d 751 (Cal. 1978).

[45] The visual artist has a 'right of integrity', but note that under the Visual Artists Rights Act, the original work is still subject to fair use. See 17 U.S.C. § § 106A and 107.

use gives a lot of liberty to the iconoclast. I feel we should protect the iconoclast even more and in other situations. Nevertheless, I am suggesting that there are ways to walk the line between honoring the icon maker and the icon smasher, and that if you put the duration issue aside, our law has good tools to work with.

LW: I don't disagree. The iconoclast, to use your terminology, is protected by fair use and can make those kinds of decisions and can make those kinds of changes. If the changes are critical or transformative, or don't replace or injure the market for the original work — all those factors are going to weigh very heavily in favor of the iconoclast. But I think the statute and the case law place appropriate limits, limits that are based at least in part on the level of transformation involved. The Visual Artists Rights Act addressed issues of integrity and attribution, but I don't think the application of fair use is affected in any meaningful way, particularly given the ease with which individual works of art can be duplicated. If your iconoclast wants to photograph and reproduce a painting, then draw moustaches on it as part of a political or other commentary, let him go ahead. His use of the whole work may work against him, but if the other factors weigh in his favor, his action will be within the parameters of fair use. Section 106A will keep him from drawing the moustaches on the original work itself.

WG: Ok, so we're in rough agreement. Let's go back to a couple of other things, including licenses and new technologies. About twenty years ago, Stanley Liebowitz wrote an article[46] that suggested that free library photocopying would not necessarily hurt publishers. His investigation suggested that the system would adapt by shifting the pattern of subscription pricing so that libraries had to pay much higher subscription prices than individuals would — sort of a *sub silentio* site licensing. I think this has come true. Sharing can increase value, both increasing the utility the public can enjoy, and increasing the price sellers can charge to capitalize on the public's enjoyment. A library that can supply photocopies will value its first physical copy of a magazine more highly than a library that can't, and will pay more to obtain that first physical magazine. The more photocopying is done by library patrons, the higher will be the amount that the library will pay for the things photocopied. And in many contexts the appropriate people end up paying the price.

---

[46] See S. J. Liebowitz, Copyright and Indirect Appropriability: Photocopying of Journals, 93 J. Pol. Econ. 945 (1985).

Take the example of a community setting like a university, where everyone is economically interconnected. If the university library pays for a site license, or pays a high subscription fee accompanied by a statutory liberty to engage in fairly extensive copying,[47] the copyright owner is paid, and the people who do the paying are ultimately the people who do the copying: As the library budget increases to pay higher subscription costs, professors may receive a little less in their paychecks, and students may have to pay a little more tuition, and that's appropriate — these are the people who benefit by using the library materials. But we should also remember that sometimes it does not work out that way — sometimes 'indirect appropriability' isn't possible because those connections do not exist between the entity buying the license or the subscription, and all the other folks who share the benefit. In those cases, the theory does not work out as well.

LW: To your point about sharing, I think those circumstances are common in many situations other than on university campuses, more than people realize. I know it's been common for a while now to talk about publishers and libraries as antagonists, but I think that is shortsighted for many reasons. In the digital world, libraries are particularly critical in bridging the so-called "haves" and "have-nots" gap, and in fact, libraries are the major purchasers of the kind of repertory and other licenses we discussed earlier. The user may pay a little more in taxes to support the public library, and the library may have to allocate its acquisition budget differently, but I don't think the point you are making, of sharing increasing value, is any less valid in the non-academic world.

We can talk more about sharing if you want to, but I'd like to address the other point you made about the Liebowitz article. It is true that subscription pricing and site licensing have become important, but photocopying is still a problem for publishers. And, as more information is being distributed digitally, more copyrights are infringed digitally. I'm not just talking about music downloads here, although that's the particular use that gets all the attention from the press. Document delivery services and interlibrary "loan" are all major issues for publishers, as they create an alternative means for users to get access to content without having to compensate the original publisher by purchasing a copy or a license.

---

[47] See 17 U.S.C. §§ 107 and 108; Williams & Wilkins Company v. U.S., 487 F.2d 1345 (1973). Libraries situated within for-profit firms are differently situated. See, e.g.; American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2nd Cir. 1994).

There are ways to create individual transactions that meet the needs of both users and content providers. The music industry was very slow to respond to the market demand when technological developments like MP3 and the growth of available bandwidth made the exchange of music in digital form so easy. In fact, the industry was slow enough so that other mechanisms, *Napster* and other peer-to-peer alternatives, arose to meet the market place demand. So the RIAA was put in the position of taking aggressive steps to try to hold back the tide. Publishers, in particular journal and other scholarly publishers, figured out a way to respond by changing their business models through more liberal licensing policies. The music industry has more recently begun to address copyright issues with new business models, but they had to come from behind. If you and I want to listen to some music now we can sit down at my computer and I can download, for ninety-nine cents a song, an incredible range of things right onto my desktop computer, and then copy them onto my *iPod* or my laptop. It happened late, but it is a response — a successful, business response. And it's happening within the context of the current copyright law and the emerging technology. So what we, the publishing community, as the financial representative for good or ill, of the creative community, need to do is to spend some time developing solid real new business models. But the market place is going to provide the incentive, and a combination of copyright protection and technology is going to provide the means.

WG: We should talk about the notion of "marketplace response" and the laissez faire implications of the "market talk" that forms part of our rhetoric. Let's not forget that law shapes the market. Laws decide what to favor and the market evolves in response. A good thing for the law to do is shape ownership to help markets exist where they should, and to keep markets out where they shouldn't.[48]

Let me return to a concern you expressed earlier. I agree the public is not morally entitled to the cheapest and easiest possible copies of works. I do not think there is such an untrammeled entitlement, and indeed have argued that there is a core of right that should be honored in terms of what artists and authors deserve. But don't mistake me: I believe that the core of authorial moral entitlement is quite narrow. Further, the public also has a core of rights to which *it* is entitled.[49] In my view, current law gives

[48] See generally, THE COMMODIFICATION OF INFORMATION (edited by Niva Elkin-Koren and Neil Netanel) (Kluwer Information Law Series, 2002).

[49] See Gordon, supra note 1.

authors much more than they are entitled to, and it does not give the public its full entitlement. For example, one of the topics appearing in copyright debates now is that merit goods, like education, information, and access to the classics, are things whose wide availability the government *should* foster, but which are being restricted either by copyright or by encryption. With a copyrightable introduction attached, a classic like Shakespeare can be locked behind a DMCA prohibition.

LW: First, I disagree with your premise. I think availability *is* being fostered by the current law, both because the creation and dissemination of educational and scholarly works is being encouraged through the use of copyright incentives, and because more materials are being made available digitally because they can be protected. Second, you're not locking up "Shakespeare" if you are applying encryption to a single version when others are available.

WG: I disagree. Convenience matters. We all get hurt if the future Leonard Bernstein is discouraged from writing a future WEST SIDE STORY because the DMCA requires him to negotiate a license to adapt ROMEO AND JULIET. This gets us back to where we were before, about how easy it should be to use Shakespeare and the rest of our heritage.

LW: We're not talking about licenses to adapt — we're talking about access. Unless the DMCA kept Bernstein from getting to the only copy of the play, you haven't refuted my point.

WG: My concern was with the added burden — and with the possibility of a license requirement that restrained Bernstein's freedom to adapt. I think your response to the latter concern is that the digitizer would have no reason to limit Bernstein's playing with Shakespeare. But that's a matter of factual prediction. Why take a chance that could result in restraining the public's use of the public domain?

LW: I don't believe we are taking that chance, but I do believe that a failure to protect creative works will lead to less creativity and less availability, and I don't want to take *that* chance. Bernstein's use of ROMEO AND JULIET is a classic example of truly creative, transformative use.

I want to return to my point about increased availability. It costs money to create that digital version of Shakespeare, and to write that foreword, and to distribute it. Somebody is also paying to maintain the website that's delivering it. So the fact that there's a license associated with it that offsets

the cost of delivering it even though it's in part comprised of something in the public domain, doesn't strike me as so terrible.

WG: But you are using copyright to subsidize the publisher.

LW: That's not new.

WG: You are right, it is not new. But it is also not a justification for copyright.

LW: Why should facilitating convenience be a reason to weaken copyright, but facilitating distribution not be a reason to strengthen it? We disagree here. If you accept that publishing serves some public good in facilitating the public's access to creative works, I don't think it's inappropriate to choose to use copyright law to promote that policy.

WG: I thought we began by agreeing that copyright was intended to provide incentives for creativity. The federal government is not empowered to do everything Congress desires. The Constitution makes encouragement of authorship one of Congress's enumerated powers. In enacting copyright legislation, Congress can only be concerned with giving incentives (or perhaps justice) to persons investing in creative effort, for the purposes of increasing the amount of creative effort. I think the Supreme Court's decision in the *Feist*[50] case supports that reasoning.

LW: But Congress can legitimately be concerned with the whole range of circumstances — the whole causal chain — between creativity and progress. Look at the way section 106(3) gives copyright owners exclusive rights over initial distribution.[51] You may disagree with me, but I believe that it is well established that promoting dissemination is a recognized object of copyright.[52] By definition, distribution takes place after creation, but Congress nevertheless included a distribution right in section 106.

WG: The distribution right helps give incentives to authors, so its existence doesn't prove anything about whether publishers' interests *standing alone* could justify a copyright provision.

Why don't we start at the beginning, with the Intellectual Property Clause of the Constitution?[53] For example, is copyright legitimately concerned with *any* activity that promotes 'progress and the useful arts?' I think the answer is clearly no. Clearly, some things that promote 'progress

[50] Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991).

[51] 17 U.S.C. § 106(3) (2002).

[52] Eldred, 537 U.S. at 244 (2003).

[53] U.S. CONST. art. 1, § 8, cl. 8.

and the useful arts' (like a stable police force to maintain the public order that permits artists to work) are state, not federal, concerns.

The clause also says Congress can grant exclusive rights. So, is copyright legitimately concerned with *any*thing that both grants exclusive rights and promotes progress? I would say no. Some exclusive rights might help progress but are not a legitimate concern of copyright. Again, look at the *Feist* decision. Even though a publisher expends money and time, and even though strangers might destructively free ride, the court held that no copyright exists in databases that lack creativity. Therefore, I would say that noncreative compilations and other noncreative activities are not a legitimate concern of Congress under the clause. And the act of digitization is a noncreative act.

LW: The opinion in *Feist* doesn't address what is or isn't a legitimate concern of copyright, but rather addresses the narrower question of what kind of work can be subject to copyright. The issue wasn't whether Congress could legislate about non-creative compilations, it was whether a non-creative compilation could be protected by copyright. It is conceivable that Congress in deciding how to regulate a creative work might legitimately take into account an interest that by itself wouldn't justify an exclusive right.

WG: Okay, I concede that *Feist* by itself doesn't address the entire range of potentially legitimate concerns: It never says outright, "It's only creativity that can matter in all copyright contexts". The holding only addressed one context: the opinion identified what gives rise to copyright in the first instance. This distinction is the point that the *Eldred* court seized on.

However, I see it as a distinction without a difference. Once one grants with *Feist* that originality is the Constitutional sine qua non for *granting* copyright, how can one make originality irrelevant to construing Congress's legitimate powers?

So I concede that *Feist* didn't squarely hold that Congress must base all its copyright legislation on reasons related to creativity. Yet that does seem a logical implication. You need more than 'lack of logical entailment' to get to the position that encouraging noncreative physical activity is an appropriate concern for copyright.

LW: That's partly true. I do agree that *Feist* does not compel a result on the question of "what is a legitimate copyright concern" either way.

WG: Not even *Eldred* compels an answer to that question. At no point does the Court say, "Term extension is justifiable by sole reference to the way it assists noncreative activity like digitization and archival preservation".

I would still argue that even if it is not logically entailed, *Feist* 'leans toward' my position and away from your position. But to fully analyze this would require us to look at Constitutional and legislative history, as well as cases. This would take us away from our current issue of what logic can tell us.

LW: Okay — in my view, logic tells us that the presence of a distribution right in section 106 indicates that Congress is concerned with how creative works are disseminated as well as how they're written. And I think that is an important point — commercial distribution of creative works is still the most effective way for those works to get into the hands of the public. A publisher, acting on its own behalf or as the agent, licensee or assignee of the author, has to be able to enforce that right. And there is nothing inconsistent with *Feist* or, certainly, *Eldred*, in saying that copyright law protects both creation and dissemination.

WG: I agree that Congress is legitimately concerned with how creative works are disseminated, but only to the extent that the dissemination affects incentives to be creative. Most often, a right of distribution assists creativity.

LW: We could argue about this forever, but I think the conclusion may be a compromise. I'm willing to concede that section 106 doesn't unambiguously support my position, but I think you should concede that *Feist* doesn't unambiguously support yours.

WG: It's a deal.

Actually, I like "deal" as a metaphor for what we're talking about. One way to look at copyright is as a deal, an arrangement, a way for people to work together to get the creative expressions they need. They cannot coordinate themselves without a device that enables them to restrict each other mutually — in a way that benefits them mutually. Copyright is a group of people saying: "I am willing to pay a little more for a copy in order to get more works created." The question is whether copyright law today well serves the people who set it up. I think copyright could do better. The public is being hurt more than it should, and some creativity is being impaired.

LW: It's not really fair to ask you to keep giving examples of that, I know, because what you are arguing is that things would otherwise be happening which are not now, and it is of course very hard to prove the negative. But what I see happening is a vibrant market for creative work, in art, in music, in all of the disciplines. Truly creative and transformative work can and is being done under the current copyright system. Authors are being compensated (through advances and royalties) by publishers, who then seek an economic return from customers, which is a system that I believe reflects economic efficiency, not a policy shift away from rewarding authors to rewarding publishers. But I would also concede that copyright law can and does interfere with certain uses of copyrighted works. Non-transformative uses of existing material are, clearly, being impeded. Somewhere between the two extremes there is probably a perfect point of balance, but you and I will have to keep talking to each other — if we're going to have any hope of finding it!