ESSAY – HOW COPYRIGHT GOT A BAD NAME FOR ITSELF

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Essay – How Copyright Got a Bad Name For Itself

Jane C. Ginsburg*

Over the last several years, copyrighted works have come to account for a healthy portion of our GNP, and an even more substantial share of U.S. exports.[1] Nonetheless, copyright is in bad odor these days. Many of the developments over the last years designed to protect copyright have drawn academic scorn, and intolerance even from the popular press.[2] I have a theory about how copyright got a bad name for itself, and I can summarize it in one word: Greed.

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[1] See, e.g., Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and its Effects Upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 35 (1998) ("Approximately twenty-five percent of American exports consist of intellectual property."); *Copyright Term, Film Labeling, and Film Preservation Legislation, Hearings Before the House Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995), LEXIS 96 CIS H 52136 (statement of Bruce A. Lehman, U.S. Commissioner of Patents and Trademarks), ("As a result of the strong protection afforded by our copyright law, the U.S. copyright industry has become one of the largest and fastest growing parts of the U.S. economy. The U.S. copyright industry contribute[s] more to the U.S. economy than any other manufacturing industry and comprises almost four percent of the nation's Gross Domestic Product. Further, the annual growth rate of the core copyright industries has been more than twice the growth rate of the whole economy.")); *id.* (Charlene Barshefsky, Deputy United States Treasurer, testifying that U.S. copyright-based industries contribute over $30 billion in foreign sales and are growing at twice the annual rate of the economy); *Copyright Term Extension Act of 1995, Hearings Before the Senate Judiciary Comm.*, 104th Cong., 104-817, LEXIS 97 CIS 52142 (statement of Sen. Orrin G. Hatch) ("Intellectual property is … our second largest export; it is an area in which we posses[s] a large trade surplus."); *id.* (statement of Bruce A. Lehman) (In 1994, "the U.S. copyright industry contributed approximately $40 billion in foreign sales to the U.S. economy.").

[2] See, e.g., LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001); SIVA VIADHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001); James Surowiecki, *The Financial Page: Righting Copywrongs*, NEW YORKER, January 21, 2002, at 27 (on The Future of Ideas); Daniel Zalewski, *Thinking These Thoughts Is Prohibited*, N.Y. TIMES, Jan. 6, 2002, § 7, at 10 (reviewing Lawrence Lessig, The Future of Ideas: The Fate of the Commons In a Connected World (2001)) ("Lessig's passionate new book . . . argues that America's concern with protecting intellectual property has become an oppressive obsession."); *Copyright Forever?*, WASH. POST, Mar. 5, 2002, at A18 (criticizing copyright term extension, which was "pressed by an assortment of influential and deep-pocketed copyright owners").

Corporate greed and consumer greed. Copyright owners, generally perceived to be large, impersonal and unlovable corporations[3] (the human creators and interpreters -- authors and performers – albeit often initial copyright owners, tend to vanish from polemical view), have eyed enhanced prospects for global earnings in an increasingly international copyright market. Accordingly, they have urged and obtained ever more protective legislation, that extends the term of copyright[4] and interferes with the development and dissemination of consumer-friendly copying technologies.[5]

Greed, of course, runs both ways. Consumers, for their part, have exhibited an increasing rapacity in acquiring and "sharing" unauthorized copies of music, and more recently, motion pictures.[6] Copyright owners' attempts to tame technology notwithstanding, such developments as compression formats, high speed lines, and peer to peer networks, particularly popular on college campuses, recast Annie Oakley's anthem from "Anything you can do, I can do better,"[7] to "Anything you can steal, I can steal more of." At least some of the general public senses as illegitimate any law, or more particularly, any enforcement that gets in the way of what people can do with their own equipment in their own homes (or dorm rooms). Worse, they would decry this enforcement as a threat to the Constitutional goal of promotion of the Progress of Science, and thus a threat to the public interest.

In this formulation, the "public interest" is doing a lot of work, not all of it persuasive. The "public interest" does not mean the personal interest of

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[3] See, e.g., Steven Levy, *The Great Liberator,* WIRED Oct. 2002 p. 140 (denouncing the "copyright machine"). Representative F. James Sensenbrenner (R-Wis), Chair of the House Judiciary Committee and an active force in setting the agenda of the House Subcommittee on Courts, the Internet, and Intellectual Property, has been especially critical of U.S. music industry groups, calling them "copyright cartels" and arguing that consumer access to online content should be "expanded, not restricted." Bill Holland, *Groups Offer Views on Copyright*, BILLBOARD, Apr. 20, 2002, at 3; Bill Holland, *Although Hearing Approaches, Sensenbrenner Keeps Mum,* BILLBOARD, May 12, 2001, at 1. The recent oral argument before the Supreme Court of *Eldred v. Ashcroft*, challenging the 1998 extension of the term of copyright, provided further opportunity for vitriolic metaphor. Comparing copyright owners to industrial polluters, a law school professor recently characterized the ongoing struggle with entertainment companies as "like the environmental movement before *'Silent Spring.'*" Amy Harmon, *An Uphill Battle in Copyright Case*, N.Y. TIMES, Oct. 14, 2002,at C4.

[4] *See* Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 302 (2000).

[5] *See* "anticircumvention" provisions of Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2000).

[6] *See, e.g.*, Greg Wright, *Online Music Sites: Some Pay, Others Play,* TIMES UNION (Albany), Mar. 14, 2002, at P21, *available* at LEXIS Gannett News Service, Newsfile (discussing appeal of free music on the internet); Dawn C. Chmielewski, *Lots of Contenders to Fill Void Left by Napster,* TIMES UNION (Albany), Sept. 16, 2001, at I1, *available at* LEXIS Knight Ridder, Newsfile (reviewing sites that facilitate downloading music, in addition to "movies, books, music videos and pictures").

[7] IRVING BERLIN, *Anything You Can Do*, *in* Annie Get Your Gun (1946).

members of the public in getting works of authorship without paying for them. This is as much a perversion of the Constitutional copyright clause as is the anthropomorphically nonsensical, but infinitely self-serving, adage "Information wants to be free."[8] But neither is every legal protective measure that a copyright owner urges in the name of authors' Constitutional interest in "securing . . . the exclusive Right to their . . . Writings"[9] a guarantor of the Progress of Science. In fact, the "public interest" in a balanced copyright system that provides meaningful incentives to first authors, while allowing second authors room to build on their predecessors' endeavors, as well as reasonable leeway for autonomous consumer enjoyment, has come in for considerable battering by both copyright owners and users.

Rhetoric has supplied a heavy cudgel in the battering. Copyright owners and users have both appropriated words' desirable associations, while endeavoring to endow them with improbable, indeed, contrary, meanings. Consider "sharing." Before Napster, sharing meant giving something up so that others could enjoy the object with which the sharer parted. That is why "sharing" is something children do not like to do. That is also why "sharing" was laudable; it implied the selfless improvement of the lot of others. But Napster brought us a new kind of "sharing," one in which recipients could enjoy the giver's munificence, while the giver never had to give anything up. This kind of "sharing" did not require transfer of the giver's copy of the copyrighted work; the giver simply made it possible for the recipients to make more copies. Everyone benefitted; everyone, that is, except the creators and owners of the copied works. Or, as the much-maligned Lars Ulrich of "Metallica" quipped, "Sharing's only fun when it's not your stuff."[10]

Admittedly, Napster's appropriation of the "sharing" language was not entirely cynical, as the software protocol on which Napster was built was already known as "peer-to-peer file sharing." But that term stems from the practices of research scientists who shared information and results of their own devising; they did not acquire and distribute the fruits of others' labors without the laborers' express or implied authorization.[11] Whatever

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[8] Compare James Glieck, *I'll Take the Money, Thanks*, N.Y. TIMES MAG., Aug. 4, 1996, *available at* http://www.around.com/copyright.html, explaining that "information doesn't want anything," to how people say: "I want information to be free").

[9] U.S. CONST., art. I, § 8, cl. 8.

[10] J.D. Considine, *MTV Awards: Outre Attire, Insider Jokes*, BALT. SUN, Sep. 8, 2000 at 1E (reviewing a skit at the MTV Awards involving Lars' Ulrich's views on Napster).

[11] *See, e.g.*, Todd Sundsted, *A New Fangled Name, But an Old and Useful Approach to Computing* (tracing early peer applications to USENET user groups and FidoNet bulletin board service), at http://www-106.ibm.com/developerworks/java/library/j-p2p/ (on file with Columbia Journal for Law and the Arts); Kurt Kleiner, *Free Speech, Liberty, Pornography*, NEW SCIENTIST, Mar. 10, 2001, at 32 (noting that although the term "P2P" currently embodies a wide variety of networking options which bypass a central server, file sharing began with the internet, "itself … a peer-to-peer system in which university

the term's genesis, "file sharing" à la Napster was simply unpaid copying for personal enjoyment. So understood, the activity lacks moral luster. But call it "sharing," and it glows with the beneficent associations of the word in its original altruistic guise. Accordingly, copyright owners' attempts to stop it seem churlish and Scrooge-like.

Users and their commercial facilitators, however, are not the only parties fairly charged with linguistic humbug. Copyright-owner industries, too, should bear their share of shame for verbal abuse. In particular, over-depiction of "piracy" as the unauthorized copying by end-users not only distorts but trivializes the term.[12] Even after the means of copying became available to the mass market, "piracy" still meant large-scale copying and sale to the public by for-profit actors. For example, individuals engaged in home taping for private use were not "record pirates;" that term designated commercial intermediaries.[13] Indeed, Congress amended the Copyright Act in 1992 to make clear that an infringement claim could not be brought "based on the noncommercial use by a consumer of [a digital or analog recording] device or medium for making digital musical recordings or analog musical recordings."[14] Similarly, in the "Betamax" case, the Supreme Court ruled that a more modest kind of private copying – time-shifting of free broadcast television programs – constituted fair use.[15]

This analysis does not mean to suggest that all private copying is infringement-immune. In fact, the cumulative economic impact of private copies, particularly if the copying becomes widespread and systematic, may be quite deleterious, and should be prevented. Nonetheless, to call private copying that falls outside the scope of fair use or the statutory exemption in the Audio Home Recording Act "piracy" is to wield a verbal bludgeon that ultimately discredits the condemnation. Equation of carefree home taping Peter Pans with professional bootlegging Captains

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and government mainframes swapped information as equals").

[12] For a more extensive critique of copyright owners' rhetorically excessive use of "piracy," *see, e.g.,* Jessica Litman, *The Demonization of Piracy 7-8, at* http://www.law.wayne.edu/litman/papers/demon.pdf (April 6, 2000), (on file with Columbia Journal for Law & the Arts); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L. J. 337, 349 (2002) (describing the expansion of "piracy" to describe "any unlicensed activity," including "things that are unquestionably legal piracy—like making the recordings expressly privileged under §1008 of the Audio Home Recording Act").

[13] *See, e.g.,* Goldstein et. al. v. California, 412 U.S. 546, 549-550 (1972) (superceded by statute) (describing "record piracy" as the unauthorized duplication and subsequent sale to the public of commercially available sound recordings of major musical artists); H.R. Rep. No. 92-487, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567 (clearly targeting commercial intermediaries as the subject of amendment granting federal copyright protection to sound recordings and characterizing "record pirates" as those who "can and do engage in widespread unauthorized reproduction of phonograph records and tapes").

[14] 17 U.S.C. § 1008 (2000).

[15] *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

Hook is more likely to instill resentment and hostility on the part of those who see themselves in the former role than to inspire their respect for authors' rights. Worse yet, it may make the real pirate's acts seem less blameworthy.

This Essay does not attempt a comprehensive review of recent U.S. copyright legislation and caselaw. Instead, it offers an analytical framework that will allow me to be both informative and opinionated. I propose first to expose some examples of the kind of copyright owner overreaching that has correctly given copyright a bad name. I then will argue that not all the bad publicity is deserved. Rather, much of the last years' legislation and caselaw, instead of overreaching, appropriately reaches out to address new problems prompted by new technologies, so as to strike a happier balance between copyright owner, intermediary, and end-user interests (or greeds). This in turn will permit our legal system to continue to afford a hospitable environment for the creation and dissemination of works of authorship, to the ultimate enrichment of the public.

I. What Copyright did to get a bad name for itself

High up on the list is the 1998 Sonny Bono Term Extension Act,[16] which added 20 years to the term of current and future copyrights. As a result, copyright now endures for a term of 95 years from publication, or 70 years following the death of the author. Thus, for example, a work first published in 1923, whose copyright would have expired in 1998, will now be protected until the end of 2018. This prompts the question whether a copyright is forever. Nowadays it just keeps going and going and going . . . A challenge to the term extension was argued to the U.S. Supreme Court in October 2002.[17] In lieu of legal argumentation regarding that case, I advance a moral point: the more superannuated a work becomes, the more its protection seems a drag on the system and on new authors, particularly when the benefits to old authors are nonexistent or exceptionally attenuated. As a result, the moral claims of copyright, as a system designed to promote and compensate creativity, lose plausibility. I strongly doubt the extra 20 years do much for authors (past or future), especially since the term extension law did not provide for their vesting in the authors' heirs.[18] But the additional 20 years do, I believe, put pressure on the system to offset the gain in years with a diminution in the scope of protection, for example, through a more vigorously implemented fair use

[16] Sonny Bono Copyright Term Extension Act, P.L. No. 105-298 [S. 505], (112 Stat.) 2827 (1998).

[17] Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), *cert granted*, Eldred v. Ashcroft, 122 S. Ct. 1062 (2002), *amended by* 122 S. Ct. 1170 (2002).

[18] Authors, or their heirs, enjoy a termination right only if they failed to exercise their right to terminate the 19-year "extended renewal" term installed under the 1976 Act. *See* Sonny Bono Copyright Term Extension Act, 17 U.S.C. § 304(d) (2000).

exception, not only during the last 20 years, but perhaps throughout the copyright term.[19]

Let us turn now to the topic of copyright and technology, a love-hate relationship I might subtitle, with apologies to Tom Lehrer, as doing the "masochism tango."[20] Last year, in a prominent forum for the discussion of international copyright issues, some participants suggested that the players in the debate over technological means of committing or forestalling copying were all paranoid, each suspecting the other of bottomless malevolence in their respective endeavors to control or to liberate copyrighted material.[21] The self-destructive dance between copyright owners and technology entrepreneurs is hardly new, as developments from piano rolls to videotape recorders attest.[22] Nor is today's invective significantly more strident, as even a glance at the legislative history of the 1909 Act mechanical license,[23] or recollection of the furor over the Betamax,[24] demonstrate. I think that recent years' evolution, from the unfortunate lawsuit seeking to bar sales of the "Rio" portable MP3 player,[25] to the misguided Hollings bill that would mandate anticopying technology for consumer electronics,[26] offers more of the same. It suggests that some copyright owners, if not paranoid, are Pavlovian in their response to new means of making copies or communicating works. I don't mean to say that no copyright-owning dog

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[19] *See, e.g.*, Joseph Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. (forthcoming 2002) (proposing more fair use for older works); Justin Hughes, *Fair Use Across Time*, 50 U.C.L.A. L. REV. (forthcoming 2003) (arguing that an expansion of permitted unauthorized uses over the duration of copyright is consistent with both private incentive and public interest objectives).

[20] TOM LEHRER, THE MASOCHISM TANGO, *in* AN EVENING WASTED WITH TOM LEHRER (1959).

[21] *See Commentary and Panel Discussion: Is the Balance Right for Copyright in an Internet World*, in 7 INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 61-1, 61-5 – 61-8 (Hugh Hansen, ed.) (remarks of Bernard Sorkin and Pamela Samuelson) (2002).

[22] *See, e.g.*, Jane Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622-26 (2001).

[23] *See, e.g*., *id*. at 1626-27.

[24] See, e.g., JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE VCR WARS (1987); *Sony, MCA Square Off Before Supreme Court*, BROADCASTING, Oct. 10, 1983, at 88 ("Copyright owners can't tell the public what it can and can't do if they want to make a profit.") (quoting Sony lawyer)); Robert Sangeorge, *Billions at Stake in "Betamax" High Court Case*, U.P.I., Oct. 4, 1983 *available at* LEXIS U.P.I. Newsfile (quoting lawyer suggesting that "the studios want to 'get all the Betamaxes on the market and disembowel them' so they cannot record off-the-air television"); *Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong. 15-168 (1982) (testimony of Jack Valenti, President of the Motion Picture Association of America, Inc., in which he argues that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone").

[25] RIAA v. Diamond Multimedia, 180 F.3d 1072 (9th Cir. 1999).

[26] S. 2048, 107th Cong. 2d Sess. (2002).

can learn new tricks, but neither do many copyright owners, particularly the larger ones, appear to be leaping to unleash these technologies' potential. In this debate, appearance counts a lot; and, whatever their conduct in fact, many copyright owners appear – or are portrayed by some vigorous detractors in the academy and in the popular press – as hell-bent on stomping out both new technology and the scientists and entrepreneurs behind it.[27]

Recent caselaw offers many other examples of perceived copyright owner overreaching; I will limit myself to two: Reverse Engineering and Parody. The first adds to the technology controversies the distasteful sauce of anti-competitive conduct. What, after all, has the reverse engineer done? He has made an intermediate copy of the targeted work's otherwise unavailable source code, in order to learn how to make an independent but compatible or competing product. As the Ninth Circuit has emphasized, most other copyrighted works by their nature disclose the information necessary to create a new work that complements or even competes with it.[28] Because most computer programs are disseminated only in object code, however, that information remains hidden; its extraction requires copying, even if the product that results from that extraction does not. Using copyright to suppress information does not cast copyright owners in an attractive light.

By the same token, infringement claims against parodies make copyright owners look not only power-hungry, but exceedingly humorless. The claim against *The Wind Done Gone*, Alice Randall's counter-story to *Gone with the Wind*,[29] was particularly ill-advised. Not only was it a public relations disaster, but its resolution, finding fair use, may open the door to assertions that "cultural icons" are free game for alternative retellings.[30] The Lord of the Rings per Gollum, or Harry Potter recounted from the point of view of Voldemort, anyone?

Given this litany of lamentable actions by copyright owners, it helps to

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[27] *See, e.g.*, sources cited *supra* note 2, and *infra* note 33.

[28] *See, e.g.*, Sega v. Accolade, 977 F.2d 1510, 1525 (9th Cir. 1992); see also Sony v. Connectix, 203 F.3d 596, 602 (9th Cir. 2000).

[29] Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001).

[30] *See* John T. Aquino, *Whose Characters Are These, Anyway?*, WASH. POST, May 19, 2002, at B04 (discussing *The Wind Done Gone* and *Lo's Diary* to illustrate the uncertainty of the law with respect to borrowing from works that have become a part of common culture); David D. Kirkpatrick, *Court Halts Book Based on 'Gone With the Wind,'* N.Y. TIMES, Apr. 21, 2001, at A1 (reviewing arguments by defendant's counsel and experts that the retelling of *Gone With the Wind* serves "a legitimate public interest partly because of the novel's unique status as an American icon"); Donna Rifkind, *Don't Stand So Close; Lolita, Then and Now*, NEW TIMES L.A., Dec. 2, 1999 (quoting Dmitri Nabokov's query in the preface to *Lo's Diary* as to whether "icons of popular culture…[will be] made subject to plundering by free riders because they have entered the common consciousness").

recall that in most of these cases, the courts held that no infringement had occurred because the fair use privilege sheltered defendants' activities.[31] Thus, fears that copyright had become the land of the "incredible shrinking" fair use doctrine have proved premature if not unfounded. [32] In other words, The System still Works. With that observation, I turn to the second theme of this Essay: that over the last several years, copyright law has often appropriately reached out to address new problems, many of them prompted by new technologies, in a way that sensitively endeavors to balance multiple interests.

II. More Reaching Out than Overreaching

Let's start with the dreaded Digital Millennium Copyright Act. While sec. 1201's prohibition on circumventing technological protection measures has drawn much criticism,[33] three of the DMCA's four statutory innovations have received far less attention in the annals of opprobrium. This is because they either respond to requests from constituencies other than copyright owners, or because they more successfully balance the interests of copyright owners, users, and intermediaries.

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[31] *See also* Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1540 (11th Cir. 1996) (endorsing *Sega* and vacating lower court decision for failing to properly instruct the jury on the issues surrounding fair use); DSC Communications Corp v. DGI Technologies, Inc., 898 F. Supp. 1183, 1189 (N.D. Texas 1995); (holding that "when good reason exists for studying or examining the unprotected aspects of a copyrighted program, disassembly for the purpose of study or examination of the disassembled program constitutes fair use"); Mitel, Inc. v. Iqtel, Inc., 896 F. Supp. 1050, 1057 (D. Colo. 1995) (following *Sega* and finding intermediate copying to ensure compatibility of long distance call control technology to be fair use); Campbell v. Acuff-Rose, 510 U.S. 569 (1994) (stating that parodies that target the copied work may well be fair uses, but remanding for determination if copying was too extensive); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (advertisement for "Naked Gun 33 1/3: The Final Insult" parodying Annie Leibovitz' celebrated photograph of Demi Moore held fair use); *but see* Dr. Seuss Ents. v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997) ("the Cat Not in the Hat" by "Dr. Juice," satire of the O.J. Simpson trial held not a fair use parody in part because Dr. Seuss' works were not the object of the satire).

[32] Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 151 (1998) (describing fair use in the context of educational copying as "an incredible shrinking affirmative defense," swiftly being "compacted into ineffectuality by profit minded copyright owners, whose 'neutral' desire to maximize revenues fosters intense opposition to the doctrine of fair use").

[33] *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT (2001); Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive*, 1999 EUR. INTELL. PROP. REV. 236; Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661 (1999); Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPYRIGHT SOC'Y USA 193 (2000); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y USA 365 (2000); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Yochai Benkler, *The Battle Over the Institutional Ecosystem in the Digital Environment*, Comm. of the ACM, Feb. 2001, at 84; Pamela Samuelson, *Good News and Bad News on the Intellectual Property Front*, Comm. of the ACM, Mar. 1999, at 19.

First, *§ 512 – Online service provider liability*: The substantial immunity for mere conduit access providers,[34] and the notice-and-take-down system for host service providers,[35] largely favor telecom intermediaries. If the service providers follow the statutory safe harbor rules, they will not be liable for damages. The system set in place arguably disfavors unauthorized postings, as service providers' incentives are to take down rather than defend the public availability of the material. But recognizing that the threat that notice-and-take-down could be abused and thus degenerate into a means to secure private injunctions, the statute also requires copyright owners who receive a counter-notice from the offending subscriber to institute suit, or see the material reposted.[36] In this respect, I suggest that the U.S. provisions are more balanced than their EU analogue, as the E-Commerce Directive provides for notice and take down, but no put back.[37]

Second, another relatively uncontroversial DMCA feature is its extension to webcasting of the compulsory license provisions of the 1995 Digital Performance Right in sound recordings.[38] That said, however, setting the compulsory license rates has proved somewhat daunting. The rates that the Copyright Arbitration Royalty Panel initially proposed[39] have been rejected by the Copyright Office,[40] following an outcry from smaller webcasters hard put to pay the fees.[41] The Copyright Office's response indicates its sensitivity to the concern that the wonderful diversity of niche audiostreaming that the web can foster should not be

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[34] 17 U.S.C. §§ 512(a), (j).
[35] *Id*. at §§ 512(c), (g), (j).
[36] *Id*. at § 512(g).
[37] *See Council Directive on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market*, Council Directive 00/31EC, 2000 O.J. (L 178) adopted on 8 June 2000 and published in the Official Journal of the European Communities on 17 July 2000; M. Yakobson, *Copyright Liability of Online Service Providers After the Adoption of the E.C. Electronic Commerce Directive: A Comparison to U.S. Law* 11:7 ENT. L. REV. 144, 146 (2000); Lucy H. Holmes, *Note and Comment, Making Waves In Statutory Safe Harbors: Reevaluating Internet Service Providers' Liability for Third-Party Content and Copyright Infringement*, 7 ROGER WILLIAMS U. L. REV. 215 (2001).
[38] *See* 17 USC § 114(d)(2).
[39] *See* http://www.copyright.gov/carp/webcasting_rates.html (CARP report filed Feb. 20, 2002).
[40] *See* In the Matter of Digital Performance Rights in Sound recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, *available at* http://www.copyright.gov/carp/webcasting-rates-order.html.
[41] *See, e.g.,* Katharine Mieszkowski, *Web Radio's Last Stand*, SALON.COM, March 26, 2002, *available at* http://www.salon.com/tech/feature/2002/03/26/web_radio/?x (last visited 7/28/2002) ("Webcasters . . . say the rate structure is far out of balance to the economics of these tiny, often one-person operations."); Mara Schwartz , *Radio Daze: A New Royalty Structure Could Silence Small-time Webcasters for Good*, NEW TIMES L.A., May 9, 2002.

financially compelled to yield to the homogenizing transmissions of the better-fed entities. At the same time, the sound recording producers and performers whose works are webcast should be compensated for this kind of public performance. This is particularly true for smaller labels and for performers who self-record: smaller webcasters may well be more likely to communicate their works than are mainstream webcasts made simultaneously with radio broadcasts. As public performance rights may become an increasingly important source of revenue, particularly relative to record sales,[42] an appropriate scale of webcasting royalty rates is crucial both to those who create and to those who communicate the recorded performances. It remains to be seen whether the revised rate the Copyright Office has now set[43] will reconcile both objectives.[44]

Third, *§ 1202 – Copyright Management Information* presents the too-often overlooked piece of the DMCA's regulation of technological measures. While some critics see digital rights management as the gateway to digital lockup,[45] not to mention Big Brother,[46] I believe that it

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[42] *See, e.g.*, Brian Garrity, *Uneasy Alliance Forms at Plug.In*, BILLBOARD, July 20, 2002, at 8 (attributing nascent relations between record labels and digital music companies to an environment in which "physical album sales are in serious decline … and the major labels are becoming increasingly willing to experiment with digital distribution in an effort to develop new revenue streams"); Hearing of the Senate Judiciary Committee, *Copyright Royalties: Where Is the Right Spot on the Dial for Webcasting?*, FED. NEWS SERVICE, May 15, 2002 (testimony of Hilary Rosen, President and CEO of the Recording Industry Association of America, in which she argued that new revenues from digital public performance rights "are more important than ever in a world where new technologies are dramatically changing the way people get and listen to music"); H.R. Rep. No. 107-274, at 12 (1995) (observing, as need for legislation securing digital performance rights in sound recordings, that "[t]rends within the music industry, as well as the telecommunications and information services industries, suggest that digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future").

[43] *See* 37 CFR part 261, at 45240 (2002).

[44] The Small Webcasters Act of 2002, passed in the House in early October but still pending in the Senate as of the time of publication, would suspend for six months the rates and terms set by the Librarian of Congress for such digital performance. Without the bill, the Librarian's rates will take effect October 20, 2002, retroactive to 1998, and potentially spur the shutting down of small webcasters. An appeal of the Librarian's decision is currently before the United States Court of Appeals for the District of Columbia. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,239 (July 8, 2002) (to be codified at 37 C.F.R. pt. 261), *appeal docketed*, No. 02-1245 (D.C. Cir. Aug. 7, 2002). *Small Webcasters Relief Act*, HR 5469, 107th Cong. (2002); 148 Cong. Rec. H7043-01 (daily ed. Oct. 7, 2002).

[45] *See, e.g.*, Julie E. Cohen, *Copyright and The Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1094 (1998) ("[D]igital rights management regimes will enable information providers to appropriate far more protection against copying and distribution than intellectual property law now provides."); Niva Elkin-Koren, *Copyrights in Cyberspace---Rights Without Laws?* 73 CHI-KENT L. REV. 1155, 1186 (1998) (suggesting that the "technological ability to restrict access to information, and information asymmetries, provide information suppliers with an inherent advantage over users," and

is worth emphasizing that sec. 1202 governs *information* identifying the *work*'s provenance and the conditions of sale or license; it covers neither access and copying controls, nor personal information regarding users.[47] Accurate licensing information should substantially reduce tracing and transaction costs. Section 1202's prohibition against knowing removal or tampering with copyright management information should, accordingly, make that information more reliable;[48] reliability in turn promotes intermediary and end user interests, as well as copyright owner interests, by facilitating e-commerce and by helping to ensure the authenticity of digitally distributed works. I persist in hoping that sec. 1202 will also afford an indirect means to advance authors' rights of attribution and integrity. After all, the author's name is one element of Copyright Management Information, and arguably, altering the work so that it no longer corresponds to its description in the copyright management information is a kind of tampering with the information.[49]

Fourth, *§1201 – Technological protection measures*: the DMCA prohibits the act of circumventing technological measures that control access to copyrighted works.[50] It also bars "trafficking" in devices primarily designed to achieve that objective.[51] Many excruciatingly

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that furthermore, "information suppliers set consumers' agenda by releasing particular informational works and withholding others").

[46] *See, e.g.*, Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2041 (2001) (cautioning that digital controls are the result of a market-driven quest for information, unconstrained by physical division of public and private spheres, and therefore "if the state wants this information, or if a third party wants to use state process to compel its production, it is harder to argue against that result if the information, presumptively relevant, is already there"); Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 185 (1997) (arguing that "technologies that monitor reading, listening, and viewing habits represent a giant leap—whether forward or backward the reader may decide—toward monitoring human thought").

[47] *See* 17 U.S.C. § 1202(c)(8) (in prescribing elements of copyright management information, Register of Copyrights "may not require the provision of any information concerning the user of a copyrighted work").

[48] Though the prohibition may be too weak, *see, e.g.,* Kelly v. Arriba Soft, 77 F. Supp. 2d 1116 (C.D. Cal. 1999) *aff'd in part and rev'd in part on other grounds*, 280 F.3d 934 (9th Cir. 2002) (finding no violation of sec. 1202 when defendant's index framed plaintiff's photographs in a way that omitted the copyright management information); Thron v. Harpercollins Publishers, 2002 WL 1733640, *1 (S.D.N.Y. July 26, 2002) (dismissing plaintiff's complaint on the grounds that purported copyright management information was found to be invalid and that plaintiff's claim furthermore lacked evidence of intentional removal of such information); Ward v. National Geographic Society, 208 F. Supp. 2d 429, 449 (S.D.N.Y. 2002) (dismissing plaintiff's DMCA claim on the grounds that evidence failed to establish that publisher knew the copyright management information published with plaintiff's photograph to be false).

[49] See Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J. L. & ARTS 137, 158-59 (1999)) (elaborating on this argument, but also pointing out its shortcomings).

[50] *See* 17 U.S.C. § 1201(a)(1)(A).

[51] *Id.* at § 1201(a)(2).

detailed and endlessly lobbied exceptions to the prohibition on circumvention follow, but their very specificity precludes resort to more open-ended, flexible exceptions such as fair use.[52] Moreover, courts have concluded that Congress intended that preclusion. Congress was persuaded that the relative security of a closed list of exceptions would encourage copyright owners to make works available over digital networks. Were the law to allow leeway for hacking, copyright owners then would lack incentive to offer more varied and less expensive forms of access to and enjoyment of copyrighted works.[53] For example, today, most popular music is made available as a package of songs on a hardcopy CD. (That is, when users haven't acquired it by other means such as Napster or its successors.) As a result, consumers often end up purchasing 10 or 12 songs, of which only one or two have any appeal. Moreover, though purchase of the CD permits unlimited listening, many purchasers may listen to their CDs only very rarely after the first hearings. One can see the attraction of marketing music as individual songs, on a pay-per-listen, or keep-it-for-a-week basis. And the cost would no longer be the $15 charged for the CD, but, say $1 for the week. But this system only works if keep-it-for-a-week doesn't turn into forever, through circumvention of the technological measure that makes the song disappear after a week.

On the other hand, not all circumvention may occur simply for chiseling or other nefarious purposes. And it is possible that, by ruling out fair use in favor of a list of specified exceptions, Congress may be foreclosing activities that seem legitimate even if unlisted. This Essay is not the occasion for detailed review and criticism of the provisions on access controls.[54] For present purposes, however, it suffices to suggest that the statute's built-in safety valve of triennial Copyright Office rulemakings on available non-infringing uses may counteract tendencies to digital lockup.[55] For the moment, despite much apprehension, little concrete evidence of a diminution of fair use and other non infringing activities has been submitted.[56]

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[52] *Id.* at §§ 1201(d)-(j).

[53] *See, e.g.*, David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680–683 (2000); Universal City Studios v. Corley, 273 F.3d 429, 443 & n13 (2d Cir. 2001) (1201's legislative history "clearly refutes" arguments for broad fair use exception: Congress "eschew[ed] the quick fix of simply exempting from the statute all circumventions for fair use") (*citing* H.R. Rep. No. 105-551, pt. 2, at 25, 36 (1998)). For a rejected minority view, see *Copyright Legislation for the Digital Millennium*, *supra* note 49 at 151-52 (contending that sec. 1201(c) nonetheless allowed room for a fair use defense to access circumvention).

[54] See Copyright Legislation for the Digital Millennium, supra, note 50, at 137-55

[55] *See* 17 U.S.C. § 1201(a)(1)(C)(D).

[56] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,555, 64,556-58 (Oct. 27, 2000) (to be codified at 37 C.F.R. § 201). *See also* Universal City Studios v. Corley, 273 F.3d 429, 459 (2d Cir. 2001) (rejecting constitutional challenge to sec. 1201(a) on ground that fair

Turning from legislation to litigation, I will not here discuss *Napster*,[57] as I addressed that decision and some of its implications in an earlier volume of this Journal.[58] Rather, I briefly consider *Kelly v. Arriba Soft*,[59] a more recent Ninth Circuit decision, which I believe strikes an encouraging balance between fostering the dissemination of information via the Internet on the one hand and securing the author's interest in the economic potential of digital distribution for her work on the other. Kelly, a photographer whose website displayed his works and offered copies via paid download, sued Arriba Soft, the developer of an Internet index of images. Arriba drew the index from a database that it had created by crawling and copying photographic images on the web. Arriba then converted the images to low-resolution "thumbnails" that it would make available in response to search requests. This index, as the first to search and retrieve by image rather than by word, offered a highly desirable innovation. But that is not all the index did. It also allowed the user to click on the thumbnail to see an enlarged, higher-resolution image. According to the Ninth Circuit, Arriba Soft did not copy the higher-quality image into its website, but rather framed its website around the image as it appeared on the originating photographer's site.[60]

In applying to digital communications the exclusive right under §

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use has not been held to be constitutionally mandated, and that in any event, "Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original."); United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (rejecting constitutional challenge to sec. 1201(b) on similar grounds).

[57] A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[58] *See* Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J. L. & ARTS 1, 22-24, 29-42 (2000).

[59] 280 F.3d 934 (9th Cir. 2002).

[60] The Ninth Circuit's conclusion that no copying had occurred may be questionable, at least under the doctrine of "RAM copying" announced in the Ninth Circuit's decision in *MAI v. Peak*, 991 F.2d 511 (9th Cir. 1993) as the framed image creates a temporary copy in the memory of the user's computer. The court's perception that no prima facie actionable *reproduction* occurred through the framing, however, should be encouraging to those who fear that the doctrine of RAM copying will bring every act of digital use within the copyright owner's exclusive right of reproduction. *See, e.g.*, Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 84 (arguing that the doctrine of RAM copying "threatens to create significant problems as more and more works are used in digital form and has the potential to give copyright owners excessive control over the use of their works"); Mark A. Lemley, *Dealing with Overlapping Copyrights On the Internet*, 22 U. DAYTON L. REV. 547, 578 (1997) (hypothesizing an "absurd result" of a literal application of the RAM copying doctrine in which "copyright owners will literally shut down the Net by enforcing the rights the courts have declared they have"); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 4, 1996, at 134 (vigorously opposing the NII White Paper proposal creating an "exclusive right to read" based on the RAM copying doctrine).

106(5) to authorize the "public display" of visual works,[61] the Ninth Circuit held that Arriba had prima facie infringed Kelly's copyrights in the photographs Arriba framed as well as those that it copied into its index. The court then held that the copying and display of the thumbnail images was fair use, because the use was primarily informational and did not substitute for purchase or commercial exploitation of the images. Put another way, the public benefit of the new and non competing informational use outweighed the copyright owner's interest in controlling copying. By contrast, the display of enlarged higher-resolution images did not constitute fair use because it competed with the photographer's market for digital downloads of his works. The higher-quality photos may have enhanced, but they were not necessary to the information-communicating function of the index; by contrast, their availability via defendant's site allowed the public to bypass plaintiff's own presentation of his photographs. Although the court did not allude to the photographer's "moral rights" interest in preserving the artistic integrity of his work,[62] the Ninth Circuit's ruling may be seen as a determination that a third party framing technique that obliterates or obscures the visual and informational context in which the author set her work is not "fair." Seen in this light, the decision may signal sensitivity to the potential prejudice to authors of undisclosed digital remanipulation of their works.

Conclusion

The Ninth Circuit's decision in *Kelly v. Arriba Soft*, I believe, appropriately balances the public interest in the vibrant development of the Internet as a tool for locating information on the one hand, with protecting authors' emerging digital markets (and perhaps her artistic integrity) on the other. One may hope that the decision heralds a happy accommodation of owner/user interests in digital communications that should prove more complementary than antagonistic.

How happy the outcome will be in fact for owners and users, or their commercial intermediaries, will in the end depend on whether these actors can keep their greed in check. Both sides can wield greed-gratifying technology to copy and distribute, or to lock up, works of authorship. But, despite some intemperate portrayals in academe and in the popular press, copyright law, both statutory and caselaw, has often

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[61] For a pre-*Kelly* discussion of the sec. 106(5) display right and its application to digital communications, *see* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies*," 2001 U. ILL. L. REV. 83.

[62] On moral rights and their protection in U.S. law, see, e.g., Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995); Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984).

intervened to temper owners' and users' more porcine inclinations. Decisions like *Campbell v. Acuff-Rose* and *Suntrust* ("The Wind Done Gone") warn copyright owners that they cannot privatize popular culture, at least not to the extent of keeping the work and the social context for which it has come to stand, free from trenchant, even raucous, criticism. Decisions like *Kelly* and *Napster* remind users and intermediaries that the technological ease of making and distributing copies does not of itself justify supplanting the author's online market opportunities. And the DMCA, whatever its many imperfections, endeavors to foster a digital environment in which enhanced security encourages the digital release of works, and limitations on service provider liability promote their broad circulation.