"The Progress of Science and Useful Arts": Why Copyright Today Threatens Intellectual Freedom

A Public Policy Report

Free Expression Policy Project

a think tank on artistic and intellectual freedom

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Executive Summary

Copyright – our system for protecting and encouraging creativity – has been described as "the engine of free expression."[1] But copyright can also interfere with free speech – with the public's right to share, enjoy, criticize, parody, and build on the works of others. Resolving these sometimes conflicting claims requires policymakers, in the words of the Supreme Court, to strike a "difficult balance" between rewarding creativity through the copyright system and "society's competing interest in the free flow of ideas, information, and commerce."[2]

A critical component of this "difficult balance" is the system of free-expression "safety valves" within copyright law. Four of these safety valves – the "idea/expression dichotomy," the concept of fair use, the so-called first-sale rule, and the public domain – provide necessary breathing space for free trade in information and ideas. The free-expression safety valves keep the system in balance and prevent the monopoly control created by copyright law from becoming rigid and repressive.

But the "difficult balance" has become lopsided in recent years. With the advent of electronic communications, and in particular the Internet, the media companies that make up the "copyright industry" have adopted techniques of "digital rights management," which control the accessing and use of creative materials in ways that are often inconsistent with a free and democratic copyright system. Two federal laws, both passed in 1998, have further distorted the system by favoring the industry at the expense of the public's interest in accessing, sharing, and transforming imaginative works.

One of these laws, the "Sonny Bono Copyright Term Extension Act," extended the term of copyright protection to nearly a century for corporations and even longer for many individuals and their heirs. It consequently delayed the time when cultural products will enter the public domain and be freely available. The other law, the "Digital Millennium Copyright Act" (DMCA) made it a crime to distribute technology that circumvents the industry's electronic locks on books, films, articles, software, or songs – even though circumvention itself is not always illegal, and even though a ban on technology strikes directly at scientific research.

Meanwhile, battles over online "file sharing" of music, movies, books, and software have created a crisis in the entertainment industry, alienated many fans, and failed to resolve the question of how much sharing should be allowed or whether all of it should be stringently prosecuted as a violation of copyright law.

The courts have not always been equal to the task of resolving these copyright conflicts. A constitutional challenge to the Sonny Bono law was rejected by the Supreme Court in 2003. The Court's decision ignored the law's adverse effects on culture, and seemed to suggest that Congress, by continually extending the term of copyright, can freeze the public domain indefinitely. But in the process of fighting this well-publicized case, many defenders of the public interest – archivists, libraries, and scholars among them – began to organize and advocate for changes in the

copyright system that could help bring valuable if long-forgotten works into the public domain.

There have already been many lawsuits involving the DMCA. In one early case, the federal government criminally prosecuted a company that created a device to decrypt electronic books. Although a judge rejected the company's defense – that its circumvention device had legitimate (indeed, constitutionally protected) uses that would not infringe the copyrights on e-books – a jury eventually acquitted the company. But in another case, online journalists who distributed "DeCSS," a program for decrypting DVDs, were found to have violated the DMCA even though the program could be used in ways that would not infringe copyright. The courts even ordered the defendants to remove links on their Web site to other sites that contained the DeCSS code.

To fight online file-sharing, the music industry went to court to shut down Napster. New, less centralized systems like Grokster and KaZaA, however, quickly replaced Napster, and the industry has not so far persuaded the courts that these digital copying and sharing technologies are themselves "contributory" infringers of copyright. But the war against file-sharing has only intensified. In late 2003, the industry sued more than 200 individuals, including teenagers, for sharing music online.

Public interest groups, scholars, librarians, artists, computer scientists, and others in the growing "copyleft" movement are responding to the copyright crisis with projects that encourage the sharing of information and creative works. Some promote and distribute free software. Others are advocating for a more flexible system that would allow material lacking in current commercial value to enter the public domain sooner.

Conflicts between "strong" copyright control and free expression today thus occupy center stage in the public policy arena. The diversity and vitality of our culture depends on resolving these conflicts in a way that maximizes artistic and intellectual freedom.

Introduction:

The "Difficult Balance" Between Copyright and Free Expression

When we think of creativity and free expression, it is the First Amendment that usually comes to mind. But there is another section of the Constitution whose explicit purpose is "to promote the progress of science and useful arts." This is the Copyright Clause, and it authorizes Congress to grant "*for limited times to authors and inventors the exclusive right to their respective writings and discoveries*."[3] The theory is that creative people need the promise of financial reward to motivate them to produce art, music, literature, scholarship, and scientific innovation.

Copyright owners these days, of course, are not necessarily impecunious writers, artists, or philosophers chewing at their tattered overcoats. Corporations own many copyrights, and trade groups are aggressive in asserting the "exclusive right" to control and profit by copyrighted works.

In the 1970s, for example, the American Society of Composers, Authors, and Publishers (ASCAP) tried to stop grocery stores from playing radios unless they paid fees for the songs that were aired. Twenty years later, ASCAP demanded fees from summer camps for songs the children sang around their campfires. The Walt Disney Company threatened daycare centers that had likenesses of Mickey Mouse painted on their walls.[4] From attempts to stop the technology of "piano rolls" in 1908 to the 1998 Digital Millennium Copyright Act, restricting access to copyrighted works today, media companies have pushed for stronger controls.

It is a mistake, however, to think that the monopoly control bestowed by copyright is absolute. From the beginning, copyright law was intended to balance the rights of owners against those of the public – to give just enough incentive to enhance creativity. When the English Parliament passed the first modern copyright law, the Statute of Anne, in 1710, it did so in part to stop publishing monopolies "from oppressing authors, potential competitors, and the public."[5] The first American copyright law, in 1790, covered only books, maps, and charts, and granted monopoly control for a mere 14 years (renewable for another 14).[6] The Copyright Clause itself specifies only "limited times" for monopoly control of creative works, after which they enter the public domain – that is, they become freely available for anyone to publish, sell, copy, or preserve.

Even during the "limited time" of copyright protection, the "exclusive right" is not perfect or absolute.[7] Not every copying of copyrighted material, nor every song sung at a beach party or birthday bash, is unlawful unless the copyright owner is found and gives permission. In part, this flexibility simply reflects a recognition of practical realities. But it is also a vital element of the "difficult balance" between open accesss and copyright control. Free-expression safety valves within the copyright system, such as allowing the public to make "fair use" of copyrighted works, thus provide essential lubrication for copyright's "engine of free expression."

Aggressive assertions of copyright control over the last quarter century have

often ignored this necessary play in the joints. In the early 1980s, for example, entertainment companies sued the Sony Corporation to stop distribution of the Betamax, an early version of the VCR, because it could be used to make unauthorized copies of TV shows. The suit was particularly shortsighted, given that rental and sale of films on video would soon become extremely lucrative for the industry. But in any event, the Supreme Court rejected the suit, ruling that a technology cannot be banned just because it might be used for nefarious ends, if it is also "capable of commercially significant noninfringing uses."

Home recording of TV programs for purposes of time-shifting was such a "noninfringing use," said the Court. Even though it involves copying entire programs, time-shifting qualifies as "fair use" under copyright law. Indeed, the Court noted that among those who favored time-shifting was Fred Rogers of *Mr. Rogers' Neighborhood,* who testified at the *Sony* trial that "he had absolutely no objection to home taping for noncommercial use," and that "it is a real service to families to be able to record children's programs and to show them at appropriate times."[8]

Major corporations have continued to push for restrictions, however. In recent years, the company that owns the Priceline Web site has claimed that its method of selling airline tickets is protected by patent law – a close relative of copyright – and may not be copied. Netflix.com obtained a patent on the way that its Web site rents DVD movies. And IBM "patented a method for keeping track of people waiting in line for the bathroom."[9]

These zealous assertions of ownership are driven in part by the concept of intellectual property ("IP") to describe copyrights, trademarks, patents, and "trade secrets." Viewing creative works as property, however, leads to the presumption that they can and should be owned and controlled forever. But as we have seen, this is not what the Copyright Clause of the Constitution envisions, nor is it consistent with a free society.

As the scholar and activist Lawrence Lessig writes, products of imagination and intellect are "nonrivalrous" – that is, they are inexhaustible. A book can be read, read again, and given away for others to read. Its value is not used up. Unlike "rivalrous" resources, works of the imagination do not need a system of control to assure that they are not depleted; they only need a system that encourages their creation, and fairly rewards their creators.[10]

Another leading thinker, Siva Vaidhyanathan, puts "intellectual property talk" at the root of today's conflicts over anti-circumvention technology, extensions of the "limited time" of copyright, and other efforts by the industry to expand its control. Vaidhyanathan notes that the term "intellectual property" is "fairly young," having originated with the UN's World Intellectual Property Organization (WIPO) in 1967. Soon afterward, major American organizations that concern themselves with copyright, patent, and trademark law "changed their names to incorporate 'intellectual property.'" Thus, "over the past thirty years, the phrase 'intellectual property' has entered

> The Walt Disney Company threatened daycare centers that had likenesses of Mickey Mouse painted on their walls.

common usage with some dangerous consequences." For copyright

> was not meant to be a "property right"as the public generally understands property. It was originally a narrow federal policy that granted a limited trade monopoly in exchange for universal use and access.[11]

This does not mean, of course, that authors should receive no compensation or that media companies should not profit from their investments. Few critics of the current situation want to eliminate copyright protection. But xeroxing a poem or dubbing a tape for a friend has not usually been considered a law-enforcement problem. Internet downloading and file-sharing are, conceptually at least, the contemporary equivalents. That is, any transmission of information online technically involves copying – even simply visiting a Web site, which requires reproduction of the site on your computer screen. Not every such reproduction should be considered a violation of copyright law.

Mr. Rogers testified that "he had absolutely no objection to home taping for non-commercial use."

Understandably, copyright owners are concerned when cultural sharing is multiplied from a few friends to millions around the globe. But the industry tends to lump together all copying under the nefarious heading of "piracy," when in fact there are substantial differences between large-scale, for-profit enterprises that sell unauthorized copies of music, software, or movies, and, for example, students' or scholars' sharing of favorite songs or news articles through a university network. In between are difficult questions about widespread, not-for-profit music and movie-sharing. Although copying on this level is generally assumed to be unlawful, it is not clear that the remedy is to make criminals of millions of Americans.

If modern technology has made copying vastly simpler, and achievable on a worldwide scale that was never possible before, it has also enabled media companies to exercise unprecedented control over the use of their products through systems of digital rights management, or "DRM." DRM controls that are built into cultural materials frequently undermine the free-expression safety valves that are so fundamental a part of the copyright system. Electronic locks and other DRM technologies now inhibit fair-use copying for purposes of study, criticism, or parody, the ability to share a book or CD with a friend, and even the availability of works that are already in the public domain.[12]

As a result of DRM, some CDs now come with locks to prevent them from being played or copied on computers.[13] "Clickwrap" agreements – those online scrolls of legalese to which one must click "yes" in order to reach the desired content – have become increasingly oppressive, and inconsistent with the flexibility of copyright law. Some Web sites include lengthy agreements that flatly require viewers to relinquish their fair-use rights as a condition of accessing the site.[14] As many observers have warned, we seem to be moving toward a "pay per view" society where the information, inspiration, and ideas contained in creative works of all kinds are becoming increasingly expensive and difficult to obtain – just at the time, ironically, that the Internet offers the

promise of unprecedented global linkage and communication.

The tension continues to grow between strong copyright control and the values of free expression and access to information. Yet much of the debate is carried on among a relatively small priesthood of lawyers, advocates, and policymakers who communicate in a largely unknown language. This report is intended to bridge the gap by describing the challenges to art, scholarship, and free expression that are posed by copyright law in the digital age. It explains the major issues and court cases in understandable terms. Obviously, it cannot cover all the details of "intellectual property" law and policy. We hope, though, that it will provide a useful guide to the issues and a sense of why they matter for artists, scholars, and all who care about free expression and access to ideas.

Tom Forsythe, "Food Chain Barbie"

Chapter 1:

Four Free-Expression "Safety Valves"

The "Idea/Expression Dichotomy"

The first free-expression safety valve in the copyright system is the idea/expression dichotomy. Copyright law protects the specific language, structure, images, or details of plot and character in a creative work (that is, their "expression"), but it does not protect facts or ideas. As the Supreme Court explained in a recent case that involved the reproduction of information in a telephone directory, copyright "rewards originality, not effort." Thus, collecting and publishing facts (in that case, names, addresses, and telephone numbers) does not possess even "the minimal creative spark required by the Copyright Act and the Constitution."[15]

As for ideas, the law recognizes that authors and artists copy them all the time. The idea of star-crossed lovers whose families object, and whose passion comes to a tragic end, would not be copyrightable even if Shakespeare had written his version of the story in 1994 instead of 1594. Of course, Shakespeare took the plot of not only *Romeo and Juliet* but most of his other masterpieces from existing sources. The idea/expression dichotomy allows artists and writers to draw freely on the themes, myths, and images that fill our culture.

Of course, drawing the line between protected "expression" and unprotected facts or ideas is not always easy. Even without word-for-word copying or direct paraphrasing, a work that bears "substantial similarity" to an earlier creation will usually be considered a "derivative work," and therefore an infringement of copyright. How to distinguish between the legitimate borrowing of ideas and the illegal creation of a "derivative work" can be a tricky business.

For example, in one case, a federal court found that software designed to help dentists organize their offices violated the law even though it did not copy anybody else's computer code, because its "structure, sequence, and organization" were "substantially similar" to an earlier software program. The nation's leading treatise on copyright said that the court's rationale in this case was wrongheaded, because "providing protection for such amorphous concepts as the 'overall structure'" of a software program undermines the idea/expression dichotomy.[16]

But these same authors also thought that Stephen Sondheim and Leonard Bernstein's borrowing of plot elements from *Romeo and Juliet* for their classic Broadway musical, *West Side Story*, would have violated Shakespeare's copyright, had he owned one. They admitted that not all courts would find the details of *West Side Story* to be "a sufficiently concrete expression of an idea so as to warrant a finding of substantial similarity."[17] But this example illustrates how shifting and unpredictable the idea/expression dichotomy can be.

Fair Use

Fair use is probably the best-known of the free-expression safety valves. It allows anyone to copy, quote, and publish parts of

a copyrighted work for purposes of commentary, criticism, news reports, scholarship, caricature, or even, as we have seen, recording and time-shifting of television programs. Not only does fair use allow culture to thrive; it also prevents publishers and authors from suppressing criticism and parody of their works.

So, when the rap group Two Live Crew borrowed the melody and parodied the words of Roy Orbison's pop song, "Oh! Pretty Woman," in a vulgar style that the copyright holder did not appreciate, the Supreme Court indicated that it was probably fair use. Even though intended for commercial sale, Two Live Crew's raunchy version, with lines such as "big hairy woman" and "two-timin' woman," served the important cultural purpose of mocking the "white bread" original. And to be effective, said the Court, parodists must quote enough of the copyrighted work to conjure it up in listeners' minds.[18]

The Nation magazine had a less fortunate experience in the 1980s after it quoted about 300 words from ex-President Gerald Ford's about-to-be-published memoir without permission. *The Nation*'s quote was part of a 2,200-word news scoop highlighting Ford's description of his pardon of Richard Nixon (Ford's predecessor in the White House), for possible crimes during Nixon's presidency. In reaction to *The Nation*'s scoop, *Time* magazine canceled its "first serial rights" to publish highlights from Ford's book.

The Supreme Court, identifying with the publisher's plight in losing this income from first serial rights, rejected *The Nation*'s claim of fair use. But three justices dissented, arguing that the scoop served the public interest, and accusing the Court majority of a "constricted reading of the fair use doctrine" that ill-served the progress of arts and sciences and the robust public debate essential to an enlightened citizenry."[19]

More recently, the writer Alice Randall faced a fair-use battle when she borrowed characters and plot from Margaret Mitchell's classic *Gone With the Wind* to produce *The Wind Done Gone*, a fictionalized critique of the earlier novel's racist stereotypes. *The Wind Done Gone* mentions homosexuality and interracial sex, both of which the Mitchell estate prohibits in its policy for licensing "derivative works." A trial judge was persuaded to ban the novel as an unauthorized sequel. A federal appeals court reversed, finding *The Wind Done Gone* to be a parody, and hence, fair use.[20]

As these examples suggest, fair use is close to the heart of free expression. If copyright owners could control – and effectively ban – every quotation or other use of their work, they would exercise a powerful form of censorship. An example of this phenomenon involved the Church of Scientology, which holds the copyright to religious texts including *New Era Dianetics for Operating Thetans,* or "NOTs." A critic of the Church posted the NOTs online without permission, to demonstrate what he believed was their criminal nature, but a federal appeals court rejected his claim of fair use.[21]

In a later case also involving religion, the Worldwide Church of God was able to suppress a breakaway sect's use of prophetic texts by Herbert Armstrong, the Church's founder. The Church elders no longer wanted the texts in circulation on account of "ecclesiastical errors." The breakaway group was thus unable to distribute what it believed were important religious works. A federal court of appeals upheld the copyright claim, over the dissent

of one judge who did not think that copyright law should be used to suppress religious works, and who felt that the splinter group's noncommercial and spiritual motivation entitled it to a finding of fair use.[22]

So essential is the fair use concept to free expression that it has also made its way into trademark law. In a case involving a rock song that made fun of the Mattel Company's fabulously successful Barbie Doll, a federal court of appeals ruled that the song was a constitutionally protected parody. The judges said that even if some consumers might be confused and think the song was sponsored by Mattel (likelihood of confusion being the basis of trademark infringement), the free-expression right of the rock group to parody Barbie took precedence.[23]

Two Live Crew's parody of "Oh! Pretty Woman" served the important cultural purpose of mocking the "white bread" original.

On the other hand, the enthusiasm of movie, book, and music fans is often squelched by unappreciative copyright owners. Internet "fan sites" have shut down after media corporations threatened their proprietors with suits for trademark and copyright infringement. The rock band Phish claims control over all fan sites and forbids them from containing "defamatory" or "offensive" content. Twentieth Century Fox sent cease-and-desist letters to *Buffy the Vampire Slayer* fan sites, driving, as one reporter quipped, "a stake into the hearts of Netizens everywhere." And Warner Brothers has suppressed sites containing irreverent sexual parodies of such *Looney Tunes* favorites as Bugs Bunny, Daffy Duck, and Tweety, claiming that these "beloved characters" should not be maligned by lascivious humor.[24]

Corporations also try to suppress online "cybergriping" by acquiring Internet domain names that contain the suffix "sucks" – commonly used to signal a site critical of corporate activities or products. The World Intellectual Property Organization's online arbitration board has allowed some sites to continue – for example, "wallmartcanadasucks.com" – but has transferred the domain names of others, such as "guinness-beer-really-sucks.com," to the complaining corporation, which can then make sure that the name is never again used for a site offering parody or criticism of its practices.[25]

In one leading case involving the "sucks.com" phenomenon, a judge ruled that a reasonable consumer or Web surfer interested in the Bally chain of fitness clubs would not be confused by a "Bally sucks" Web site, and that allowing Bally to shut down the site would unacceptably allow trademark law "to eclipse First Amendment rights."[26] But most of these disputes never make it to court, and threats of litigation are often enough to suppress criticism of corporate practices and products.

Similarly, wealthy organizations ranging from the Walt Disney Company to the National Basketball Association often use "cease-and-desist" letters to intimidate critics and chill "appropriationist art."[27] The rap music technique of sampling has been inhibited by lawsuits that challenge the borrowing of even a few bars of a lyric or melody for purposes of incorporating them into a new musical creation.[28]

Indeed, the fact that an injunction was entered halting publication of *The Wind Done Gone* – even though it was eventually reversed on appeal – demonstrates how subjective and unpredictable fair use can be. The four factors that enter into a finding of fair use, as enumerated in the copyright law, all involve judgment calls.[29] As one scientist has written, the legal definition of fair use is "maddeningly vague. ... Even a well-trained copyright lawyer cannot say with certainty where the line lies between fair and unfair uses."[30]

The First Sale Rule

A third critical safety valve is the first sale rule – the concept that copyright holders only control the first sale of their works, after which purchasers may give them away, sell them, or otherwise pass them along to friends, colleagues, second-hand stores, libraries, schools, Salvation Army outlets, flea markets, auctions, or any other place where the public can re-use them. Video stores can rent tapes to countless customers, and libraries can likewise lend books to countless borrowers – who in turn can lend them to their friends, as long as someone returns them on time.[31]

The first sale rule aids immensely in the spread of knowledge, entertainment, inspiration, and ideas. It is also a pragmatic recognition of the limits of copyright enforcement. For few of us would want to live in a world where corporations or government agents monitor and control what we do with every book, computer program, or CD that we buy. Yet through encryption, mandatory clickwrap agreements, and other "DRM" techniques, the copyright industry has been able to undermine the rights of the public under the first sale rule.

Compared to fair use, there have been relatively few legal disputes involving the first sale rule. Still, there are some close and difficult questions. In one case, a court ruled that tearing illustrations from a legitimately purchased book and mounting them on ceramic tiles for resale was not protected by the first sale rule. But in a later case, a different court found that mounting lawfully acquired cards on tiles *was* protected.[32] More recently, software companies have been able to circumvent the first sale rule by "licensing" rather than selling their products.[33]

The copyright industry has persuaded Congress to enact two major exceptions to the first sale rule – one for music and the other for computer software. Although a purchaser of a CD can still give or sell it to a friend, anyone with a "commercial purpose" is forbidden, under the Record Rental Amendment of 1984, from renting or lending musical recordings.[34] The industry feared that without this exception, music lovers would rent their favorite recordings and then copy them onto tape for their home collections, instead of buying them. Libraries and other nonprofit educational institutions have an exemption from the law, and are still permitted to lend musical works.

In 1980, the industry carved out another exception to the first sale rule for software. The justification, according to the U.S. Copyright Office, was that computer programs are "the only type of copyrighted work that can be easily, quickly, totally, and perfectly copied by an infringer."[35] Again, nonprofits are exempted.

The authors of the leading treatise on copyright law criticize this erosion of the first sale rule. They argue that a book buyer should have the same right to distribute the book to others regardless of

whether it is in "hardcopy" or electronic form.[36] Likewise, it is questionable whether the computer software industry should, through licensing and other contracts, be able to undermine the fundamental principle that after the first sale of a work, copyright owners have no further right to control its distribution.

The All-Important Public Domain

The fourth and perhaps most important free-expression safety valve is the public domain. The Copyright Clause requires that after a "limited time" of monopoly control, creative works must enter the public domain, where they are free for anyone to publish, sell, adapt, translate, record, or perform. And "limited time," as we have seen, meant only 14 years, renewable for another 14, under the nation's first copyright law. As the 19th century legal scholar and Supreme Court Justice Joseph Story wrote, the purpose of the Copyright Clause was to "admit the people at large, *after a short interval,* to the full possession and enjoyment of all writings and inventions without restraint."[37]

One reason an expanding public domain is so important is that creative works grow from past achievements; they do not, as law professor Jessica Litman quipped, just rise full-grown, like "Aphrodite from the foam of the sea."[38] Justice Story explained not long after the Copyright Clause was written that "few, if any, things" are "strictly new and original throughout. Every book in literature, science and art borrows, and must necessarily borrow, ... much which was well known and used before."[39] From Shakespeare to James Joyce, Michelangelo to Andy Warhol, creators and inventors have echoed, copied, mocked, and transformed previous works. Rock music, folk, blues, and jazz all borrow themes, riffs, and melodies from earlier creations.[40]

In addition to this vital role in fermenting creativity, the public domain also promotes preservation and scholarship. Historians can reproduce pictures, letters, sound recordings, and other expression without pursuing the frequently futile quest for copyright permission. Even when owners can be found, they may refuse permission, or impose unpalatable conditions. Reportedly, the estate of songwriter Lorenz Hart refuses any biographer who mentions Hart's homosexuality to reprint his lyrics. Likewise, the playwright Lillian Hellman was reputed not to have licensed any except "first-class" productions of her works. Ted Hughes, widower of the poet Sylvia Plath, strictly controlled what biographers and anthologizers could say about her life and their stormy marriage in exchange for permission to quote her poems or letters.[41]

For scholars and archivists, fair use is not an adequate substitute for the public domain. It is often impossible to predict whether a particular borrowing will be considered fair by a judge or jury, and, perhaps more important, these issues are seldom decided in court – most publishers simply will not print copyright-protected documents without permission. This includes even unpublished letters, drawings, and photographs.

Finally, popular access is greatly enhanced once works enter the public domain. Material that is unavailable, or available only in expensive editions, can, once copyright expires, be published and distributed in wide variety, more cheaply, and often with new introductory or supplementary texts. The year after Willa Cather's *My Antonia* entered the public

domain, seven new editions appeared, with different introductions and varying prices – a pattern that is typical.[42] Libraries can freely copy and disseminate letters, photographs, and news articles once they are in the public domain. Amateur or impecunious theatrical troupes can perform musicals, plays, and poems without paying often prohibitive licensing fees.

The copyright industry, by and large, takes a less enthusiastic view of the public domain's virtues. Media companies say that works are neglected and decay when nobody with monopoly control is motivated to preserve them. Paramount Pictures Vice President Scott Martin recently gave an example: the classic Frank Capra movie, *It's a Wonderful Life*, which entered the public domain at the end of its first copyright term because its owner failed to file a timely renewal application. As a result, Martin wrote, "the film was endlessly broadcast by local stations and cable channels looking for no-cost programming." It was "sliced and diced" to fit into time slots between commercials. "By the 1980s," he said, "there were multiple versions of the film, all in horrid condition."[43]

But once the owners of the underlying rights to the story and music asserted their claims, Martin says, the film was spruced up, with marvelous results. "Only after the copyrights in the underlying rights were enforced was anyone willing to spend the money necessary to restore and preserve the film."[44]

There is another side to this story, of course. Anyone who has been on an airplane or watched movies on TV knows that media companies frequently allow their copyright-protected works to be "sliced and diced" (and bowdlerized to eliminate naughty words or scenes). The public domain thus cannot be blamed for insults to the integrity of creative works.

Perhaps more important, all of those allegedly "horrid" copies of *It's a Wonderful Life* enabled millions of people to see it. The film "was actually a box-office flop at the time of its release, and only became the Christmas movie classic in the 1960s due to repeated television showings at Christmastime."[45] It was thanks to the public domain that the film achieved classic-movie status.

Finally, Martin's argument that works will only be preserved if their owners have an incentive to keep them profitable applies to relatively few creations. For most works, which no longer have commercial value, entry into the public domain is crucial because only then can archivists preserve them without going through the laborious, expensive, and often futile process of trying to locate and secure permission from copyright owners.

The public domain is a critical part of the "difficult balance" underlying the Constitution's Copyright Clause. Yet in the past century, Congress has stretched the "limited time" contemplated by the Copyright Clause to the point where it now, as one scholar quipped, resembles perpetual copyright "on the installment plan."[46] From the original 14 years, renewable for another 14, in the 1790 Act, Congress in 1831 extended the term to 28 years, renewable for another 14; and again in 1909, to 28 years, renewable for another 28.[47] Between 1962 and 1974, Congress

> "Even a well-trained copyright lawyer cannot say with certainty where the line lies between fair and unfair uses."

enacted nine short-term extensions, to prevent older works from entering the public domain while it prepared a massive new copyright law that finally passed in 1976.[48]

This 1976 law, following the international Berne Convention, adopted a flexible – and lengthy – "limited time": the life of the author plus 50 years for individuals and their estates; 75 years from publication or 100 years from creation, whichever expired first, for corporations holding copyrights on works created by their employees (so-called "works made for hire").[49]

Then came the Sonny Bono Copyright Term Extension Act of 1998, which added another 20 years across the board. Under the Sonny Bono law, the "limited time" of copyright is now the author's life plus 70 years for individuals, and 95 years for most copyrights held by corporations.[50] Like the previous extensions, the law expands copyright not only for future works, but for existing ones, even though their authors – many of them now dead – obviously don't need any additional incentive to create them.

Chapter 2:

Freezing the Public Domain: The Battle Over the Sonny Bono Law

The Politics of Copyright Extension

The Sonny Bono law was the result of strenuous lobbying by the copyright industry. Often called the "Mickey Mouse Law" because of the Walt Disney Company's central role in urging its passage, it prevented the original image and character of Mickey, who made his screen debut in 1928 in the film *Steamboat Willie*, from entering the public domain in 2003. Disney and other film companies pushed aggressively for term extension, smoothing the way, as one journalist noted, with "well-targeted campaign contributions."[51]

During the three years it took to pass the Sonny Bono law, media companies and their political action committees (PACs) gave more than $6.5 million in campaign contributions to members of Congress. Representative Howard Coble, a co-sponsor of the law, received $63,000 in individual and PAC contributions. Senate co-sponsor Orrin Hatch received $50,000 from large donors, including the major movie studios, the Motion Picture Association of America (MPAA), and ASCAP.[52]

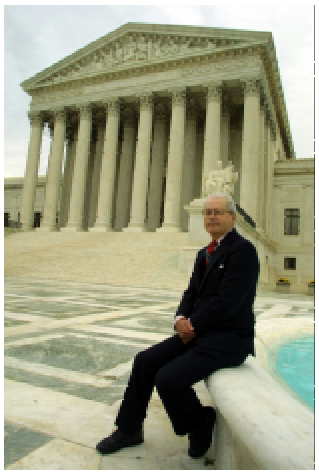
Senator Patrick Leahy, who publicly forgoes PAC contributions, received nearly $20,000 from individual Disney employees. (He was the ranking minority member of the Senate Judiciary Committee that passed on the bill.) Time Warner employees gave Leahy $36,000. Disney chairman Michael Eisner flew to Washington to meet with Senate Majority Leader Trent Lott, who then signed on as a co-sponsor. Journalist Daren Fonda noted: "That day, Lott's campaign committee received a check from Disney for $1,000 and 11 days later, Disney donated $20,000 in unrestricted 'soft money' to the National Republican Senatorial Committee."[53]

Given all this industry largesse, it is fitting that the Sonny Bono law bears the name of an entertainer-turned-politician. Mary Bono, who succeeded to her husband's seat in Congress after his death, explained: "Sonny wanted the term of copyright protection to last forever," but "I am informed by staff that such a change would violate the Constitution." She suggested that Congress consider the proposal of the MPAA's Jack Valenti, for "forever less one day."[54]

Defending the Public Domain: *Eldred v. Ashcroft*

The effect of the Sonny Bono law was to prevent more than 400,000 works from the 1920s and '30s from entering the public domain.[55] Most of them were obscure creations without commercial value, though often with considerable historical interest. But many famous works also had their copyrights extended – among them, F. Scott Fitzgerald's *The Great Gatsby*, Ernest Hemingway's *The Sun Also Rises*, Thomas Mann's *The Magic Mountain*, the iconic American film *The Jazz Singer*, the book and score to the musical *Show Boat*, songs by Cole Porter, and the children's classic *Winnie the Pooh*.[56]

As the briefs filed in the legal case that challenged the Sonny Bono law attested, the effects were dramatic. The College Art Association, in a friend-of-the court (or *amicus curiae*) brief joined by the National Humanities Alliance and other groups whose members study visual art, explained that scholars assembling texts and databases often cannot locate the owners of copyrights in educationally valuable letters, songs, photos, and other documents. Indeed, most authors have neither the time nor the financial resources to do this gritty work of tracking down copyright permissions – though publishers generally expect them to. Without permissions, most publishers won't include the materials.



Eric Eldred at the Supreme Court. Photo by Declan McCullagh

As a result, said the College Art Association, there are "gaping holes" in such documentary compilations as *The Video Encyclopedia of the Twentieth Century*, a resource popular with researchers and teachers, and "Who Built America?," an award-winning CD-ROM series for high school and college students containing primary sources from the 1930s. The compilers of "Who Built America?" had great difficulty finding copyright owners, and those they found sometimes wanted large fees even where the works in question had no commercial value. Thus, they were forced to omit the Depression Era demagogue Huey Long's campaign song, "Every Man a King," as well as many clips from popular films of the time. They substituted government documents or other works in the public domain, but the result was an unbalanced picture of the era.

The brief described an art historian who was refused permission to use a photo of Pablo Picasso and his daughter because the copyright owner disagreed with the historian's analysis of Picasso's work. A publisher that planned a new critical edition of *Cane*, by the Harlem Renaissance author Jean Toomer, in part to counterbalance the bias against Toomer reflected in the only available edition, could not go ahead because of the copyright term extension on *Cane*. "In the past," the brief said, "researchers could anticipate and plan on new material becoming available for unrestricted use on a constant and continuing basis." But the law's 20-year "moratorium on the public domain" upsets those expectations and penalizes scholars, museums, teachers, and historians. All this in the interest of further enriching a relatively few copyright owners "who already have received significant value from their ownership under the preexisting term."[57]

The suit challenging the Sonny Bono law started with a small online publisher named Eric Eldred. He began the nonprofit Eldritch Press in 1995, "inspired to help his triplet daughters wade through the antique prose of [Nathaniel Hawthorne's] *The Scarlet Letter*, which they were assigned to read in middle school."[58] Eldred searched for Internet resources to assist them, including accessible, comprehensible, and reader-friendly copies of the text. As his lawyer Lawrence Lessig tells the story, what Eldred found online "was essentially unusable."[59] The Web versions had typos, relied on outdated texts, or were crudely scanned.

Beginning with Hawthorne, Eldred began to provide easily readable texts of other public-domain works, by such major-league authors as Joseph Conrad, Anton Chekhov, and Henry James. The daily "hit count" on his Web site grew to 20,000. In 1997, the National Endowment for the Humanities recognized Eldritch Press's Hawthorne site as "one of the 20 best humanities sites on the Web."[60]

Eldred was set to add a Sherwood Anderson story collection and a book of Robert Frost poems, among other works whose copyrights were about to expire, when the Sonny Bono Act delayed their entry into the public domain by 20 years. He began to complain publicly, and one news story caught Lessig's attention. With Harvard Law School's Berkman Center for Internet & Society, Lessig framed a legal challenge to the Sonny Bono law.

They had three legal arguments. First, by freezing the public domain, the Sonny Bono law violates the right to free expression and access to ideas, as embodied in the First Amendment. Next, by extending copyright for already-created works, the law violates the Copyright Clause requirement of limited times. Finally, the law does not "promote the progress of science and useful arts," as required by the opening words of the Copyright Clause, because there is obviously no need to provide further motivation for authors to produce works that already exist.

Other plaintiffs in the case that became known as *Eldred v. Ashcroft* included a publisher of books on genealogy and local history, a church choir director, a classical sheet music company, the American Film Heritage Association, and Dover Publications, famous for quality reprints of public domain works. Before copyright extension, Dover planned to reprint Kahlil Gibran's *The Prophet*, originally published in 1923. The choir director, who limits her selections to public domain works because of the high cost of copyrighted sheet music, planned to perform work by Ralph Vaughn Williams and Edward Elgar. The classical sheet music company was preparing to publish compositions by Béla Bartok, Maurice Ravel, and Richard Strauss, which were about to enter the public domain, and distribute them to school and community orchestras.[61]

This was the first time anyone had brought a legal challenge to copyright extension, and the lower courts made quick work of Lessig's claims. A federal judge dismissed the suit, and in February 2001, the U.S. Court of Appeals, by a 2-1 vote, affirmed. The judges in the majority ruled that neither the opening words of the Copyright Clause nor its reference to "limited times" prevents Congress from extending copyright as often as it likes. The one dissenting judge pointed out that repeatedly extending copyright is fundamentally equivalent to creating a perpetual, unlimited – and therefore clearly unconstitutional – term.[62]

Eldred in the Supreme Court

By this time, news of both the Sonny Bono law and the *Eldred* case had spread. Librarians, scholars, activists, and many others grew concerned about copyright's continuing impoverishment of the public domain. "Free Mickey" became the rallying cry of those supporting Eldred.[63] After the Supreme Court agreed to review the case, a large coalition of law professors, library associations, archivists, writers, computer professionals, arts and humanities alliances, and media centers weighed in with *amicus curiae* briefs on Eldred's behalf.

In all, fourteen *amicus* briefs on Eldred's side were submitted, with a total of 141 signers. They included groups ranging from the National Writers Union and the College Art Association to the Association of American Physicians & Surgeons and Computer Professionals for Social Responsibility. Their aim was to bring home to the Supreme Court justices the real cultural costs of ever-longer copyright terms, and consequent freezing of the public domain.

The brief from online archiving projects, for example, described how Internet public-domain publishing has revived countless forgotten or hard-to-find works. Archiving projects now "digitize and distribute millions of out-of-copyright books, movies, and music ... materials that commercial publishers, distributors, and rights-holders have effectively abandoned." While media companies that own the copyrights "often let these films decay and books disappear, this material is invaluable to scholars researching our history, artists developing new art forms, and anyone seeking to explore our culture."

Disney took advantage of the public domain in creating *Snow White, Cinderella*, and other classics.

To reclaim these works, they must be in the public domain. Finding and paying copyright owners is untenable, given the millions of documents involved. And in any case, the vast majority of works affected by the Sonny Bono law – published more than 70 years ago – "are not available from copyright owners at any price" because the owners cannot be found.

The brief offered as one example the Steven Spielberg Digital Yiddish Library, with about 12,000 digitized works, which "has helped turn a dying literature into 'the most in-print literature on the planet.'" This online archive "brings both a literature and an enriched understanding of the Yiddish culture to people across the globe."

By contrast, "other parts of our culture and heritage remain obscured behind the wall of copyright." Early issues of *The New Yorker, Time, Readers Digest*, and other magazines "provide an unparalleled window into early 20th century American life and culture." But unlike the Yiddish treasures in the Spielberg archive, few of these magazines can be found online because they are still under copyright. Until they fall into the public domain, the process of clearing rights for each article, drawing, and photograph makes digital archiving practically impossible.

The archives' brief also pointed to movies, that "rare medium of full immersion," with unmatched power "to transport us to distant times and places." Film "literally allows us to bear witness," whether to the police violence inflicted on civil rights era protesters, Martin Luther King, Jr.'s leadership of the 1965 march on Selma, Alabama, or countless other historical events. But as the public domain recedes, teachers, students, scholars, and the rest of the public are unable to see these images.[64]

Other support for Eldred came from First Amendment lawyers, copyright lawyers, writers, libraries, and economists. The writers, among them William Gass, Peter Matthiesen, Eva Hoffman, and Ursula Leguin – all, of course, copyright owners themselves – argued that a growing, healthy public domain is the necessary

source for new creation. They pointed out that Disney, which worked so hard to freeze the public domain by pushing for the Sonny Bono law, nevertheless took advantage of it many times in creating animated versions of *Snow White, Cinderella, The Hunchback of Notre Dame*, and other classics. Indeed, Disney's *Steamboat Willie* was a parody of the classic Buster Keaton movie, *Steamboat Bill, Jr*.[65]

The economists' brief argued that copyright extension produced no economic benefit – virtually no additional incentive to create new works, and significantly higher costs for "derivative works" such as adaptations and performances. And as with any monopoly, the elimination of competition increased costs to consumers.[66]

Finally, a brief from the American Association of Law Libraries, the Medical Library Association, and other library groups had particular relevance for scholarship and culture. These are the institutions that preserve literature, art, science, journalism, and other products of human creativity, and make them available to all, regardless of wealth. The brief described *Documenting the American South*, an electronic collection sponsored by the University of North Carolina, which provides no-fee access to more than 1,000 publications and manuscripts. This archive includes Confederate imprints, Southern literature, materials on the African American church, and about 160,000 pages of slave narratives, of which, in many cases, only a few hard copies exist. Before digitization, hardly anyone got to see them. Now they are accessed by 15-20 people per day – well over 5,000 per year. The project would be impossible without the public domain.

The librarians' brief also addressed a limited exemption in the Sonny Bono law that allows them to reproduce and distribute works that are in their final 20 years of copyright – but only if the works are not currently profitable for their owners, and if copies cannot be obtained "at a reasonable price." The exemption is so narrow, said the librarians, that it "may ultimately do little" to "mitigate the substantial burdens" of the law.[67]

The Department of Justice and the copyright industry countered the outpouring of briefs attacking the Sonny Bono law with powerful arguments of their own. The government's brief emphasized how novel Eldred's claims were: Congress has been extending copyrights on existing works for 200 years, and no one before had brought a legal challenge arguing that "limited times" cannot be extended or that the opening words of the Copyright Clause ("to promote the progress of science and useful arts") mean that laws not shown to encourage new creations are beyond Congress's power. In any event, they argued, the longer term would spur media companies to invest in restoring and distributing old works, and although not creative, these activities also promote "science and useful arts."

The government stressed that Congress, not the courts, is the appropriate branch of government to decide what policy best serves art and culture. Indeed, it insisted, for the courts to wade into this area would require reviewing a multitude of congressional judgments – among them, that longer copyright protection, not the public domain, advances film preservation, and that the media industry, if it receives additional profits, will invest in more new creations. The government's lawyers warned the Supreme Court that if it starts subjecting copyright term extensions to First Amendment scrutiny, it will end up in

the impossible position of second-guessing Congress's judgments on "each and every feature" of copyright law.[68]

As if to outdo Eldred's supporters, those on the government's side filed a total of 18 *amicus curiae* briefs. Several came from the copyright industry – the MPAA, AOL Time Warner, the Recording Industry Association of America (RIAA). Others came from celebrated copyright holders or their estates – George Gershwin, George Balanchine, and David Mamet (among others who signed on to a brief from the Association of American Publishers); the Songwriters Guild of America; and AmSong, Inc. (an "organization dedicated to the protection of musical copyrights," whose members include Bob Dylan, Carlos Santana, Don Henley, and Thelonious Monk, Jr.).

The common themes of these briefs supporting copyright extension were the financial and proprietary interests of creative artists and their heirs. They also argued that copyright holders make good use of already-created works through adaptations and movie deals. But they failed to acknowledge the even greater use that would occur if the works were allowed to enter the public domain.

A brief that was particularly aggressive (and humorless) came from Dr. Seuss Enterprises, the heirs of E.B. White (author of the timeless *Stuart Little* and *Charlotte's Web*), and Madeleine and Barbara Bemelmans (heirs of Ludwig, the author of the *Madeline* books). They argued that enriching the public domain was not a purpose of the Copyright Clause at all, and in fact that allowing works to enter the public domain has pernicious effects. "While in no way seeking to disparage" Eldred and his fellow plaintiffs, they said, "others having access to works through the public domain make use of well-known characters to glorify drugs or to create pornography. These uses, especially for children's works, demean and dilute the original works and discourage their continued popularity."[69]

The assumption of these copyright owners was that cultural icons like Dr. Seuss should be immune from irreverent or scandalous uses. But this misapprehends the role of mockery and cultural quotation in a system of free expression. These writers' estates seemed unwilling to accept that the fame of works like *The Cat in the Hat* or *Charlotte's Web* makes them natural targets for take-offs and parodies. They should no more have immunity from such critiques or humor than the Walt Disney Company should be able to suppress the famous "Disneyland Memorial Orgy," a cartoon created by *Mad* magazine illustrator Wally Wood and published as a poster by *The Realist* magazine in the 1960s.[70] The "Orgy" depicts Mickey, Minnie, and other Disney characters in sexually suggestive situations. Although Disney has tried over the years to stop distribution of the "Orgy," it remains an important wry comment on the sexlessness of "Disneyfied" American culture.

Another common argument of those defending the Sonny Bono law was that the copyright system, by recognizing fair use and the idea/expression dichotomy, already accommodates First Amendment rights. The government's brief elaborated on this theme. Just as in the *Nation* case, it said, where the Supreme Court rejected an argument that the public interest in Gerald Ford's memoirs required a new exception to copyright, free speech safeguards such as fair use already "protect First Amendment interests and render further judicial intervention unnecessary."[71]

Finally, the government and its supporters emphasized the need for "harmonization" of U.S. copyright law with Europe's. They said Congress was right to decide that in the interests of international trade, and of protecting America's number two export, popular culture, U.S. copyright holders should not have any less protection abroad than their foreign competitors. Under the Berne Convention, countries need only give the same copyright protection to a foreign work that it has in its country of origin. Hence, without the Sonny Bono law, U.S. copyrights would be protected in Europe for the life of the author plus 50 years (as provided by the 1976 Copyright Act) rather than life plus 70 – the term in European Union countries.[72]

But the Sonny Bono law did not in fact make U.S. copyright terms consistent with Europe's. European Union countries give 70 years for works owned by corporations. The Sonny Bono Act gives corporations 95 years from the date of publication or 120 years from the date of creation, whichever expires first – that is, at least 25 years longer than many countries in Europe.[73]

Moreover, most European countries don't have an equivalent of the U.S. "work for hire" doctrine, which gives corporations the copyright in works created by their employees. In Europe, the life of the author – or multiple authors in the case of movies – is often used to calculate copyright terms for works by corporate employees. Hence, the goal of harmonizing U.S. and European copyright law is stymied at the outset by a major difference in the treatment of works by corporate employees. The U.S. Register of Copyrights admitted to Congress before passage of the Sonny Bono law that the 20-year extension would not make American law consistent with Europe's.[74]

On October 9, 2002, the case of *Eldred v. Ashcroft* was argued before a packed audience in the Supreme Court. Several of the justices seemed incensed by the Sonny Bono law. Sandra Day O'Connor said the law "flies directly in the face" of the "very short term" of copyright that the framers of the Constitution had in mind. But she wondered whether this necessarily made it unconstitutional. Justice Ruth Bader Ginsburg had a variant on the same question: should there be any judicial review of Congress's decisions in this area, she asked Lessig; and if so, what standard should apply?

Part of the "Disneyland Memorial Orgy" by Wally Wood.

Justice Stephen Breyer was skeptical of the government's claim that Congress can legitimately promote "science and useful arts" not by encouraging creativity but simply by rewarding the distributors of already-created works. He asked the government's lawyer, Solicitor General Ted Olson, whether Congress could therefore pass a law granting copyrights for the Bible, Shakespeare, or Ben Jonson? The question was obviously rhetorical, but Olson was reluctant to say that even this would be unconstitutional.

Several other justices seemed uncomfortable with the law's extension of existing copyrights. But O'Connor asked Lessig

whether invalidating it would not doom the 1976 Copyright Act, which also added to the term of existing copyrights. Breyer opined that invalidating the '76 law would produce "chaos" that would be "horrendous." Lessig responded that the Court could make a distinction because of the settled expectations created by the '76 Act.[75]

After the argument, Lessig reported that research on the books and movies whose copyrights were extended in 1976 indicates that the vast majority are no longer commercially available; hence, "a surprisingly small amount of work would be affected" if the '76 Act were invalidated.[76]

Nevertheless, this question about the vulnerability of the 1976 copyright law loomed in the justices' minds. On January 15, 2003, they upheld the Sonny Bono law by a vote of 7-2.

Justice Ginsburg's opinion for the Court made no mention of the ways that a stagnant public domain impoverishes art and culture, as the College Art Association and others had documented in their briefs. Instead, she condemned Justice Breyer, one of the two dissenters, for making "abundant policy arguments" instead of sticking to legal precedent. Breyer's impassioned dissent relied extensively on the briefs, noting for example that about 350,000 films, songs, and other works with little or no commercial value are still frozen in "a kind of intellectual purgatory" because of the Sonny Bono law.[77]

Ginsburg's opinion gave short shrift to the free-expression issue. The Copyright Clause and the First Amendment "were adopted close in time," she said – indicating that, "in the Framers' view, copyright's limited monopolies are compatible with free speech principles." Her opinion did not consider that those "limited monopolies" lasted quite a short time in the 18th century, or whether "limited" is even an appropriate description for a period that spans nearly a century – and often longer. But in any event, Ginsburg said, "copyright law contains built-in First Amendment accommodations" – in particular, the idea/expression dichotomy and the defense of fair use.[78]

What Ginsburg overlooked here, as law professor Jack Balkin soon pointed out, "is that the limitation of copyright terms is also a central important built-in feature of copyright law that protects free speech values." Balkin added: "In the Court's eagerness to get rid of the First Amendment claims in this case, it has created truly bad law that will cause problems for freedom of expression for many years to come."[79]

The Supreme Court's 2002 decision in *Eldred v. Ashcroft* gives Congress near-total discretion to decide what is an appropriate copyright term – to extend the "limited time" yet again for virtually any period. As Justice John Paul Stevens noted in a dissenting opinion, only one year's worth of creative works entered the public domain in the preceding 80 years. By allowing Congress to extend existing copyrights *ad infinitum*, Stevens said, the majority ignored "the central purpose" of the Copyright Clause.[80]

Justice Ginsburg was certainly right that copyright term extension is an issue of policy. Of course, this doesn't disqualify the courts from weighing in; they often consider policy arguments, especially in constitutional cases. As Justice Breyer said, "judicial vigilance" is necessary "if we are to avoid the monopolies and consequent restrictions of expression" that the Copy-

right Clause and the First Amendment were both intended to prevent.[81]

In an editorial, *The New York Times* agreed. Calling the public domain "the great democratic seedbed of artistic creation," the *Times* opined that the Supreme Court's decision "may make constitutional sense, but it does not serve the public well."[82]

The Difficult Balance Revisited: What is a "Limited Term"?

Copyright term extension is an issue that splits the worlds of art and culture. First Amendment experts disagreed on the constitutionality of the Sonny Bono law. Bob Dylan, Carlos Santana, and many other artists urged Congress to pass it. Since existing law already gave them copyright control for life plus 50 years, they were presumably concerned about the ability of their grandchildren and great-grandchildren to profit from their works. Understandably (but incorrectly), they thought of their creations as their permanent property.

The *Eldred* case was not an easy one as a matter of constitutional law. As the government argued, how is a court to decide what is an appropriate, or constitutionally permissible, "limited time"? This does seem essentially a judgment for Congress to make.

But if "limited time" can really mean hundreds of years, or can be extended by Congress indefinitely, then the public domain becomes a dead letter – which is certainly not the outcome intended by the drafters of the Copyright Clause.

The Supreme Court's failure to come to grips with the problem of the disappearing public domain suggests that this issue must be resolved in the public policy arena. And despite the disappointingly wooden Supreme Court decision in *Eldred*, the litigation may have had the salutary effect of taking the issue out of the legislative shadows and into the light of policy debate. As one journalist noted, public awareness might now persuade Congress to revisit the issue and, at the very least, allow copyrights to lapse "unless owners make an effort to renew them."[83]

Lawrence Lessig elaborated, arguing that it is not necessary to lock up all works created after 1923 in order to go on providing profits for the 2% of them that "continue to be commercially exploited." Just as patent holders must pay a fee every few years to continue their patents, "the same principle could be applied to copyright."[84] Scholars, archivists, artists, and the reading and listening public could then at least use materials whose owners do not bother to renew.

As Lessig and many others have pointed out, the stakes are higher than ever. The Internet for the first time enables people the world over to read, view, and learn from works that in pre-digital times were buried in library stacks, private collections, attics, or basements. The immense promise of global communication, preservation, and intellectual exchange should not be squandered by the calcification of the public domain.

Chapter 3:

The Ins and Outs of Circumvention: The Digital Millennium Copyright Act

Locking Up Expression and Shrinking Fair Use

After the Supreme Court agreed to review the *Eldred* case, one reporter made the connection between the Sonny Bono law and other efforts to strengthen copyright control by observing that term extension is part of "a larger fight that pits copyright holders against the spread of technology that allows almost anyone to easily copy and distribute almost any work online."[85] The main battleground of that "larger fight" is the apocalyptically named Digital Millennium Copyright Act, or DMCA.

The DMCA had its origins in a 1994 "Green Paper" that the Clinton Administration produced in response to industry concerns about the potential for widespread copying and sharing of books, articles, movies, music, and virtually any other expression online. The problem of electronic piracy was – and remains – a serious one. The question is how to address it without undermining copyright's free-expression safety valves. The Green Paper took a radical approach, asserting that every reading or viewing of a work on a computer should be considered a reproduction requiring copyright permission.[86]

This approach dramatically restricts both fair use and the first sale rule online. It prevents anyone who legitimately accesses or purchases a document from making a backup copy or forwarding it to a friend, without a new permission. It locks up everything that in the offline world could be freely browsed in a bookstore or library.

As Professor Pamela Samuelson put it in an article headlined "ALERT – Stop the Clinton Copyright Grab": "Browsing through a borrowed book, lending a magazine to a friend, copying a news article for your files – all seem innocuous enough. But the Clinton administration plans to make such activities illegal for works distributed via digital networks."[87]

Starting from this radical premise, Congress now crafted a law to help the industry prevent unauthorized access to copyrighted material. The DMCA essentially gives the force of law to the industry's digital rights management techniques. Indeed, the DMCA goes beyond making it a crime to circumvent encryption devices in order to access copyrighted works. It also criminalizes the very creation and distribution of circumvention tools.[88]

These "tools" provisions of the DMCA (sometimes called the "anti-trafficking" provisions) exceed anything previously contemplated in copyright law. For instead of penalizing copyright infringement, they ban research and communication of information that might be used for infringement. Like efforts to ban the VCR, rejected by the Supreme Court in the 1984 *Sony* case, banning circumvention tools is troubling because they have many legitimate "non-infringing" uses.

Supporters of the DMCA respond that it accommodates fair use and other tradi-

tional checks on copyright monopolies. For example, it only prohibits circumvention of electronic locks for purposes of access, not for purposes of copying. But the "tools" provisions ban technologies designed for access *or* copying. Thus, as Jessica Litman wrote, consumers wanting to make legitimate use of copyrighted works must come up with ways to circumvent encryption on their own.[89] And they cannot share what they discover unless they are willing to risk being sued or prosecuted for "trafficking" in circumvention tools.

The law has a few narrow exemptions. One permits "nonprofit libraries, archives, and educational institutions" to use circumvention tools to access a work – but "solely in order to make a good faith determination of whether to acquire a copy," and only if the work "is not reasonably available in another form." Another exception permits "reverse engineering" in very limited circumstances once a person has already "lawfully obtained the right to use a copy of a computer program." Still another allows research designed to "analyze flaws and vulnerabilities of encryption technologies."[90] But in each case, using the exemption is difficult because manufacture and distribution of the necessary tools is illegal.

The DMCA acknowledges the importance of fair use. It directs the Librarian of Congress (after investigation by the Copyright Office) to decide every three years whether anybody seeking access to any "particular class of works" for legitimate aims such as fair use is likely to be "adversely affected" by the law.[91] But in 2000, after receiving hundreds of comments from educational and civil liberties groups on the importance of circumvention to the exercise of fair use, the Copyright Office recommended only two narrow exemptions to the access ban of the DMCA: lists of Web sites blocked by Internet filters, and works made inaccessible because of "malfunction, damage, or obsoleteness" of encryption devices. In late 2003, the Copyright Office added two more exceptions – for "computer programs and video games distributed in formats that have become obsolete," and for "literary works distributed in e-book format," when all existing e-book editions contain access controls that block read-aloud functions and other software useful to the visually impaired. [92]

Like copyright term extension, the DMCA has been defended as necessary to harmonize U.S. with international law. Two treaties crafted by the World Intellectual Property Organization (WIPO) oblige member countries to "provide adequate legal protection and effective legal remedies" against circumvention of electronic locks on copyrighted works. According to the Copyright Office, the DMCA simply "implements the WIPO treaties."[93]

But the head of the Patent and Trademark Office acknowledged that the treaties do not require the DMCA's "device-oriented" approach – as opposed to the more traditional "conduct-oriented" approach that targets copyright infringers and not the researchers who create new technologies.[94]

Effects of the DMCA

Cases Involving Scholarship

One of the first applications of the DMCA was against scholars. In early 2001, a group of companies calling themselves the Secure Digital Music Initiative issued a "Public Challenge" to computer experts to try to circumvent the watermarks they had developed to prevent unauthorized accessing or copying of musical recordings. Edward Felten and

fellow scientists from Princeton University, Rice University, and Xerox Corporation cracked the codes, and were preparing to discuss the results of their research at a U.S. Navy-sponsored conference when they received a letter from the RIAA, the music industry trade group. The letter, also sent to Princeton and Navy officials, threatened legal action under the DMCA if the researchers published or publicized their work.

The scientists were both incensed and intimidated. They withdrew their paper from the conference but, represented by the Electronic Frontier Foundation (EFF), they also sued the trade group to challenge the threatened use of the DMCA to suppress their research results. The RIAA now backed off, saying that its letter was "a mistake" – although reserving the right to threaten other scholars in the future. The Department of Justice moved to dismiss the case, arguing that it was "not ripe" because the RIAA was no longer threatening to sue.[95]

The government also argued that the DMCA did not cover Felten's research. This was because his decryption programs were not specifically designed or marketed with the aim of accessing copyrighted material. Instead, they were developed "to further scientific research into access controls." Like the RIAA, though, the government hedged its bets, adding:

> This is not to say that any conduct undertaken in an academic context would be automatically immune from DMCA liability. Rather, it merely credits Plaintiffs' allegation that their purpose is in fact academic pursuit and scientific advancement. In its law enforcement capacity, the Department remains free to make its own determination of what any actor's actual purpose is.[96]

Individual scientists along with Usenix, an association of more than 10,000 technology researchers, contested the government's argument for dismissing the case. They focused on the DMCA's chill on academic research, especially given the possibility of further industry threats. They also pointed out that, contrary to the government's claim, Felten plainly had an intent to access copyrighted materials – the object of the SDMI's "Challenge," after all, was to circumvent the watermarks. What Felten did not have was an intent to infringe copyright.

In the end, though, the federal judge dismissed the case because he did not think there was a sufficiently live controversy. By then, Felten had presented his findings at a Usenix symposium.[97]

Russian researchers were not so fortunate. In July 2001, federal agents arrested Dmitri Sklyarov, a young Russian programmer, at a conference in Nevada after he presented parts of his dissertation on "eBooks Security – Theory and Practice." The paper described the Advanced eBook Processor, a program that disabled the Adobe company's eBook Reader, encryption software for electronic books. Its major purpose was to allow buyers of e-books to translate them into Portable Document Format (PDF), then move them to other machines for more convenient reading, printing, copying, or rearranging, much of which would qualify as fair use. The program was legal in Russia where Sklyarov had created it as an employee of the ElcomSoft company.[98]

The arrest of a young scholar for discussing technical research at a conference caused quite a stir, and in December, the government agreed to "defer" its charges against Sklyarov in exchange for his agreement to testify at a criminal prosecution of ElcomSoft. In the agreement, Sklyarov acknowledged that the "only purpose" of the Advanced eBook Processor was to "create an unprotected copy" of an encrypted document.[99] Like Felten, though, Sklyarov said he had no intent to infringe copyrights, or assist in infringement.

A few months later, ElcomSoft moved to dismiss the criminal charges, arguing, among other things, that the DMCA's ban on anti-circumvention technology is unconstitutional. The American Association of Law Libraries, the Music Library Association, EFF, and other groups supported the company with a friend-of-the-court brief. They argued that Adobe's eBook Reader, like other digital rights management technologies, was "designed to give publishers nearly perfect control" over what lawful owners of e-books can do with them – including lending, printing, partial copying, and other activities protected by the concepts of first sale and fair use. By backing up DRM with legal sanctions, the DMCA deprived lawful e-book buyers of their first sale and fair-use rights.[100]

The judge was not persuaded, however, and in May 2002, denied ElcomSoft's motion to dismiss the case. While acknowledging that DRM tools embedded in Adobe's eBook Reader do restrict first sale and fair use, he said Congress nevertheless had the power to "sacrifice" these interests and give DRM the force of law. He added that the DMCA doesn't eliminate fair use – it just makes its exercise more difficult. The fair user may have to retype portions of text, or hand-copy them rather than using the computer's convenient cut-and-paste functions; but the law does not guarantee "the right to the most technologically convenient way to engage in fair use."[101]

In December 2002, the criminal trial against ElcomSoft began in federal court in California. The distance between the two sides could be gauged by their lawyers' opening statements. The prosecutor labeled ElcomSoft's Advanced eBook Processor a "burglar's tool." The company's lawyer said it was "a legitimate program never used to infringe copyrights."[102]

In the end, a jury acquitted ElcomSoft, finding that the company lacked criminal intent. It is likely that the jury sensed government overreaching. As online commentator Walt Crawford reported, "although Adobe hired two companies to search for unauthorized books on the Internet, the company never found any indication that ElcomSoft's software was used to make illicit copies."[103]

The Irrepressible "DeCSS" Code

The early DMCA case that generated the most heat involved neither e-books nor music. *Universal City Studios v. Corley* was the movie industry's attempt to suppress a decryption program called DeCSS, which unlocks the industry's "Content Scramble System" (CSS) for movies on DVD. DVD players come equipped with descramblers; without them, the disks would not play. But once unlocked, DVDs can be played on computers and other machines that lack descrambling technology.

DeCSS was created in 1999 by three European programmers, one of them a Norwegian 15 year-old, Jon Johansen,

whose main interest was not pirating movies but being able to play them on open source Linux-based computers.[104] The MPAA filed a complaint against Johansen in Norway, and a prosecutor responded by bringing criminal charges. Meanwhile in the U.S., Paramount, MGM, Columbia Pictures, Time Warner, Disney, and Twentieth Century Fox joined Universal City Studios in a lawsuit to try and stop the spread of DeCSS.

The companies did not sue the hundreds of Web publishers and activists who were discussing, describing, and distributing DeCSS online. (They did send "cease and desist" letters to many sites, some of which removed the program.) Their lawsuit instead focused on Eric Corley, editor of *2600: The Hacker Quarterly* and proprietor of the Web site 2600.com. *2600* published DeCSS as part of a news article reporting on circumvention technology and the larger political debate over encryption. It was not clear why the studios chose to sue only Corley and two others associated with his Web site, but his lawyers suggested one theory: Corley was "a gadfly in the field of computer security, publishing information that often embarrasses security professionals."[105]

A federal judge, offended by the hacker mentality and mindful of the industry's large investment in DVDs, issued a preliminary injunction, a court order forbidding Corley and two of his colleagues from publishing DeCSS or posting it on the Internet. Later, the judge barred Corley from hyperlinking to any sites where DeCSS could be found.[106]

Represented by the Electronic Frontier Foundation, Corley appealed. His lawyers argued that the injunction violated his First Amendment right to publish truthful information, that neither he nor anyone else the movie studios could identify had actually used DeCSS to violate copyright, and that interpreting the DMCA to bar any "trafficking" in codes like DeCSS essentially eliminated fair use in the digital world, by censoring technology that would enable fair users to gain access to creative works. The DMCA's structure was "upside-down," they said – it threatened communication among journalists and scholars by punishing the distribution of information that *might* be used for copyright infringement more stringently than copyright infringement itself.[107]

The *Corley* case, involving DVDs, epitomized the shrinking of fair use more dramatically than the prosecution of ElcomSoft, which involved e-books. For, as the judge who refused to dismiss the charges against ElcomSoft observed, those wanting to copy portions of an e-book for criticism, scholarship, or other fair uses can still do so by laboriously re-typing selected passages. With visual images, retyping just doesn't work. To obtain a film clip or even a single frame for purposes of fair use, one must copy it. And to copy it, if it is "copy-protected" through DRM techniques, one must use circumvention tools.

Corley's brief to the court of appeals gave some examples. Princeton Professor Peter Ramadge, a film scholar, wanted to use DeCSS to facilitate his searching through movies for particular images – such as Humphrey Bogart in the familiar act of smoking a cigarette. "Professor Ramadge's research relies on access to digital video content like that found on DVDs," the brief explained. "Ordinary VCR movies are insufficient. His use of DVD movies would undoubtedly qualify as fair use for research and scholarship." But without DeCSS, Ramadge had to rely for his research on an "industrial partner that could execute the needed license agree-

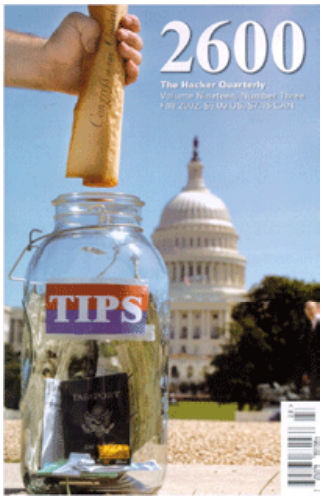
ments," resulting in access to only two full-length movies.[108]

Similarly, a friend-of-the-court brief from two scholars asked the judges to "imagine a professor of critical film theory putting together a series of illustrations of sexist or racist stereotyping in Hollywood movies." Or a professor of media law, "who offers a short snippet of *The Insider* to motivate discussion of the costs and benefits of commercial media. These and millions of other unsung acts of individual creativity that rely on common cultural materials are central to expressive freedom," yet the DMCA makes such fair uses virtually impossible.[109]

Briefs filed by cryptographers, law professors, the American Library Association (ALA), and the ACLU gave still more examples. Columbia law professor Jane Ginsburg had "linked to sites where DeCSS was posted in the course of teaching her copyright course." Protesters had worn T-shirts "bearing portions of the DeCSS source code."[110] (Indeed, shortly after the court of appeals decided the *Corley* case, it was reported that "DeCSS ties" bearing portions of the code were available; and composer Joe Wecker had written "DeCSS (Descramble)," a song whose lyrics consist of the DeCSS code.[111])

These examples suggested the practical problems with a law that bans the exchange of computer codes. The prospect of federal agents confiscating T-shirts or wading into Professor Ginsburg's class to prevent hyperlinks to Web sites containing DeCSS is sobering, to say the least.

The U.S. government intervened in the *Corley* case to defend the DMCA. Its primary argument was that decryption codes are simply not constitutionally protected expression. They are merely a functional means of accomplishing circumvention. But even if the First Amendment protects code, the government said, broad anti-trafficking rules are constitutional because there is no other way to prevent piracy. Noting "the epidemic-like propagation of circumvention technology," the government said that the Internet "poses a unique threat to the rights of copyright owners," while "digital technology enables pirates to reproduce and distribute perfect copies of works – at virtually no cost at all to the pirate."[112]



2600: The Hacker Quarterly.

The court of appeals basically agreed. Although it ruled that computer programs like DeCSS *are* speech within the meaning of the First Amendment, nevertheless, it said, the DMCA's anti-tool provisions are constitutional. They serve the important purpose of protecting encryption devices, which the judges analogized to burglar alarms, or locks that property owners install in their homes.

Certainly, the appeals court judges conceded, there is a free-expression problem with the DMCA, because it shrinks opportunities for fair use. But this was a choice for Congress to make. Besides, neither the injunction against Corley nor the DMCA itself prohibited fair use of encrypted works. They only limited access, and ability to copy. True, such limitations make fair use more difficult. But, said the court, "we know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitu-

tion, guarantees copying by the optimum method or in the identical format of the original."

Thus, although Corley insisted that the public "should not be relegated to a 'horse and buggy' technique in making fair use of DVD movies," the appeals court judges noted that people can still, without tools like DeCSS, comment on encrypted films, quote dialogue, and even record portions "by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie."[113]

Here, though, the judges overlooked the fact that without sophisticated and expensive equipment, it is not possible successfully to videotape images from a computer or television set.[114]

But whatever the credibility of their proposed alternatives for exercising fair use rights, the judges in *Corley* were well aware that the DMCA radically limits fair use, not to mention the lending and sharing that are ordinarily allowed by the first sale rule. They simply concluded that Congress had the authority to decide there was no other reasonably effective way of stopping piracy.

It did not help that the judges were irked by the defendants' rebellious, anti-corporate style. Both the trial and appeals court judges noted that 2600, the name of Corley's site, was the hertz frequency "of a signal that some hackers formerly used to explore the entire telephone system." Furthermore, the trial court's original order had simply prohibited posting DeCSS; it was extended to bar hyperlinks after Corley defiantly announced his intention to engage in "electronic civil disobedience" by linking to other Web sites containing the program. By the summer of 2000, there were nearly 500 such sites.[115] The appeals court affirmed this controversial part of the injunction, even though it is quite a stretch to view the creation of a hyperlink as equivalent to distributing a circumvention tool within the meaning of the DMCA.

More than a year after the industry's victory in *Corley*, the Norwegian criminal prosecution against young Jon Johansen – known as "DVD Jon" – went to trial. In January 2003, Johansen, by now age 19, was acquitted by a judge who ruled that he had not violated any of Norway's anti-piracy laws by helping create the software, because DeCSS itself is merely a tool, not an act of copyright piracy. But prosecutors, "on behalf of Hollywood studios," lodged an appeal, and as of late 2003, Johansen was facing a second trial in the Norwegian appeals court.[116]

Soon after the *Corley* case ended, a new battle over DeCSS erupted. A company called 321 Studios manufactures DVD Copy Plus, a product that cracks CSS encryption and enables DVD buyers to make backup copies. Backups are prudent because DVDs are fragile, and many consumers like them because they can eliminate annoying previews and commercials. DVD Copy Plus basically consists of freely available software, including DeCSS, with a detailed instruction manual. 321 Studios went to court for a "declaratory judgment" that the product is legal, after the MPAA threatened suit to stop its sale.

321 argued that making a backup copy of a DVD that one already owns is a legitimate fair use, not an infringement of copyright. Simply because its product might be used for illegal copying, the company said, is not sufficient reason to outlaw it, any more than it would be sufficient reason to ban VCRs or photocopy machines. Moreover, a movie on DVD may be in the

public domain, no longer protected by copyright, and thus legal for anyone to copy. To interpret the DMCA so broadly as to criminalize tools that allow legitimate owners to copy public domain materials for their own use and convenience, said 321, would not only shrink fair use but violate the First Amendment.[117]

The movie studios countered that DVD Copy Plus is nothing more than a burglar's tool, and hence violates the DMCA. By this time, they had both the *ElcomSoft* and *Corley* decisions to rely on. But 321 was able to make use of the Supreme Court's recent *Eldred* decision in urging a narrower interpretion of the DMCA. That is, the Court in *Eldred* rejected a First Amendment challenge to Congress's 20-year extension of copyright because it said that sufficient free-expression protections – such as fair use – are built into copyright law. Without such protections, the copyright system would no longer be consistent with the First Amendment. Interpreting the DMCA so broadly as to ban such consumer-friendly products as DVD Copy Plus would impermissibly upset the traditional copyright-free expression balance.

The *321* case was argued before federal Judge Susan Illston in May 2003. Although Judge Illston said she was leaning toward ruling for the studios, she had a few telling questions for their attorneys. She asked one of them "how, once a copyright expires, a work would ever enter the public domain if studios continued to produce encrypted copies?" A journalist reported that the attorney "didn't have a good answer." Likewise, the judge asked: "'What about Siskel & Ebert?' If a studio refuses to cooperate, how could a movie reviewer include a clip?" The attorney responded that "'fair use is not a constitutional right.'"[118]

As of late 2003, Judge Illston had not made a decision. But as one reporter commented:

> In many ways, the horse is out of the barn. The DeCSS program is widely available on the Internet and users can make pirate copies of any DVD. Despite legal injunctions, many sites sell T-shirts with the outlaw code printed on them. Until the studios obtained a sealing order, the code was available in a case file at the Santa Clara County Superior Court.[119]

Yet another angle on DeCSS encryption involved not the DMCA but California "trade secrets" law. In January 2000, responding to a suit by the movie industry, a California judge issued a preliminary injunction forbidding a number of Web sites from posting or distributing DeCSS, or any "master keys," "algorithms," or other information about DVD encryption codes.[120] This judge found that DVD encryption is a "trade secret" and that DeCSS reveals the secret, in violation of California law.

Only one of the defendants, Andrew Bunner, appealed. He won a reversal from the California Court of Appeals, which said that computer programs like DeCSS are protected by the First Amendment, and that the order banning their dissemination was an unconstitutional prior restraint – censoring "pure speech" before it happens. Prior restraints are "highly disfavored" as a matter of long-established First Amendment law; and the

> The judges in *Corley* were well aware that the DMCA radically limits fair use.

industry's right to protect its "economically valuable trade secret," the appeals court said, is not "more fundamental" than free expression. If, later on, the industry actually proved a violation of California trade secrets law, then the court allowed that a permanent injunction or money damages would be appropriate.[121]

Not only the movie industry but many other businesses were up in arms after this ruling. Forty-two companies or organizations filed briefs supporting the association's appeal to the California Supreme Court. Professor Richard Epstein, who wrote a brief on behalf of Microsoft, Ford, and Boeing, among others, claimed that the appeals court ruling threatened "a wide range of trade secrets, from customer lists to blueprints to industrial know-how – even the secret formula for Coca-Cola."[122]

In August 2003, the California Supreme Court reversed the appeals court's expansive First Amendment ruling, but in a way that promised little consolation to the industry. A "trade secrets" injunction, even a preliminary one, is not a prior restraint, said the court, and does not present First Amendment problems. But whether the injunction was really justified in this case was another matter. How can DeCSS be a secret of any kind, asked the court, when it is widely available on the Web? This was the question for the court of appeals to decide "on remand." One judge would not have bothered with a remand, since he thought it obvious that DeCSS was not a "trade secret."[123]

Squelching Competition

The DMCA has also become a weapon for companies seeking to squelch competition. In 1999, for example, the Sony Corporation's video games division obtained a preliminary injunction stopping the sale of a product called "Game Enhancer." The product allowed users to play games sold abroad on Sony playstations which are programmed to recognize only games sold domestically. Sony's theory was that the Enhancer circumvented copyrighted software in Sony's playstation. But the result was to reinforce Sony's practice of limiting the use of its products to certain geographical areas. In addition, the Enhancer allowed players to modify video games in a manner similar to Sony's own product, the "Game Shark." The possibility that Sony's primary purpose in stopping the Enhancer was to defeat this competition got little sympathy from the court.[124]

Four years later, Lexmark International, a manufacturer of computer printers, also obtained a preliminary injunction, this time banning the distribution of a microchip that mimicks the "authentication sequence" in Lexmark's toner cartridge. The chip enables competitors to market remanufactured cartridges that work with Lexmark printers. Lexmark persuaded a federal judge that the authentication sequence of its toner cartridge is a form of encryption that needs to be unlocked in order to access the copyrighted software in its computer printer. Under this convoluted reasoning, the competing microchip amounted to a circumvention tool banned by the DMCA.[125]

Representative Zoe Lofgren, one of the relatively few members of Congress who opposes the broad reach of the DMCA, cited the *Lexmark* case as an example of digital rights management being pushed too far. "We have ceded too much power to copyright owners," Lofgren said. "People are afraid to proceed on innovative measures."[126]

Meanwhile, the maker of the competing microchip petitioned the U.S. Copyright

Office, already mulling over numerous requests for fair-use exemptions as part of its second rulemaking proceeding under the DMCA, to create an exemption for computer programs that are embedded in printers and toner cartridges. In its petition, the company argued that Lexmark should not be able to use the DMCA to stifle competition. In October 2003, the Copyright Office rejected the request.[127]

Researching Internet Filters

An example of how the DMCA affects both research and political advocacy was the ACLU's ill-fated lawsuit against N2H2, manufacturer of a popular Internet filter called "Bess." Filters are widely but inaccurately promoted as efficient mechanisms for blocking out pornography and other controversial online content.[128] A young cyber-expert, Ben Edelman, does research on the operation of filters, and has provided the public with information on their propensity to block thousands of valuable, educational Web sites.

To conduct his research, and determine how accurately Bess blocks online pornography, Edelman needed to obtain its list of blocked sites. This in turn required him to reverse engineer and unlock the filter's copyright-protected program. And although the Copyright Office has created an exception to the DMCA for those wanting to access Internet filter block lists, the exception doesn't extend to the tools necessary to do the job.

"In other words," as the ACLU explained, "even though Ben and everyone else has a right to perform that act of circumvention, creating and distributing the tool necessary for actually exercising that right is prohibited."[129] Since Edelman's purpose was "legitimate research and criticism rather than piracy," his planned project should have qualified as fair use, as well as First Amendment-protected expression. Yet because he wanted to distribute his decryption program so that others could access Bess's block list, the ACLU said his actions would violate the DMCA. It sued N2H2, hoping to get a judicial declaration that the DMCA would be unconstitutional if applied to outlaw Edelman's research.

N2H2, defending the suit, argued that until Edelman had actually de-crypted its program, there was no live controversy for the federal courts to resolve – in other words, that the suit was premature. The judge agreed, and in April 2003, dismissed the case. Edelman's description of his intended research, the judge said, was too vague to determine whether it would really violate the DMCA, and it was equally speculative whether N2H2 would sue to stop him.

But the underlying reason for dismissing the case may have been the judge's lack of sympathy with Edelman's claim. "There is no plausibly protected constitutional interest that Edelman can assert that outweighs N2H2's right to protect its copyrighted property from an invasive and destructive trespass," he wrote.[130]

> How can DeCSS be a secret of any kind, asked the court, when it is widely available on the Web?

Yet few free-expression issues today are more sweeping in their implications than censorship caused by Internet filters as they block art, information, and ideas that their corporate manufacturers decide are inappropriate, or that their keyword-based programs mistakenly target. As another activist, Seth Finkelstein, put it,

"independent investigation of the snake oil claims" of filtering companies has now become "fraught with legal peril."[131]

The Circumvention Dilemma

The court of appeals in the *Corley* case put its finger on the circumvention dilemma when it identified "two unattractive alternatives": either tolerate some infringement of intellectual freedom in an effort to stop piracy, or else "tolerate some decryption" in order to avoid trampling on free expression. This "fundamental choice," said the court, "cannot be entirely avoided."[132]

With the DMCA, Congress chose to impair a great deal of intellectual freedom in an effort to stop circumvention tools that can be used by digital pirates. And although there is no perfect answer to the circumvention dilemma, it seems clear that the DMCA strikes too repressive a bargain.

In May 2002, the Electronic Frontier Foundation published *Unintended Consequences*, a report on the costs to intellectual freedom inflicted by the DMCA. In addition to summarizing the Felten, Sklarov, and other cases, the report recounted how a Dutch cryptographer and security systems analyst discovered a major security flaw in an Intel video encryption system but declined to publish his findings "on the grounds that he travels frequently to the U.S. and is fearful of prosecution" under the DMCA. Other foreign scientists are similarly wary of traveling to the U.S., and the organizers of at least one major academic conference have chosen to hold all future meetings abroad.[133]

There is no question that, in the interests of stopping illegal copying, the DMCA and related anti-circumvention laws stifle legitimate research, communication, and use of creative works. As one columnist observed, "even the President's Special Advisor for Cybersecurity has expressed concern that the DMCA stifles legitimate research needed to improve homeland security."[134] The government's attempt, in cases like Felten's and Sklyarov's, to distinguish between encryption research done for scholarly ends and research done for purposes of infringement is inherently unstable, and insufficient to let researchers or hackers know what is or is not a crime.

The question is what can be done to restore the balance. The lawyers for Eric Corley suggested a number of ways the DMCA could be revised or narrowed, while still combating piracy. Congress could keep the anti-circumvention rules but create broader exemptions for fair use and other non-infringing uses, especially in libraries. It could limit liability "to those who intentionally aid and abet copyright infringement or who conspire to infringe copyrights," as is done in laws governing burglars' tools. It could amend the law to allow copying for personal, noncommercial purposes. And it could make disseminators of decryption codes liable only if they "induced or acted in collusion with" copyright infringers.[135]

Many other measures could be considered to redress the balance. What should be kept in mind is that copyright enforcement will never be perfect, nor should it be. As commentators have noted, a leaky system is best, for culture and free expression. The DMCA, in trying to plug every leak, ends up radically restructuring the system. Its strict enforcement of the industry's efforts to control both illegal and legal uses of copyrighted material – as well as uses that are in that dim gray area of possibly fair use – sacrifices research, communication, creativity, and simple enjoyment in the dubious interests of maximum profit and total control.

Chapter 4:

File Sharing, Free Exchange, and the Online Commons

Napster and Its Successors

Since the late 1990s, "peer-to-peer" sharing of popular music has been the copyright industry's most visible concern, and the *Napster* case was its first big attempt to stop it. As with DeCSS, the industry decided, at least initially, to go after the technology that enables file-sharing rather than users of the technology who actually engage in copyright infringement.

Napster was the brainchild of 19 year-old Shawn Fanning who, by 2000, had attracted $15 million in venture capital to support his "MusicShare" software and a Web site that offered indexing and technical help to music lovers wanting to share their digital "MP3" music files. The files themselves remained on their owners' computers, but Napster's site and software allowed searches through those computers, and enabled free transfers. Fanning said he was merely a matchmaker, helping fans engage in the kind of sharing and copying that had always transpired offline. But there was no question, as one columnist put it, that Napster was also "part of a movement challenging copyright."[136]

In 2000, the rock band Metallica fired the first volley in the peer-to-peer wars by suing Yale, Indiana University, and the University of Southern California for allowing students to use Napster to copy songs. Yale promptly blocked access to Napster but the others, in the words of one advocate, rejected the demand and stood up "for principles of academic freedom [and] free exchange of information."[137]

Shortly afterwards, A&M Records, Geffen, Sony, and other music producers sued Napster itself, claiming it was a "contributory and vicarious copyright infringer." With about 60 million users sharing nearly 40 million songs, they said, Napster was a major threat to the integrity of copyright. The judge agreed, and issued a preliminary injunction barring Napster, Inc. from "engaging in, or faciliating others in copying, downloading, uploading, transmitting, or distributing" copyrighted music.[138]

Napster had two main defenses. First, it argued that file-sharing was fair use, not copyright infringement. After all, in the *Sony* case involving VCRs, the Supreme Court had said that copying an entire work can sometimes be fair use. Moreover, many fans used Napster to sample music in order to decide whether to buy it, much as shoppers do with earphones and sample disks in music stores.

But even assuming that many users were making unlawful copies, Napster said, it wasn't guilty of "contributory" or "vicarious" infringement simply because its software was being used for illegal purposes. Burglars use tools, but the manufacturers of screwdrivers are not liable for their illegal acts. Hence, Napster's software was no more unlawful than tape recorders and other tools for copying music. A 1992 federal law, the Audio Home Recording Act, protects such tape record-

ing against claims of copyright infringement.[139]

The courts were not impressed. They found Napster guilty as charged because it had "sufficient knowledge" that infringement was going on, its software contributed to the illegal activity, and it had the ability "to police its system" but failed to do so. Importantly, though, the court of appeals did modify the preliminary injunction against Napster, which it found to be too broad. It was Napster's conduct, not simply its technology, that contributed to copyright infringement, said the appeals court. To find Napster guilty of copyright violations simply because it "allows for infringing uses would violate *Sony* and potentially restrict activity unrelated to infringing use."[140]

The appeals court thus ordered that the injunction be narrowed because it was unfair to put "the entire burden" on Napster of ensuring that no copyright infringement was going on through the use of its system. Instead, the music companies had to tell Napster which of their copyrighted works were available on its system before Napster had the duty to delete them.

But even after the trial judge issued this modified injunction, Napster was doomed. Within a few months, the judge ordered a shutdown of the site until Napster removed all files from its index which it had "reasonable knowledge" contained copyrighted works. Even with a new filtering system in place, Napster wasn't able to satisfy the court, and it eventually agreed to a $26 million settlement of the case. Soon after, it went out of business.[141]

Senator Orrin Hatch commented with dismay on the process by which a preliminary injunction – "before a trial on the merits, mind you" – destroyed an enterprise "that had developed a community of over 50 million music fans."[142]

But the demise of Napster hardly ended online file-sharing. New peer-to-peer systems like Grokster, Morpheus, and KaZaA soon replaced Napster. These programs enable users to connect with each other and share materials of all kinds, including music, without a central Web site, index, or overt conduct of the kind that incriminated Napster. By 2002, more than 14 million fans were using Grokster and similar programs to download music, movies, TV shows, photos, and text for personal use.[143]

Another lawsuit was inevitable, and in late 2001, 28 media companies sued the distributors of Grokster, Morpheus, and KaZaA for contributory copyright infringement. MusicCity, the developer of Morpheus, moved to dismiss the case, arguing that under the *Sony* decision, courts cannot ban technology that is capable of lawful uses simply because it can also be used for infringement. MusicCity pointed out, for example, that Morpheus file-sharing technology is used by Project Gutenberg, a respected online archive, to convert many non-copyrighted works, "from the King James Bible to Shakespeare to the CIA World Fact Book," to digital form.[144]

In April 2003, the federal court agreed. It ruled that Morpheus and Grokster are closer to VCRs and photocopy machines than to a centralized file-sharing service like Napster. Although the distributors of the programs undoubtedly know that many users are infringing copyrights, the judge found no evidence that they assisted with

specific acts of infringement. And there are "substantial noninfringing uses" for the file-sharing software, he found – from distributing free songs to "sharing the works of Shakespeare."[145]

As of late 2003, the industry's appeal of this decision was pending. But however the *Grokster* case is ultimately decided, it is difficult to imagine that file-sharing technology will ever be completely suppressed. For one thing, online sharing and copying goes well beyond the borders of the United States. Although StreamCast, the successor to MusicCity, is based in Tennessee and Grokster is owned by a California family, KaZaA, as of late 2002, was managed in Australia and distributed by a company incorporated on the South Pacific island of Vanuatu. Its computer servers were in Denmark and as *The New York Times* reported, "its software was last seen in Estonia."[146]

This global aspect means that courts in different nations will take different approaches to file-sharing. Early in 2002, for example, the Amsterdam Court of Justice in the Netherlands ruled that KaZaA is not liable for the way individuals use its software, and that those concerned with copyright violations should go after the infringers, not the makers of tools.[147] Even if a U.S. appeals court – or, eventually, the Supreme Court – comes out the other way, its ruling will have limited effect in the face of the Dutch decision.

Journalist John Alderman notes the irony that by killing Napster, the music industry pushed fans toward more sophisticated programs which replaced the central online meeting place with software that directly connects users to each other. He berates the industry for failing to embrace the new technology and find attractive ways to distribute music, movies, and other arts online. Instead, he says, the industry, dinosaur-like, tried to stop history.[148]

Eventually, music companies did set up Web sites where songs can be obtained online for modest fees. But intra-industry disagreements have hobbled these ventures; some performers have been incensed at their minuscule share of the royalties; and consumers have generally not been thrilled to find that they are only allowed to "rent" songs, which disappear after a set period of time and cannot be moved to portable MP3 players. In addition, popular new recordings have been kept out of the archives in an attempt to protect CD sales.[149]

Although efforts to package and sell music online continue – including a promising venture by Apple in 2003 that is less restrictive than the earlier services – it is also true, as the industry says, that it is difficult for sites charging even small fees to compete with free music. By the middle of 2003, KaZaA had reportedly been downloaded more than 270 million times – more than any other free program on Download.com.[150]

Universities, New Lawsuits, and Corporate Sabotage

Even before the music industry lost the *Grokster* case, it was exploring other ways to defeat file-sharing. In mid-2003, it sued four college students who, it claimed, were operating "little Napsters" at their universities. The students were using software like "Flatlan," "Phynd," and "Direct Connect" to index files and handle search requests.

The lawsuits, which demanded damages of $150,000 for every work that was unlawfully copied – for a potential total of

billions of dollars – were intended to send a clear message of intimidation, and they had the desired effect. In little more than a week, the students and their families settled the suits, agreeing to pay the RIAA $12,000-$15,000 each and to shut down the software programs.[151]

But these suits would not necessarily have been winners for the industry. The technologies involved, as one expert said, look "very different than the old Napster model." Phynd, for example, "is a generic search engine technology that lets users configure it to search whatever they want." Flatlan "lets a student set up a search engine – often on an ordinary dorm room PC – that scours all computers connected to a campus network that have Windows file-sharing turned on." Unlike Napster or even KaZaA, "Flatlan searches a network that already exists."[152]

One commentator noted that substituting "www.google.com" for "wake.princeton.edu" in one of the industry's lawsuits would describe the operation of the popular search engine very well. "Can you use Google to find and download copyrighted materials? You betcha. ... But of course, Google's a fairly good-size company with a legal staff and would probably fight the RIAA."[153]

The suits against college students represented a major escalation in the file-sharing wars. The industry had been trying for years to persuade universities to monitor students' and professors' computer use and crack down on copying. On the one hand, the trade associations said that "copyright infringement is theft, ... pure and simple." On the other hand, there are legitimate uses of peer-to-peer networks, particularly in academia. These include the sharing of scientific research and other collaborative projects. *The Chronicle of Higher Education* suggested that without a wholesale crackdown, universities could still stop piracy by observing "unusual spikes that might indicate that someone was illegally sharing the latest Ben Affleck movie or Britney Spears video."[154]

And, as the Electronic Privacy Information Center (EPIC) argued, the collegiate surveillance desired by the industry would require universities to "delve into the content and intended uses of almost every communication. Such a level of monitoring is not only impracticable; it is incompatible with intellectual freedom. ... Network monitoring for bandwidth management is appropriate, but monitoring of individuals' activities does not comport with higher education values."[155]

In addition to pressuring universities, the industry fights file-sharing by sending "take-down" letters to both academic and non-academic Internet service providers (ISPs). The letters demand that the ISPs remove Web sites, search engines, or other online material that they say contains copyright-protected work. Under a section of the DMCA, ISPs can be liable for copyright infringement by their users unless they comply "expeditiously" with such industry notices.[156]

Of course, the industry's claims are not always correct. Indeed, without a legal proceeding to test their accuracy, it is unlikely that they would be.

For example, in May 2003, the RIAA publicly apologized to an academic ISP, Penn State University, for sending a "stiff copyright warning" that turned out to be mistaken. The letter alleged that the university's astronomy department was unlawfully distributing songs by the musician Usher. The department's system manager searched in vain for such a file,

and finally solved the mystery when he discovered that a professor named Usher was mentioned on the site, along with a song "performed by astronomers about the Swift gamma ray satellite, which Penn State helped to design." The combination of "Usher" and the ".mp3" suffix had, according to one news report, "triggered the RIAA's automatic copyright crawlers."[157]

In another dubious application of the DMCA's take-down provisions, the Internet company Verio, under pressure from Dow Chemical Company, removed the activist service provider Thing.net from the Web because of a parody press release posted on the 18th anniversary of the Bhopal disaster in India – "a deadpan statement, which many people took to be real," explaining that Dow "could not accept responsibility for the disaster due to its primary allegiance to its shareholders and to the bottom line." Dow had sent a stern notice to Verio under the DMCA. The political commentary was silenced thanks to the DMCA's automatic take-down provisions, overreaching by Dow, and Verio's failure to challenge Dow's claim that the parody constituted copyright and trademark infringement. According to Thing.net, organizations affected by the take-down included the art space P.S.1, *Artforum* magazine, Tenant.net, which aids renters facing eviction, and hundreds more.[158]

The DMCA does require ISPs to "notify the subscriber" whose material has been removed as a result of the notice-and-take-down rules. If the subscriber submits a "counter-notification" in the form prescribed by the law, the ISP must then undo the removal, unless the company that originally complained goes to court.[159] But there is no time specified for notifying the subscriber ("promptly" is all the DMCA says), and many individuals do not have the legal knowledge or wherewithal to follow the procedure laid out by the law. Meanwhile, the mandatory take-down may last indefinitely. It allows the industry to short-circuit lengthy and burdensome lawsuits, but risks suppressing a great deal of legitimate expression in the process.

Most ISPs do not welcome take-down letters. They find the prospect of policing possible unlawful activity among their billions of users to be distinctly unappealing – somewhat like forcing the telephone company to listen in on users' conversations for evidence of crime. But under the DMCA, they do not have much choice.

In 2002, one ISP challenged a part of the DMCA's notice-and-take-down scheme. This provision allows copyright owners to obtain subpoenas from a federal court requiring ISPs to identify users who, the copyright owners claim, are engaged in infringement. There does not need to be any pending lawsuit for the subpoenas to be issued. Verizon went to court to contest an RIAA subpoena.

Verizon challenged both the constitutionality of the DMCA's subpoena provision, and the broad way that the RIAA was interpreting it – to apply not just to Web sites, but to any online communication, even if the ISP is not hosting it, but simply transmitting it. Verizon argued that the law contains no "built-in protection for expression" of the type that the Supreme Court specifically noted in the *Eldred* case was an essential element of the copyright

"Can you use Google to find and download copyrighted materials? You betcha."

system. But a federal judge rejected Verizon's arguments, and ordered it to comply with the subpoena.[160] As of late 2003, the case was on appeal.

Meanwhile, relying on the *Verizon* decision, the RIAA now sent nearly 1,000 subpoenas to ISPs, including universities, demanding the names of users who it claimed were sharing copyrighted music.

In response, Senator Norm Coleman opened a legislative inquiry into whether the RIAA's tactics "are violating the privacy rights of innocent people." He criticized the RIAA for issuing subpoenas for "'unsuspecting grandparents whose grandchildren have used their personal computers.'" *The New York Times* quoted one parent who used KaZaA "to find songs that included 'Happy Birthday' to play for his young daughter when she woke up on her birthday, among other times. 'It's cute, but look what happened,' he said. 'It's an expensive birthday.'"[161]

EPIC Records locked up advance copies of Tori Amos and Pearl Jam CDs by gluing them inside Sony Walkman players.

Although a few colleges and one ISP went to court to fight the subpoenas,[162] most complied, supplying the industry with the identifying information it needed to sue individual file-sharers. In early September, the RIAA filed 261 such suits – one of them against a 12 year-old girl – while simultaneously offering an "amnesty" to anyone who would delete all shared files and submit a statement swearing to resist all future file-sharing temptations.

Some observers questioned the wisdom of the industry's hard-nosed strategy. As Professor Jane Ginsburg said:

> It could backfire. If you have really widespread copyright infringement, there is a great temptation to say if it's that widespread it can't be infringing any more. The risk of suing individuals is that there will be more pressure in that direction.[163]

Mass lawsuits against music fans are the most visible and controversial of music companies' strategies, but quieter initiatives are also underway. The industry continues to develop new DRM techniques – for example, Epic Records' attempt in 2002 to lock up advance copies of Tori Amos and Pearl Jam CDs by gluing them inside Sony Walkman players that are then sent to reviewers. One observer commented on this tactic: "even a 'glueman' player is unlikely to deter a diehard critic" who wants to copy or resell the disk. A reviewer said he was able to pop the player open, in order to "listen to it how I want to listen to it – and in my stereo is where it sounds best."[164] For the music industry to force reviewers less resourceful than this one to evaluate new music by listening to it on a Walkman instead of a home stereo does seem self-defeating.

Another plan, contemplated by the Walt Disney Company in July 2003, involves manufacturing DVDs that automatically stop working after a certain time. The idea, ostensibly, is to save consumers the trouble of returning DVD rentals to their local video store. One environmentalist noted that the impact of disposable movies could be horrendous, "as millions of now useless discs clog the landfills with nonbiodegradable polymers." Still other schemes

floated in 2003 include lowering the retail prices of CDs, and urging legislation to outlaw file-sharing on the theory that it enables minors to access pornography.[165]

Finally, the industry has embarked on "direct action." In 2002, journalists reported on a "cottage industry" of saboteurs, supported by media companies, who "saturate file-swapping networks with false or corrupted versions of songs and videos, hoping to frustrate would-be downloaders."[166] The next year, the industry took its campaign one step further, by "quietly financing the development and testing of software programs that would sabotage the computers and Internet connections of people who download pirated music." The proposed sabotage could take three forms: redirecting users to Web sites where they can buy songs; scanning personal computers for music files that might be illegally copied and then deleting them; or freezing a person's computer system entirely. The second option, one executive admitted, was problematic because "it was deleting legitimate music files, too."[167]

Solutions: Restoring the Copyright/Free Expression Balance

Many critics argue that online file-sharing, whether or not every instance of it violates copyright law, actually helps rather than harms the music industry. Negativland, a group of activist musicians, says that "the literally unconsumable plethora" of free music online "does create sales." Free music is "excellent advertising," which produces enough new sales to balance out losses caused by file-sharing. "The amount of free music downloading going on (perhaps now in the billions) really scares the recording industry, but they seem to forget the scales of practicality involved. They only need to sell a fraction of that amount to become sinfully rich anyway."[168]

Similarly, John Alderman points out that through file-sharing, "songs and artists were rediscovered by listeners whose fond memories wouldn't support a $16 CD but who were happy to download a song for a nostalgic listen."[169] In this scenario, no sale is lost because none was likely in the first place. To the contrary, the triggering of fond memories might lead to a purchase that would not otherwise happen.

Surveys late in 2002 indicated that although music sales were down about 10% for the year, it was not clear that file-sharing – rather than a slow economy or other factors – was responsible. According to one report, 32% of Internet downloaders said they bought less music since they began file-sharing online, but 25% said they bought more. Another survey found that people who use file-sharing have increased their overall spending on tapes and CDs: "47% of experienced file sharers with broadband Internet access and CD burners increased their spending, while 36% decreased their spending." A report late in 2002 suggested that old-fashioned bootlegging, rather than online file-sharing, was a more likely factor in the decline of music sales.[170]

As for the potential loss to musicians from file-sharing, some commentators suggest exploring alternative payment options. Back in the 1960s, the Grateful Dead promoted free circulation of bootleg tapes, believing that more sales of concert tickets would result.[171] More recently, Pearl Jam left Sony's Epic label and "is now a prominent member of the independent music scene, with no other means of distribution" than the Internet. And Metallica, once a vocal opponent of online

file-sharing, by 2003 had released some songs for free online.[172]

But the industry has continued to push Congress for stronger copyright protection and stricter enforcement. In late 2001, Senator Fritz Hollings introduced a bill that would have required "security technologies" in all new digital products – including CDs, videos, e-books, printers, hard drives, CD and DVD players, video game consoles, set-top cable boxes, and satellite TV. Anyone removing or altering the locks, or distributing copyrighted material with the locks disabled, would face the usual copyright penalties of five years in prison and fines up to $500,000 for a first offense; double that for subsequent offenses.[173]

Even more than the DMCA, Hollings's bill would have eliminated the balancing role traditionally performed by courts in copyright cases, by giving the force of law to private security systems and punishing those who evade or disable them, regardless of the impact on fair use or intellectual freedom. The basic problem with this approach is that DRM technologies cannot possibly take account of the variations and subtleties of copyright law, and particularly fair use.

As copyright expert Deirdre Mulligan explains, "only those policies that can be reliably reduced to yes/no decisions can be automated successfully. ... Policies that are subject to many exemptions or based on conditions that may be indeterminate or external are difficult or impossible to automate with DRM."[174]

Hollings's proposal was not greeted happily by cyber-activists or, more significant politically, by manufacturers. While groups such as StopPoliceware.org and Boycott-riaa.com argued that Hollings's mandatory "policeware" would hopelessly atrophy fair use and first-sale rights already compromised by the DMCA,[175] software manufacturers struck a deal with the music industry. The manufacturers agreed not to support legislation such as that championed by Representative Rick Boucher, that would "clarify and bolster the right of people to use copyrighted material in the digital age," while in return the recording companies backed off from Hollings's proposal.[176]

But legislative support for the industry continues. By mid-2003 seven states had passed "super DMCAs" that are even broader than the original, federal version. The year before, Representative Howard Berman proposed a "Peer to Peer Piracy Prevention Act" to create "a safe harbor from liability" for media companies engaging in "reasonable, limited self-help measures to thwart P2P piracy" – that is, sabotaging personal computers and software if they believe their owners are violating copyright law.[177]

Whatever the outcome of all the lawsuits, lobbying, and proposed new laws, it is clear that, thanks to the Internet, our culture has fundamentally changed. As hard as the industry pushes to control how its products are used, new ways of copying and sharing emerge. "In the long run," as one scholar says, "the media industry may well exhaust itself in a Quixotic quest to keep the ever growing and ever more sophisticated digital genie bottled up."[178]

Especially in the age of the Internet, with its potential for massive sharing and copying, more balanced approaches are possible. The lawyers representing Eric Corley gave some examples. (See "The Circumvention Dilemma," in chapter III.) Attorney David Nimmer suggests others: Congress could require companies that encrypt copyrighted works to provide a

means of unlocking them for legitimate first-sale or fair-use purposes. It could also protect consumers from legal liability if they find themselves "stymied by over-reaching on the part of content owners," and resort to "self-help."[179]

Some of Nimmer's ideas have been adopted by Representatives Rick Boucher and Zoe Lofgren, two of a growing contingent in Congress who recognize that the imbalance in current copyright law is unhealthy and are working to change it. In 2002, Boucher and two colleagues filed legislation that would have ameliorated some of the more drastic terms of the DMCA. Their bill would have exempted from the law anyone who "is acting solely in furtherance of scientific research into technological protection measures," as well as any circumvention for purposes of fair use. Following the *Sony* case, it would also have legalized the manufacture or distribution of "a hardware or software product capable of enabling significant non-infringing use of the copyrighted work."[180]

Another bill, filed by Representative Lofgren, stated that it would "restore the traditional balance between copyright holders and society" by allowing circumvention for fair use purposes – unless the copyright owner makes tools available to do this without additional cost. Lofgren's bill would also have allowed the manufacture and distribution of circumvention tools that are "necessary to enable a non-infringing use."[181]

Although neither bill passed in 2002, legislative efforts are continuing. Boucher reintroduced his "Digital Media Consumers' Rights Act" in 2003, with support from Intel, Verizon, Sun Microsystems, the American Library Association, the American Association of Universities, the National Humanities Alliance, and several other corporations and public interest groups.[182]

As Boucher has written, clickwrap licenses and other forms of digital rights management, backed up with enforcement tools like the DMCA, are endangering free expression. From "the college student who photocopies a page from a library book or prints an article from a newspaper's Web site for use in writing a report, to the newspaper reporter excerpting materials from a document for a story," Boucher said, "the very vibrancy of our democracy is dependent upon the information availability and use facilitated by the fair-use doctrine." And if the direction of U.S. copyright policy doesn't change, he warned, "a time may soon come when what is available for free on library shelves will only be available on a 'pay per use' basis."[183]

Lawrence Lessig adds that mandatory licensing of music online – that is, requiring copyright owners to allow the replay or copying of their products in exchange for a reasonable fee – would provide the industry with compensation while stopping its attempts to shut down the Groksters of the world.[184] Mandatory licensing is a standard feature of music on radio.

Legislation was also filed in 2003 to address the wreckage left by the Supreme Court's *Eldred v. Ashcroft* decision. Adopting Lessig's proposal that copyright owners be required to renew after a certain time, so that works without commercial value can enter the public domain sooner, Representative Lofgren introduced the "Public Domain Enhancement Act" of 2003. It would require copyright holders to pay a $1 renewal fee after 50 years, and

again every ten years, until the end of the copyright term.[185]

Non-legislative efforts to relax some of the more oppressive features of the current system are also gaining momentum. The open source movement, for example, works to make source code (the human-readable building blocks of software) available to all who use computer programs. The open source Linux operating system has become an increasingly popular alternative to Microsoft.

Microsoft and other manufacturers are aware of the challenge posed by Linux. In May 2002, they formed the "Initiative for Software Choice" to combat the increasing number of legislative proposals and statements from foreign governments promoting open source software. The industry group said it simply wanted "even-handed competition," but Bruce Perens, a strategist who was fired by Hewlett-Packard because of his open source advocacy, said the group's real purpose was to quash competition from Linux. Perens formed his own organization, "Sincere Choice," to advocate for governments to buy software "that operates well with other programs." The issue is crucial, he says, because software giants like Microsoft "have huge toll booths on the Internet that can limit the spread of open source software."[186]

Promoters of open source software have also questioned the generosity of Microsoft's gifts to nonprofits, which may amount to $1 billion annually. Making schools and other potentially big buyers of computer technology dependent on Microsoft through gifts obviously inhibits their ability to choose open source alternatives down the road.[187]

In October 2002, Mitch Kapor, a longtime open source supporter who made his fortune with the Lotus spreadsheet, formed the "Open Source Applications Foundation" to create and distribute free software for e-mail programs, file-sharing, and other collaborations. The foundation offers its software for free to individuals or organizations, provided they reciprocate by making programs they produce with the foundation's software freely available as well.[188]

Earlier in 2002, Lessig and his colleagues began another organization, Creative Commons, with the goal of enlarging the public domain. Their first project was to design licensing agreements that would allow works to be copied and used well before their copyright term expires. Musicians interested in building an audience and visual artists wanting to disseminate their work can license it for noncommercial copying. "Inspired in part by the free-software movement," they explained, "which has attracted thousands of computer programmers to contribute their work to the public domain, Creative Commons plans to create a 'conservancy' for donations of valuable intellectual property whose owners might opt for a tax break rather than selling it into private hands."[189]

A similar project, developed by the Soros Foundation, aims to counter the increasing commercialization of academic publishing, with its often prohibitive subscription fees, by encouraging scholars and universities to create open-access journals and "self-archiving" programs. The goal is to make research and education more accessible, "share the learning of the rich with the poor and the poor with the rich," and "lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge."[190]

Yet another recently formed organization, Public Knowledge, states as its

purpose to make intellectual property law "serve democracy, science, and culture." It combines research with activism, working with librarians, computer scientists, and others to challenge parts of the DMCA. It also advocates with the U.S. Patent Office for policies that will advance scientific research and public health.[191]

The Electronic Frontier Foundation has also been a leader in promoting alternatives to a heavily controlled copyright system. In addition to providing exhaustive information on copyright battles, EFF's Web site gives advice on the uses and limits of file-sharing and circumvention technology.[192]

EFF also collaborates with Harvard's Berkman Center and law clinics at other universities on the Chilling Effects Clearinghouse. The brainchild of Berkman Center fellow Wendy Seltzer, the Clearinghouse offers information on fair use for Internet sites catering to music or movie fans or otherwise containing copyrighted or trademark-protected images. Many of the sites criticize, parody, or protest the conduct of corporate trademark owners. The database maintains an archive of "cease-and-desist" letters that corporate copyright owners frequently use in efforts to shut down offending Web sites – for example, a letter accusing the anti-corporate sites "EnronownstheGOP.org" and "Radioslack.com" of intellectual property infringement.[193]

Seltzer says the Clearinghouse aims to "protect free expression against unwarranted legal threats by collecting and analyzing cease-and-desist notices sent to Internet users," and helping them understand their rights in response.[194]

"Notmickey," by Ashley Holt

Conclusion

Copyright enforcement will never be perfect, nor should it be. Whether or not circumventing digital locks or copying songs, pictures, or articles for friends and colleagues are technical violations of copyright law, much of this activity has been "below the radar" in the past, and has not prevented publishers, music producers, or other media companies from enjoying healthy profits. The legitimate goal of stopping commercial piracy should not be an excuse for turning the Internet and popular culture into highly restricted and heavily controlled corporate domains or making criminals of computer scientists and music-loving teenagers.

In 1918, Justice Louis Brandeis wrote that "the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use." These "incorporeal productions," he said, should have "the attribute of property" only "in certain classes of cases where public policy has seemed to demand it."[195]

Today, public policy has stretched "the attribute of property" too far, and as a result has skewed the "difficult balance" of copyright law. Increasingly, readers, writers, artists, librarians, scholars, and many other citizens are recognizing what is at stake.

Recommendations

q Move toward restoring the "limited time"/public domain balance by returning to the copyright terms of the 1976 Act: life plus 50 years for individuals; 75 years for corporations. Alternatively, require that heirs and corporations file notices of renewal, thereby allowing works that no longer have commercial value to enter the public domain sooner. Require corporate copyright holders to file a notice of renewal after 50 years, and every ten years thereafter, as proposed by Representative Lofgren.

q Repeal the "tools" provisions of the DMCA, or at least, exempt anyone whose purpose is political commentary or scientific research. Legalize the manufacture or distribution of circumvention tools that permit "significant non-infringing use" of copyrighted works.

q Create broader exemptions for fair use under the DMCA. Limit liability for circumvention to those who intentionally aid copyright infringement. Alternatively, interpret the law narrowly to bar only conventional circumvention devices such as "black boxes," and not to censor computer code.[196]

q Recognize that much copying done for personal, noncommercial purposes is fair use.

q Require copyright owners to license music and other creative work online on reasonable, nondiscriminatory terms.

q Eliminate the DMCA requirement that Internet service providers and search engines remove disputed content from their servers based simply on a demand letter from a copyright owner. Eliminate ISP liability for copyright infringement by their users unless they intentionally assist with infringement.[197]

q Outlaw the industry practice of encrypting portions of works that are not copyright-protected – for example, the original text of public domain works.[198]

q Encourage alternatives to lengthy copyright terms through Creative Commons and similar projects.

Endnotes

1. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

2. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

3. U.S. Constitution, article I, §8, clause 8.

4. See Jane Ginsburg, "Copyright and Control Over New Technologies of Dissemination," 101 *Columbia Law Review* 1613, 1622 (2001); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). Marcus Errico, "Okay, Six Choruses of 'Kumbaya' – That'll Be $1.50," *Eonline*, Aug. 24, 1996, http://www.eonline.com/News/Items/0,1,109,00.html (accessed 9/12/03); "ASCAP Clarifies Position on Music in Girl Scout Camps," ASCAP press release, www.ascap.com/press/1996/ascap-082696.html (accessed 10/25/02); James Surowiecki, "Righting Copywrongs," *The New Yorker*, Jan. 21, 2002, p. 27; Jonathan Zittrain, "The Copyright Cage," *Legal Affairs*, July/Aug. 2003, www.legalaffairs.org/issues/July-August-2003/feature_zittrain_julaug03.html (accessed 7/16/03) (reporting that ASCAP "now charges the Scouts $1 a year, foregoing real profits while making it clear that the girls sing only by ASCAP's belatedly good graces").

5. Pamela Samuelson, "The Copyright Grab," 1995, www.negativland.com/white.html (accessed 9/12/03); see also Paul Goldstein, *Copyright's Highway: The Law and Lore of Copyright From Gutenberg to the Celestial Jukebox* (New York: Hill & Wang, 1994), pp. 39-45.

6. 8-8 *Nimmer on Copyright A*, Appendix 8, §A, Renewal Term Extensions Under the 1909 Copyright Act.

7. 17 U.S. Code §106 sets out the nature of the exclusive right: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) 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; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) 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 (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

8. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442, 432, 446 (1984).

9. James Surowiecki, "Patent Bending," *The New Yorker*, July 14-21, 2003, p. 36.

10. Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), p. 95.

11. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: NYU Press, 2001), pp. 11-12. See also Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia U. Press, 1967), p. 74 ("to say that copyright is 'property,' although a fundamentally unhistorical statement, would not be boldly misdescriptive if one were prepared to acknowledge that there is property and property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in given circumstances").

12. See Robert Kunstadt, "Fair Use Should Not Die," *National Law Journal*, Nov. 11, 2002, p. A16 (describing the industry practice of encrypting both new introductory material and public domain material).

13. Dave Wilson & Jon Healey, "CDs That Block Copying May Herald a Revolution," *Los Angeles Times*, Jan. 6, 2002, www.latimes.com/

business/la-010601copy.story (accessed 1/6/02).

14. Brenda Sandburg, "Fair Use Fears Over Federal Circuit Ruling," *The Recorder*, Oct. 8, 2002, www.law.com/jsp/article.jsp?id=1032128694823 (accessed 10/8/02).

15. *Feist Publications, Inc. v. Rural Tel. Service Co*., 499 U.S. 340, 363-64, 349 (1991). The idea/expression dichotomy is reflected in the copyright law, 17 U.S. Code §102(b). On the four main free-expression safety valves, see Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain," 74 *N.Y.U. Law Review* 354 (1999).

16. *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc*., 797 F.2d 1222, 1248 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987); 4-13 *Nimmer on Copyright* §13.03[A][1][d].

17. 4-13 *Nimmer on Copyright* §13.03[A][1][b].

18. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

19. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), *id.*, 579 (Justices Brennan, White, & Marshall dissenting).

20. See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp.2d 1357 (N.D.Ga. 2001), vacated, 252 F.3d 1165 (11th Cir. 2001), reversed, 268 F.3d 1257 (11th Cir. 2001); Wendy Gordon, "Authors, Publishers, and Public Goods: Trading Gold for Dross," 36 *Loyola of Los Angeles Law Review*, fall 2002, llr.lls.edu/eldred/ gordon.pdf (accessed 7/29/03), p. 20. The case later settled: the Mitchell estate agreed to drop its suit and in exchange, Randall's publisher made a contribution to Morehouse College in Atlanta. *American Library Association Newsletter on Intellectual Freedom*, July 2002, p. 177.

21. *Religious Technology Center v. Henson,* 1999 U.S.App.LEXIS 11828 (9th Cir. 1999), cert. denied, 528 U.S. 1105 (2000).

22. *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001).

23. *Mattel, Inc. v. MCA Records, Inc*. 296 F.3d 894, 904 (9th Cir. 2002), cert. denied, 123 S.Ct. 993 (2003).

24. See "Phish Fan Web Site Policy," www.phish.com/guidelines/index.php?category=2 (accessed 9/20/03); Julie Keller, "Buffy Cyberfans Slayed By Fox," *Eonline.com*, Dec. 23, 1999, www.eonline.com/News/Items/Pf/0,1527,5782.00.html (accessed 9/8/03); Letter from Warner Brothers to Jonathon Woodward, Nov. 8 1995, www.io.com/~woodward/@cme/served.txt (accessed 9/8/03).

25. See *Wal-Mart Stores, Inc. v. wallmartcanadasucks.com*, Case No. D2000-1104, WIPO Arbitration and Mediation Center, Nov. 23, 2000; *Diageo plc v. John Zuccarini*, Case No. D2000-0996, WIPO Arbitration and Mediation Center, Oct. 22, 2000. In the *Zuccarini* case and an earlier case involving a number of variations on "Wal-Mart sucks," the WIPO judges found the corporate critics guilty of harassing the company rather than genuinely wanting to exercise free-speech rights. But a dissenting judge argued, in a case involving "vivendiuniversalsucks.com," that bad behavior should not be a relevant consideration where the result of a mandatory domain name transfer is to allow corporations to acquire and then suppress "sucks.com" Internet addresses, which are well-known for political commentary. *Vivendi Universal v. Mr. Jay David Sallen*, Case No. D2001-1121, WIPO Arbitration and Mediation Center, Nov. 7, 2001.

26. *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp.2d 1161, 1166 (C.D. Cal. 1998).

27. For a sampling of such cease-and-desist letters, see Chilling Effects Clearinghouse, www.chillingeffects.org (accessed 10/16/02). Parodists are not always intimidated by threatening letters. For example, a letter sent by lawyers for Vice President Dick Cheney in early 2003 to the managers of a site parodying the Bush Administration asserted that images of

Lynne Cheney with a red clown nose constituted an unlawful use of her "name and picture for purposes of trade" and portrayed her "in a false light." The New York Civil Liberties Union vowed to provide a First Amendment defense for the parodists if Cheney made good on his threat to sue. Benjamin Weiser, "Web Site Hears From Cheney After Parody Involving Wife," *New York Times*, Mar. 6, 2003, p. A24.

28. *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (finding Biz Markie album "I Need a Haircut" violated copyright by using three words and some music from "Alone Again (Naturally)" by Gilbert O'Sullivan). Some later cases reject this rigid approach and look to whether the sampling involves "substantial similarity" or only "fragmented literal similarity" to the original work. *E.g.*, *Williams v. Broadus*, 2001 U.S. Dist. LEXIS 12894 (S.D.N.Y. 2001); *Bridgeport Music v. Dimension Films,* 230 F. Supp.2d 830 (M.D. Tenn. 2002).

29. The four main factors that determine whether the fair use defense will defeat a claim of copyright infringement are: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole;" and "(4) the effect on the potential market for or value of the copyrighted work." 17 U.S. Code §107.

30. Edward Felten, "A Skeptical View of DRM and Fair Use," *Communications of the ACM*, Apr. 2003, Vol. 46, No. 4, pp. 57, 58.

31. The first sale doctrine is codified in the copyright law: 17 U.S. Code §109(a).

32. *Miracle Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988), cert. denied, 489 U.S. 1018 (1989); *Lee v. Deck the Walls*, 925 F. Supp. 576 (N.D. Ill. 1996).

33. *Adobe Systems v. One Stop Micro, Inc.*, 84 F. Supp.2d 1086 (N.D. Cal. 2000).

34. 17 U.S. Code §109(b); for the history of this exception to the first sale rule, see 2-8 *Nimmer on Copyright* §8.12.

35. Computer Software Rental Amendments Act of 1990, 17 U.S. Code §109(b); see 2-8 *Nimmer on Copyright* §8.12.

36. 2-8 *Nimmer on Copyright* §8.12.

37. Joseph Story, 3 *Commentaries on the Constitution of the United States* §1147 (Boston: Hilliard Gray & Co., 1833) (emphasis added).

38. Jessica Litman, "The Public Domain," 39 *Emory Law Journal* 965, 966 (1990).

39. *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845), quoted in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

40. See Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: NYU Press, 2001), pp. 117-48; Brief of *Amici Curiae* National Writers Union *et al*. in Support of Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., 2001 Term), p. 11.

41. Written testimony of Dennis Karjala before House of Representatives Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, on H.R. 989 (July 13, 1995), n.8, reprinted in *The Copyright Term Extension Act of 1995, Hearing Before the Committee on the Judiciary*, *United States Senate, on S. 483,* 104th Congress, 1st Session (Sept. 20, 1995), p. 83 n.8; Joyce Wadler, "The Play's His Thing, Even if You Never Heard of It," *New York Times*, Oct. 9, 2002, p. A28; Frances McCullough letter, "Sylvia Plath's Journals," *New York Review of Books*, Jan. 18, 1990; Janet Malcolm, *The Silent Woman: Sylvia Plath and Ted Hughes* (New York: Knopf, 1994).

42. See Minority Views of Senator Hank Brown, *Report of the Senate Committee on the Judiciary on the CTEA*, Senate Report No. 104-315, 104th Congress, 2d Session (July 10, 1996), p. 34 (new editions of *My Antonia* in 1994 cost "from $2 to $24, thereby making the story available to many more people").

43. Scott Martin, "The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection," 36 *Loyola of Los Angeles Law Review*, fall 2002, llr.lls.edu/volumes/v36-issue1/martin-original1.pdf (accessed 7/29/03), pp. 40-43.

44. *Id.*

45. "It's a Wonderful Life," www.filmsite.org/itsa.html (accessed 12/31/02).

46. Statement of Professor Peter Jaszi, printed in *The Copyright Term Extension Act of 1995*, *Hearing Before the Committee on the Judiciary, United States Senate, on S. 483*, 104th Congress, 1st Session (Sept. 20, 1995), p. 72.

47. Act of Feb. 3, 1831, ch. 16, §16, 4 Stat. 439; Act of Mar. 4, 1909, ch. 320, §§23-24, 35 Stat. 1080-81.

48. Public Law 87-668, 76 Stat. 555 (1962); Public Law 89-142, 79 Stat. 581 (1965); Public Law 90-141, 81 Stat. 464 (1967); Public Law 90-416, 82 Stat. 397 (1968); Public Law 91-147, 83 Stat. 360 (1969); Public Law 91-555, 84 Stat. 1441 (1970); Public Law 92-170, 85 Stat. 490 (1971); Public Law 92-566, 86 Stat. 1181 (1972); Public Law 93-573, Title I, §104, 88 Stat. 1873 (1974).

49. Public Law 94-553, §304, 90 Stat. 2572 (1976).

50. Corporate copyrights are generally the result of works made for hire – that is, made by corporate employees or contractors. The Sonny Bono law made the term for such works 95 years from the date of first publication or 120 years from the date of creation, whichever expires first. This also applies to anonymous or pseudonymous works. Public Law 105-298, §102, 112 Stat. 2827 (1998), amending 17 U.S. Code §§301-304.

51. James Surowiecki, "Righting Copywrongs," *The New Yorker*, Jan. 21, 2002, p. 27. Some say, however, that Mickey Mouse changed sufficiently after *Steamboat Willie* so that Disney's copyright on the image would not have expired in 2003. See Scott Martin, "The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection," 36 *Loyola of Los Angeles Law Review*, fall 2002, llr.lls.edu/volumes/v36-issue1/martin-original1.pdf (accessed 7/29/03), pp. 123-26. Martin also argues that even after term extension, Disney would not have lost its trademark rights to control uses of Mickey's image.

52. Daren Fonda, "Copyright Crusader Eric Eldred Says the Latest Copyright Law Goes Too Far," *Boston Globe Magazine*, Aug. 29. 1999, p. 12; Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), p. 33 n.10.

53. Daren Fonda, "Copyright Crusader Eric Eldred Says the Latest Copyright Law Goes Too Far," *Boston Globe Magazine*, Aug. 29. 1999, p. 12; Linda Greenhouse, "Justices to Review Copyright Extension," *New York Times*, Feb. 20, 2002, pp. C1, C6 ("[t]he 1998 extension was a result of intense lobbying by a group of powerful corporate copyright holders, most visibly Disney").

54. Statement of Mary Bono, in 144 *Congressional Record* H9946, 9952 (Oct. 7, 1998).

55. Brief for Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., 2001 Term), pp. 7, 46, citing Edward Rappaport, "Copyright Term Extension: Estimating the Economic Values," *Congressional Research Service Report for Congress* (May 11, 1998), pp. 8-16.

56. Daren Fonda, "Copyright Crusader Eric Eldred Says the Latest Copyright Law Goes Too Far," *Boston Globe Magazine*, Aug. 29. 1999, p. 12; Brief of *Amici Curiae* the Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation Filed on Behalf of Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), p. 12.

57. Brief of College Art Association, *et al*. as *Amici Curiae* in Support of Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), pp. 13, 7-10. The other signers of this brief were the Visual Resources Association, National Humanities Alliance, Consortium of College and University Media Centers, and National Initiative for a Networked Cultural Heritage.

58. Andrea Foster, "A Bookworm's Battle," *Chronicle of Higher Education*, Oct. 25, 2002, p. A35.

59. Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), p. 122.

60. Andrea Foster, "A Bookworm's Battle," *Chronicle of Higher Education*, Oct. 25, 2002, p. A35; Daren Fonda, "Copyright Crusader Eric Eldred Says the Latest Copyright Law Goes Too Far," *Boston Globe Magazine*, Aug. 29. 1999, p. 12.

61. Daren Fonda, "Copyright Crusader Eric Eldred Says the Latest Copyright Law Goes Too Far," *Boston Globe Magazine*, Aug. 29. 1999, p. 12; Brief for Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., 2001 Term), pp. 3-5.

62. *Eldred v. Reno*, 239 F.3d 372, 375-76 (D.C. Cir. 2001), affirmed, 123 S.Ct. 769 (2003); *id*. at 381-82 (Judge Sentelle dissenting).

63. Emily Newburger, "The Year of the Copyright," *Harvard Law Bulletin*, spring 2003, p. 3.

64. Brief of *Amici Curiae* the Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation Filed on Behalf of Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), pp. 3-5, 13-14, 22-23.

65. Brief of *Amici Curiae* National Writers Union *et al.* in Support of Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), pp. 7, 13-14; Jesse Walker, "Mickey Mouse Clubbed: Disney's Cartoon Rodent Speaks Out on the *Eldred* Decision," *Reason*, Apr. 2003, pp. 18, 20 (an "interview" with the mouse, who has temporarily escaped from his corporate fetters).

66. Brief of George A. Akerlof *et al*., in Support of Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002).

67. Brief *Amici Curiae* of the American Association of Law Libraries, *et al*., in Support of Petitiioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), pp. 19, 29-30. Other signers of this brief were the American Historical Association, American Library Association, Art Libraries Society of North America, Association for Recorded Sound Collections, Association of Research Libraries, Council on Library and Information Resources, International Association of Jazz Record Collectors, Midwest Archives Conference, Music Library Association, National Council on Public History, Society for American Music, Society of American Archivists, and Special Libraries Association. The Sonny Bono law's library exemption is found in 17 U.S. Code §108(h). It added to a section of the existing copyright law that permits libraries to make limited copies for purposes of preservation or replacement, and allows patrons to make isolated, occasional copies as long as libraries post copyright warnings near the photocopy machines. 17 U.S. Code §108 (a)-(g).

68. Brief for the Respondent, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., Aug. 2002), p. 46.

69. Brief *Amici Curiae* of Dr. Seuss Enterprises, *et al., Eldred v. Ashcroft*, No. 01-618 (S.Ct., Aug. 2002), p. 19.

70. Curator's notes, "Illegal Art" exhibit, sponsored by *StayFree!* magazine, CBGB 313 Gallery, New York City, Nov. 13-Dec. 6, 2002.

71. Brief for the Respondent, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., Aug. 2002), p. 40; *Amicus Curiae* Brief of the Songwriters Guild of America Concerning First Amendment Issues and in Support of Respondent, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., Aug. 5, 2002), p. 15 ("First Amendment challenges to copyright laws have generally been rejected precisely because the ... idea/expression dichotomy adequately protects First Amendment interests").

72. Brief for the Respondent, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., Aug. 2002), pp. 37-38.

73. Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), p. 32 n.4; Council Directive 93/98/EEC, Articles 1(1), 1(3), 1(4), cited in Brief of Intellectual Property Law Professors as *Amici Curiae* Supporting

Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), p. 17; Brief of*Amicus Curiae* International Coalition for Copyright Protection in Support of Respondent, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., Aug. 2002), pp. 5-7.

74. Brief for Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., 2001 Term), pp. 42-44 (also noting that six out of 20 categories of copyright "are actually less harmonized now than they were prior to CTEA"). A brief from 53 copyright scholars pointed to numerous other inconsistencies between U.S. and European copyright law, which the Sonny Bono law did not resolve. Brief of Intellectual Property Law Professors as *Amici Curiae* Supporting Petitioners, *Eldred v. Ashcroft*, No. 01-618 (S.Ct., May 20, 2002), pp. 16-19; see also *Report of the Senate Committee on the Judiciary on the CTEA*, Senate Report No. 104-315, 104th Congress, 2d Session (July 10, 1996), pp. 14, 30 (Minority Views of Senator Hank Brown); Anthony Tommasini, "Companies in U.S. Sing Blues As Europe Reprises 50's Hits," *New York Times*, Jan. 4, 2003, p. A1 (because European Union copyright term for sound recordings is only 50 years, European companies are releasing 1950s recordings by stars like Maria Callas, Elvis Presley, and Ella Fitzgerald, which are still covered by copyright in the U.S.).

75. Marjorie Heins notes, Oct. 9, 2002; Linda Greenhouse, "Justices Hear Arguments on Extension of Copyrights," *New York Times*, Oct. 10, 2002, p. C1; Michael Grebb, "Justices Doubt Free Speech Link," *Wired News*, Oct. 10, 2002 www.wired.com/news/politics/0,1283, 55684,00.html (accessed 7/29/03).

76. Lessig Blog Archives, cyberlaw.stanford.edu/lessig/blog/archives/cat_eldredcc.shtml (accessed 7/29/03).

77. *Eldred v. Ashcroft*, 123 S.Ct. 769; *id*. at 806 (Justice Breyer dissenting).

78. *Eldred v. Ashcroft*, 123 S.Ct. at 788-89.

79. Jack Balkin Blog, Jan. 15, 2003, "Mickey in Chains, Part II, or Why the Court Got it Wrong in *Eldred v. Ashcroft,*" balkin.blogspot.com/2003_01_12_balkin _ archive.html (accessed 1/19/03).

80. *Eldred v. Ashcroft*, 123 S.Ct. at 800 (Justice Stevens dissenting).

81. *Eldred v. Ashcroft*, 123 S.Ct. at 812 (Justice Breyer dissenting).

82. Editorial, "The Coming of Copyright Perpetuity," *New York Times*, Jan. 16, 2003, p. A28.

83. Amy Harmon, "A Corporate Victory But One That Raises Public Consciousness," *New York Times*, Jan. 16, 2003, p. A24.

84. Lawrence Lessig, "Protecting Mickey Mouse at Art's Expense," *New York Times*, Jan. 18, 2003, p. A17.

85. Amy Harmon, "Case Could Shift Balance in Debate on Public Domain," *New York Times*, Feb. 20, 2002, p. C7.

86. Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), p. 95.

87. Pamela Samuelson, "The Copyright Grab" (1995), www.negativland.com/white.html (accessed 7/29/03); see also Mike Godwin, "Copywrong: Why the Digital Millennium Copyright Act Hurts the Public Interest," *Reason*, July 2001, p. 57; Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), pp. 90-96 (recounting how the Green Paper's release caused dismay among libraries, authors, online service providers, and makers of electronic devices and computer hardware; public hearings were held, but in the end, the Administration altered only the style and strategy, not the substance, of its views on how copyright should work online. The main difference between its initial Green Paper and its final White Paper, *Intellectual Property and the National Information Infrastructure*, was that the White Paper did not propose major changes in the substance of copyright law. Rather, says Litman, it interpreted existing law to assert that "most of the enhanced protection copyright owners might want was already available.").

88. 17 U.S. Code §1201(a)(1)(A), (b). The DMCA provides for the usual copyright law civil and criminal penalties – up to a $500,000 fine or five years in prison for a first offense, and up to $1 million or 10 years in prison for subsequent offenses. 17 U.S. Code §§1203, 1204.

89. Jessica Litman, *Digital Copyright* (Amherst, NY: Prometheus Books, 2001), p. 144.

90. 17 U.S. Code §1201(d), (e), (f), (g) (also including an exemption for law enforcement).

91. 17 U.S. Code §1201(a)(1)(B).

92. 65 *Federal Register* 64555 (Oct. 27, 2000); 68 *Federal Register* 62011 (Oct. 31, 2003), codified in 37 Code of Federal Regulations §201.40(b). See also Robin Gross, "DMCA Takes Full Effect – Millions of Americans Become Criminals," *EFFector Online Newspaper*, Vol. 13, No. 11 (Dec. 13, 2000), www.eff.org/effector/HTML/efffect 13.11.html (accessed 7/29/03). After its 2003 hearings, the Copyright Office rejected 25 other requests for "fair use" exemptions from the DMCA. Memorandum From Marybeth Peters, Register of Copyright to James H. Bellington, Librarian of Congress (Oct. 27, 2003), http://www.copyright.gov/1201 (accessed 11/4/03).

93. WIPO Copyright Treaty, Article 11, quoted in *The Digital Millennium Copyright Act of 1998 - U.S. Copyright Office Summary* (Dec. 1998), www.loc.gov/copyright/legislation/dmca.pdf (accessed 7/29/03).

94. Testimony of Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce Lehman in response to questions from Representative Rick Boucher, in *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the House Subcommittee on Courts and Intellectual Property*, 105th Congress, 1st Session (Sept. 16, 1997), p. 62.

95. RIAA Letter to Felten, Apr. 9, 2001, www.eff.org/Legal/Cases/Felten_v_RIAA/20010409_riaa_sdmi_letter.html (accessed 7/29/03); "EFF Protects Scientists' Speech in RIAA Case," EFF press release, Oct. 25, 2001, www.eff.org/Legal/Cases/Felten_ v_RIAA/20011025_eff_felten_pr.html (accessed 7/29/03); Electronic Frontier Foundation, *Unintended Consequences: Three Years Under the DMCA* (May 3, 2002), www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf (accessed 7/29/03); Defendant John Ashcroft's Memorandum in Support of Motion to Dismiss, *Felten v. RIAA*, No. CV- 01- 2669 (GEB) (D. N.J., Sept. 25, 2001); Defendant John Ashcroft's Reply Memorandum in Support of Motion to Dismiss, *Felten v. RIAA*, No. CV- 01- 2669 (GEB) (D. N.J., Nov. 8, 2001).

96. Defendant John Ashcroft's Reply Memorandum in Support of Motion to Dismiss, *Felten v. RIAA*, No. CV- 01- 2669 (GEB) (D. N.J., Nov. 8, 2001), pp. 2-3.

97. EFF Media Release, "Scientists Support Professor's Copyright Challenge," Aug. 13, 2001; David McGuire, "Scientist Ends Crusade Against Copyright Law," *Washington Post*, Feb.6, 2002, www.computeruser.com/news/02/02/08/news.html (accessed 8/6/03); "Federal Judge Stymies Professor's Challenge of Digital-Copyright Law," Associated Press, Nov. 29, 2001, www.freedomforum.org/templates/document.asp?documentID=15439&printerfriendly=1 (accessed 7/29/03). For the EFF's archive on the case, see www.eff.org/IP/DMCA/Felten_v_RIAA (accessed 7/29/03).

98. Richard Smith, "Digital Copyright Act Harms Research," July 30, 2001, www.privacyfoundation.org/commentary/tipsheet.asp?id=47&action=0 (accessed 9/8/03) (originally published in *MSNBC Online*); Jennifer 8. Lee, "Man Denies Digital Piracy in First Case Under '98 Act," *New York Times*, Aug. 31, 2001, p. C3; Ariana Eunjung Cha, "Keep Digital Copyright Law Intact, Agency Says," *Washtech.com*, Aug. 30, 2001, www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A16744-2001Aug29&notFound=true (accessed 8/9/03); "Charges to be Dropped Against Russian Cryptographer," Associated Press, Dec. 14, 2001, www.freedomforum.org/templates/document.asp?documentID=15536&printer friendly=1 (accessed 7/29/03).

99. Jennifer 8. Lee, "In Digital Copyright Case, Programmer Can Go Home," *New York Times*, Dec. 14, 2001, p. C4; U.S. Attorney press release, "On Dropping of Charges Against Dmitry Sklyarov," Dec. 13, 2001, www.eff.org/IP/DMCA/US_v_Elcomsoft/ 20011213_usatty _pr.html (accessed 7/29/03).

100. *Amicus Curiae* Brief of the Electronic Frontier Foundation, *et al*. in Support of Motion to Dismiss, in *United States v. Elcom Ltd*., CR 01-20138 RMW (N.D. Cal. Feb. 4, 2002), pp. 5-7, 22-23. Other signers of this brief were the ACM Committee on Computing Law & Technology, American Association of Law Libraries, Consumer Project on Technology, Electronic Privacy Information Center, Music Library Association, and U.S. Public Policy Committee of ACM.

101. Order Denying Defendants' Motions to Dismiss the Indictment on Constitutional Grounds, *United States v. Elcom Ltd.*, 203 F. Supp.2d 1125, 1131 (N.D. Cal. 2002).

102. Shannon Laferty, "Digital Copyright Act Goes Before First Criminal Jury," *The Recorder*, Dec. 4, 2002,www.law.com (accessed 12/4/02).

103. Walt Crawford, "ElcomSoft/Sklyarov: DMCA Comes to Trial," *Cites & Insights*, Jan. 2003, p. 2.

104. "Interview with Jon Johansen," LinuxWorld.com, n.d., www.linuxworld.com/linuxworld/lw-2000-01-dvd-interview.html (accessed 11/5/02); Johansen's trial testimony in *Universal City Studios v. Corley*, www.eff.org/IP/DMCA/MPAA_DVD_cases/20000720_ny_trial_transcript.html (accessed 7/29/03).

105. Brief for Defendants-Appellants, *Universal City Studios v. Corley*, No. 00-9185 (2d Cir. 2001), p. 5.

106. *Universal City Studios v. Reimerdes*, 82 F. Supp.2d 211 (S.D.N.Y. 2000) (preliminary injunction); 111 F. Supp.2d 294, 346 (S.D.N.Y. 2000) (decision after trial).

107. Brief for Defendants-Appellants, *Universal City Studios v. Corley*, No. 00-9185 (2d Cir. 2001), p. 7. Corley's co-defendants settled the case and did not appeal.

108. Brief for Defendants-Appellants, *Universal City Studios v. Corley*, No. 00-9185 (2d Cir. 2001), p. 48.

109. Brief of *Amici Curiae* Professors Yochai Benkler and Lawrence Lessig in Support of Appellants, *Universal City Studios v. Corley*, No. 00-9185 (2d Cir. 2001), p. 9.

110. Brief of *Amici Curiae* American Civil Liberties Union *et al*. in *University City Studios v. Corley*, No. 00-9185 (2d Cir. 2001) p. 16. In addition to the ALA, others signers of this brief were the Association for Research Libraries, Music Library Association, National Association of Independent Schools, Electronic Privacy Information Center, and Computer & Communications Industry Association.

111. The availability of the ties was noted on legalminds.lp.findlaw.com/list/cyberia-l/msg33924.html (accessed 12/2/02). The DeCSS song was reported in "Evidence: A Selection of Banned and Contested Art," Columbia University National Arts Journalism Program, "The New Gatekeepers" Conference, Nov. 20-21, 2002.

112. Brief for Intervenor United States of America in *Universal City Studios v. Corley*, No. 00-9185 (2d Cir. 2001), p. 24, quoting*Report of the House Committee on Commerce on the DMCA*, H.R. Rep. No. 105-551, 105th Congress, 1st Session (1998), p. 25.

113. *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001). Corley did not appeal to the Supreme Court.

114. Communication with Cindy Cohn, legal director, Electronic Frontier Foundation, Dec. 2002.

115. *Universal City Studios v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001);*id*. at 436 n.2; *Universal City Studios v. Remeirdes*, 111 F. Supp.2d at 308-09, 313.

116. Timothy O'Brien, "Norwegian Hacker, 19, Is Acquitted in DVD Piracy Case," *New York Times*, Jan. 8, 2003, p. C4; Reuters, "Norwegian Teenager to Face Retrial for Film Piracy," Feb. 28, 2003, www.findlaw.com/entertainment/s/20030228/technorwaydvddc.html (accessed 3/9/03).

117. Complaint for Declaratory Relief, *321 Studios v. Metro-Goldwyn-Mayer Studios et al.*, No. C 02 1995 (N.D. Cal., filed Apr. 22, 2002).

118. Jason Hoppin, "Judge Leaning Studios' Way in DMCA Fight," *The Recorder*, May 16, 2003, www.law.com/jsp/article.jsp?id=1052440742962 (accessed 5/16/03).

119. Jason Hoppin, "The DMCA's Screen Test," *The Recorder*, Apr. 25, 2003, www.law.com/jsp/article.jsp?id=1051121785484 (accessed 4/26/03).

120. *DVD Copy Control Association v. Bunner*, 93 Cal. App.4th 648, 656 (6th App. Dist., Santa Clara County, 2002), "depublished" after the California Supreme Court agreed to review the case, 41 P.3d 2 (Cal. Feb. 20, 2002).

121. *DVD Copy Control Association v. Bunner*, 93 Cal. App. 4th at 665-66.

122. Mike McKee, "'Friends' in High Places," *The Recorder*, Aug. 29, 2002, www.law.com (accessed 9/3/02).

123. *DVD Copy Control Association v. Bunner,* 2003 Cal. LEXIS 6562 (unpublished), slip opinion, No. S102588 (California Supreme Court, Aug. 25, 2003) (Judge Moreno concurring).

124. *Sony Computer Entertainment, Inc. v. GameMasters*, 87 F. Supp.2d 976 (N.D. Cal. 1999).

125. Memorandum and Order, *Lexmark International v. Static Control Components*, 253 F. Supp. 2d 943 (E.D. Ky. 2003).

126. Quoted in Amy Harmon, "Pondering Value of Copyright vs. Innovation," *New York Times*, Mar. 3, 2003, p. C2.

127. 68 *Federal Register* 62017 (Oct. 31, 2003). The Copyright Office reasoned that the DMCA already allows reverse engineering of the toner authentication technology, so that no additional exemption is necessary. Peters Memorandum, *supra* n.92, pp. 172-83.

128. For information about Internet filters' inevitable over-blocking of valuable content; see, David Sobel, ed., *Filters and Freedom* (Washington, DC: EPIC, 2001); Free Expression Policy Project, *Internet Filters: A Public Policy Report* (2001), www.fepproject.org/policyreports/filteringreport.html (accessed 9/1/03); *American Library Ass'n v. United States*, 202 F. Supp.2d 401, 431-48 (E.D Pa. 2002), reversed (though without contesting the lower court's extensive fact-findings on the irrational operation of Internet filters), 123 S.Ct. 2297 (2003).

129. ACLU FAQ on *Edelman v. N2H2, Inc.*, www.aclu.org/issues/cyber/Edelman _FAQ.html (accessed 7/29/03); Complaint in *Edelman v. N2H2, Inc.*, No. 02-CV-11503-RGS. (D. Mass., filed July 25, 2002).

130. Memorandum and Order on Defendant's Motion to Dimiss, *Edelman v. N2H2, Inc*., No. 02-CV-11503-RGS (D. Mass. Apr. 7, 2003), p. 3.

131. Seth Finkelstein, "SmartFilter - I've Got a Little List," Dec. 7, 2000, sethf.com/anticensorware/smartfilter/gotalist.php (accessed 9/8/03).

132. *Universal City Studios v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001).

133. Electronic Frontier Foundation, *Unintended Consequences: Three Years Under the DMCA*, May 3, 2002, p. 3, www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf (accessed 7/29/03). See also EFF's January 2003 update, *Unintended Consequences: Four Years Under the DMCA*, www.eff.org/IP/DRM/DMCA/20030102_dmca_unintended_consequences.html (accessed 8/4/03).

134. Jeff Grove, "Legal and Technological Efforts to Lock Up Content Threaten Innova-

tion," *Communications of the ACM*, Apr. 2003, Vol. 46, No. 4, p. 21.

135. Petition for En Banc Review, *Universal City Studios v. Corley*, No. 00-9185 (2d Cir. Jan. 14, 2002).

136. Edward Rothstein, "Swashbuckling Anarchists Try to Eliminate Copyrights From Cyberspace," *New York Times*, June 10, 2000, p. B4.

137. Professor Michael Madison, in *Symposium Beyond Napster: Debating the Future of Copyright on the Internet: Panel One: The Road to Napster: Internet Technology and Digital Content*, Nov. 16, 2000, published in 50 *American U. Law Review* 363 (2000); see also John Borland, "Hollywood Chases Down Campus Sites," *CNET News.com*, Oct. 10, 2002, www.news.com.com/2100-1023-961637. html (accessed 7/29/03) (reporting that the rapper Dr. Dre sued several universities as well).

138. *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001). On the popularity of Napster at its peak, see Neil Strauss, "Record Labels' Answer to Napster Still Has Artists Feeling Bypassed," *New York Times*, Feb. 18, 2002, p. A1.

139. 17 U.S. Code §1008 exempts audio recording devices and their noncommercial use from suits for copyright infringement.

140. *A&M Records v. Napster*, 239 F.3d at 1021-23.

141. *A&M Records v. Napster*, 284 F.3d 1091 (9th Cir. 2002); Brenda Sandburg, "Napster Sings the Blues, Agrees to $26 Million Settlement," *The Recorder*, Sept. 25, 2001,www.law.com (accessed 9/25/02). Ironically, the Napster name still had so much appeal that it was bought by a company called Roxio, which in 2003 acquired the faltering industry online music service, Pressplay. The theory was that reviving Pressplay under the Napster name would improve business. Amy Harmon, "Deal May Raise Napster from Online Ashes," *New York Times*, May 19, 2003, p. C1.

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143. "Fighting Back," *Economist.com*, Nov. 14, 2002, www.economist.com/agenda/Printer Friendly.cfm? Story_ID=1446431 (accessed 9/9/03).

144. Memorandum of Defendants Streamcast Networks, Inc. (Formerly Known as MusicCity.Com) ... in Support of Motion for Partial Summary Judgment, in *Metro-Goldwyn Mayer-Studios v. Grokster*, No. 01-08541 SVW (PJWx) (C.D. Cal.), Jan. 22, 2002, p. 11. MusicCity also argued that noncommercial uses of Morpheus by individual consumers to burn CDs are lawful under the Audio Home Recording Act of 1992 (see n. 139), which creates a mechanism for musicians "and other stakeholders" to receive royalties for home copying. *Id*., p. 13 n. 6. The Court of Appeals in *Napster* rejected a similar argument.

145. Order Granting Defendants' Motions for Summary Judgment, *Metro-Goldwyn-Mayer Studios v. Grokster*, 259 F. Supp.2d 1029, 1035 (C.D. Cal. 2003), appeal pending. Technically, the decision did not apply to KaZaA, which did not join in Morpheus and Grokster's motion for summary judgment.

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a think tank on artistic and intellectual freedom

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