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Authors and Users in Copyright

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Recommended Citation
Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1 (1997).
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PART I

AUTHORS AND USERS IN COPYRIGHT[1]

by JANE C. GINSBURG[2]

It has become fashionable, among some thinkers and activists in copyright and related fields, to disparage or to deplore copyright protection. For one drawn to copyright both for its intellectual fascination and its inspiring goals of fostering creativity and protecting authorship, I am distressed to learn that I am among the defenders of a fallen faith, that authors' rights are misguided (if not pernicious) impediments to technological progress, and, worst of all, that copyright blocks freedom of thought and speech in cyberspace.[3] Digital agendas notwithstanding, some of this derogatory discourse is not new; infringers have long found eloquent, if somewhat cynical, ways to justify piracy in the name of progress (not to mention the First Amendment).[4]

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[1] This article is based on the 26th Annual Donald C. Brace Memorial Lecture, sponsored by the Copyright Society of the U.S.A., delivered on Nov. 13, 1997.

[2] Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Many friends and colleagues offered helpful suggestions throughout the evolution of this article. Thanks in particular to Tom Lombardo, Josh Masur, Henry Monaghan, Shira Perlmutter, Kate Spelman and George Spera, and to the Columbia Law School faculty symposium. Special thanks for research assistance to Jacqueline Ewenstein, Columbia Law School class of 1998.

[3] *See. e.g.*, John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994 <http://wwww.wired.com/wired/2.03/features/economy.ideas.html, visited 11/22/97> (arguing that copyright on the Internet defeats the Jeffersonian purpose of seeing that ideas are available to everyone regardless of economic station); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134, 135 (warning that the information superhighway is being turned into a "publisher dominated toll road.") [hereinafter, *The Copyright Grab*] ; Rosemary Coombe, *Left Out on the Information Highway*, 75 OR. L. REV. 237, 239 (1996) (lamenting that in the digital environment, communicational activities long encouraged by democracies with an Enlightenment faith in the progress of arts and science, are viewed as trespassing on private property.) [hereinafter, *Left Out*]

[4] *See, e.g.*, Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 157 (3rd Cir. 1984) ("A defendant, however, is not immune from liability for copyright infringement simply because the technologies are of recent origin or are being applied to innovative uses."); WGN Continental Broadcasting Company v. United Video Inc., 693 F.2d 622, 627 (7th Cir. 1982) ("The comprehensive overhaul of copyright law by the Copyright Act of

But today's copyright detractors invoke additional rationales. Where Professor Paul Goldstein declared in a 1991 Brace Lecture that copyright was about authorship,[5] we now learn that copyright is "a law of users' rights."[6] Thus recharacterized, exclusive rights for authors are to be tolerated only so far as they enhance the instruction, or perhaps the convenience, of users.[7]

Because this Brace Lecture addresses the shift in the focus of copyright rhetoric from Authors to Users, it is important to specify at the outset what I mean by "user rights." Note that quotes surround the phrase "user rights," because "rights," of course, is a loaded term. Copyright law comprehends a variety of exceptions and limitations on authors' exclusive rights that permit subsequent authors and users to copy, adapt, distribute, publicly perform and display a work of authorship without the permission

1976 was impelled by recent technological advances . . . This background suggests that Congress probably wanted the courts to interpret definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared . . . "). For denial of a First Amendment defense to copyright infringement, *see, e.g.,* Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Twin Peaks Productions Inc. v. Publications, Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993).

[5] Paul Goldstein, *Copyright*, 38 J. COPYRIGHT SOC'Y U.S.A. 109 (1991).

[6] The trend is evidenced by a proliferation of "user rights" titles in recent copyright scholarship. *See e.g.,* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT, A LAW OF USERS' RIGHTS (1991) [hereinafter, A LAW OF USERS' RIGHTS; Richard Stallman, *Reevaluating Copyright: The Public Must Prevail*, 75 OR. L. REV. 291 (1996). *See also* works cited *infra*, note 11.

[7] "User rights" challenges to other branches of intellectual property law appear to be more discretely targeted than the current broad-based attacks on copyright. For example, with respect to trademark law, some commentators are concerned that vigorous enforcement of trademark rights against parodists or others who exploit the popular linguistic and cultural associations of famous trademarks will curtail freedom of speech. *See, e.g.*, Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J. L. & ARTS 123 (1996); Alex Kozinski, *Trademarks Unplugged*, 68 NYU L. REV. 960 (1993); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in The Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Robert Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158. With respect to patent law, there are significant scholarly and popular press objections to patents on software programs, particularly business applications programs. *See, e.g.*, Pamela Samuelson, Benson *Revisited: The Case Against Patent Protection for Algorithms and Other Computer Related Inventions*, 39 EMORY L.J. 1205 (1990); Richard Morin, *Freedom to Program*, UNIX REVIEW, May 1, 1995, at 79; Michael J. Miller, *Software Patents Must Go*, PC MAGAZINE, March 15, 1994, at 79.

of the author or copyright owner.[8] Not all of these exceptions and limitations are what I would call "user rights." As I employ the term, "user rights" concern assertions by a variety of intermediaries, from some library establishments, to home electronic equipment manufacturers, to online service providers, as well as by some free spirits, who insist that the "information society" requires that end users have open and free access to consume works of authorship.[9] For some, these assertions resemble a creed; for others, the claims are more opportunistic. In either event, we are talking about claims of rights to consumptive use of the entire work, not about rights of subsequent authors to copy in part or to adapt from preexisting works in the creation of new works.

Another prior Brace Lecturer, Judge Pierre Leval, dubbed the latter kind of use "transformative use."[10] The latter kind of use enjoys a long and respected pedigree, is wholly consistent with — indeed, furthers — basic copyright principles, and is *not* the primary focus of my inquiry into "user rights." The consumptive "user rights" I wish to discuss concern

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[8] For example, authors enjoy the exclusive right to reproduce their works in copies, but copying for criticism, comment or parody will be exempted if the fair use criteria are met. *See* 17 U.S.C. sec. 107. Similarly, authors enjoy exclusive rights of public performance, but performances that fit the criteria of section 110 will benefit from specific exemptions (some justified by the nonprofit educational character of the performances, others understandable only as pork barrel concessions). *Compare* 17 U.S.C. §§ 110(1) (classroom performances) and 110(2) (distance learning) *with* 110(6) (horticultural fairs) and 110(10) (social functions of veterans' organizations).

[9] *See, e.g.*, the American Library Association Office for Information Technology Policy Library Bill of Rights (visited 11/22/97) ("Users should not be restricted or denied access for expressing or receiving constitutionally protected speech . . . Although electronic systems may include distinct property rights and security concerns, such elements may not be employed as a subterfuge to deny users' access to information.") <http://www.ala.org/otip/ebillrits.html>; the Home Recording Rights Coalition's mission statement on its homepage (visited 11/22/97): "The HRRC is a coalition of consumers, consumer groups, trade associations, retailers and consumer electronics manufacturers, dedicated to preserving your right to purchase and use home audio and video recording products for noncommercial purposes. HRRC was founded in 1981 . . and [s]ince then, the HRRC has supported to the consumer's "Right to Tape" and "The Right to Rent." <http://www.hrrc.org>; *A Cyberspace Independence Declaration*, posted on the Electronic Frontier Foundations publications page (visited 11/22/97) ("Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter. There is no matter here.") <http//eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration).

[10] Pierre N. Leval, *Fair Use or Foul*, 36 J. Copyright Soc'y U.S.A. 167 (1989); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990); the Supreme Court adopted Judge Leval's "transformative use" formulation in Campbell v. Acuff-Music Inc., 510 U.S. 569, 579 (1994).

convenience, rather than creativity; access to works of authorship, rather than incentives to produce them. Attempts by authors and copyright holders to control the dissemination or subsequent exploitation of their works are, in the light of this conception of user rights, deleterious to the commonweal in a time of rapid technological evolution.[11]

How did the current concept of consumptive user rights evolve? I believe there are a variety of causes. The main cause, of course, is technological, but technological change has been reinforced by an ideological denigration of copyright, as well as by changes in the way copyrighted works are commercialized. The last-mentioned cause, it must be acknowledged, includes overzealousness, not to say overreaching, expressed by authors (or, more accurately, copyright owners) at the prospect of being able to charge for every conceivable digital use of copyrighted works.[12]

In this lecture, I will elaborate on what I perceive to be the causes of the current user rights challenge to copyright. I will also consider some responses to those challenges. Then I will address the issue that I believe will set the alignment of authors and end-users in the digital era. That is the problem of private copying.

I.

First, some doctrinal underpinnings of the author/user debate. Copyright, we all know, is supposed to further the public interest. The "public interest" comprises the goals and aspirations of authors *and* users, of publishers *and* educators, and so forth. One *specious* step in the author/user debate is to identify the author *in opposition to* the public, so that the "public interest" can be redefined as "users' interests." That rhetorical move then advances the proposition that if an author's exercise of copyright hinders the public's enjoyment of works of authorship, then that exercise is unjustified. But the source of our copyright principles, the U.S.Constitution, provides no solace for that fallacy. The Constitution's copyright clause grants Congress the power "to promote the progress of Science . . . *by securing to Authors . . . for limited Times the exclusive Right to their Writings . . .*" (emphasis supplied).[13] The Constitution does not set copyright in tension with the public interest; on the contrary, it equates the public interest with the guarantee of authors' exclusive rights; thus en-

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[11] *See, e.g.*, James Boyle, *Overregulating the Internet*, Wash. Times, Nov. 14, 1995 at A17, Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway*, 13 Cardozo Arts & Ent. L.J. 345 (1995); *See also*, Diane Zimmerman, *Copyright in Cyberspace: Don't Throw Out the Public Interest with the Bath Water*, 1994 Ann. Surv. Am. L. 403.

[12] *See, e.g.*, Eugene Volokh, *Cheap Speech*, 104 Yale L. J. 1805 (1995); *The Copyright Grab*, *supra* note 3.

[13] U.S. Const., art. I, § 8, cl. 8.

couraged, authors in turn enrich society and further knowledge by creating works that promote learning, and which in time will join the common. Congress advances the general well being when it protects authors' rights to determine whether, when and how to disclose their works to the public and to exploit them.[14]

This does not mean that authors' rights under copyright are absolute. The copyright law well knows that "no man is an island,"[15] no work stands alone. Each work owes much to its precedessors, and each in turn informs its successors.[16] Hence, authors are not copyright owners of their "ideas" (as opposed to the "expression" of their ideas). As Learned Hand and others have emphasized, ideas and broader plot outlines are "given up to the public" so that subsequent authors may draw from their predecessors' innovations and insights.[17] And the fair use doctrine helps ensure that subsequent authors may build upon not only their predecessors' ideas, but, in appropriate circumstances, reasonable amounts of their expressions as well. The fair use doctrine (in this classic guise) and the idea/expression dichotomy thus relieve most of the tension that exclusive rights for first authors may cause when confronted with the creative demands of second authors. These doctrines do not traditionally address tensions between authors and consumptive users. The response of copyright doctrine to new technologies, by contrast, has in part concerned consumptive use.

New technologies have always strained, or perhaps propelled, copyright law; indeed, copyright scholars of all stripes are fond of recalling that copyright itself was a response to the printing press.[18] Technological advances have occurred both with respect to the means of disseminating works of authorship, and with respect to their creation. In the latter category, one may place photography, cinema, sound recording, and computer programs. In the former, in addition to the printing press, one may range cable and satellite transmissions, video tape recorders, and digital networks. U.S. copyright law has tended to follow two different patterns, depending on whether the technology advanced the creation, or the dissemination, of works of authorship. When technology opens up new avenues of creation, copyright law has tended to absorb these, and to re-

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14 *See, e.g.*, FEDERALIST NO. 43 (Madison) ("The public good fully coincides in both cases [copyright and patent] with the claims of individuals.")

15 JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS NO. XVII (John Carey, ed. Oxford University Press 1990) at 344.

16 For a discussion of authors' debt to their predecessors, *see, e.g.,* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

17 *See, e.g.,* Nichols v. Universal Pictures, 45 F.2d 119 (2d Cir. 1930) (L. Hand, J.).

18 *See, e.g.,* A LAW OF USERS' RIGHTS at 19-20; PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY, THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 39-41 (1994) [hereinafter, COPYRIGHT'S HIGHWAY].

quire new creators to obtain the permission of authors whose prior works the new creators would adapt to the new medium. Hence, a motion picture version of a novel or a sound recording of a song came within the exclusive rights of the creator of the "underlying work."[19] By contrast (and perhaps counter-intuitively), new means of dissemination have often escaped the copyright owner's control, as courts or legislatures have been persuaded to exempt, or limit liability in favor of the exploiters of new ways to bring works to consumers. Hence, piano rolls were not "copies;" cable retransmissions were not "performances;" time-shifting of free broadcast television programs was fair use.[20] So the beneficiaries of new technology may be prior authors, when their claims meet those of other authors; but disseminators, when the author's claim meets that of consumptive access. We can thus see that the seeds of the concept of end user rights have in fact long been germinating.

II.

Why do end user rights now dominate copyright rhetoric? I will offer four suggestions. First, end-user demands differ from the claims of creative or transformative users. Creative users do not disparage authors' rights, though they may initially chafe at them. Creators have an interest in the copyright system that consumers do not (or, at least, do not acknowledge in the short term). As much as a new author may prefer to create a derivative work free from editorial or financial tribute to her predecessor, she also recognizes (or comes to recognize) that copyright will ultimately benefit her too. New creators end up being suborned by the principle of exclusive rights, because they produce works that will be the objects of exclusive rights, too. This is not true of end users (or disseminators); the copyright balance for them is not tribute now for exclusive rights later, but payment or restraints on access now for the prospect of more works to consume later. The benefits of "later" in this instance

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[19] *See,* Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911) (film version of novel "Ben Hur"); 1909 Copyright Act, 17 U.S.C. § 1 (e) (bringing mechanical reproduction of musical compositions within the scope of copyright).

[20] *See,* White-Smith Music Publishing v. Apollo Co., 209 U. S. 1 (1908) (pianola rolls); Fortnightly Corp. v. United Artists Television, Inc. 392 U.S. 390 (1968) (cable retransmissions); TelePrompTer Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974) (cable retransmissions); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (video tape recorders). *See generally,* COPYRIGHT'S HIGHWAY, *supra* note 18, at 65-67, 89-90, 125, 149-58 (reviewing the cases).

may seem too attenuated to tolerate perceived incursions on "rights" to access, copy and disseminate works of authorship.[21]

These "rights" arise from the vastly increased capacity that technology has given end users to receive, store, copy, and transmit works of authorship. If I have the means to copy as a matter of fact, why can't I use them, as a matter of law? What about my constitutional right to tape *Dallas* or *Seinfeld*? My human right to access to culture, including popular culture? What's wrong with scanning a published photograph and sharing it with my closest 500 friends on my listserve, or with anyone who accesses my website? Copyright owners make too much money anyway.

Second, as technology has promoted the pragmatic claims of consumptive users, literary criticism has made a distinctive (not to say destructive) contribution to copyright theory. Post-modernism has moved from English and Comparative Literature departments to the halls, or at least the journals, of law schools, bringing with it a complementary challenge to copyright. The "death of the author" announced in literary theory has produced a syllogism in copyright rhetoric: Copyright is a consequence of the romantic conception of authorship; romantic authorship is dead; copyright is (or should be) dead, too.[22] In post modernism, authors are tyrants, imposing their meanings on texts: Michel Foucault pronounced that the author does not precede the work; he is a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which

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21 I owe this observation to Prof. Pierre Sirinelli, Dean of the Faculty of Law, Université de Paris-Sud, who offered a similar analysis in the context of digital-era challenges to French copyright law.

22 *See, e.g.,* David Lange, *At Play in the Field of Words: Copyright and Construction of Authorship in the Post-Literate Millennium*, 55 L. & CONTEMP. PROBS. 139 (1992) (arguing that if intellectual property survives, it will no longer lend itself to a romantic construction of authorship for the purposes of suppressing speech) [hereinafter, *Authorship in the Post-Literate Millennium*]. Some critics take the somewhat less radical position that copyright need not die, but that it must be revised to reflect the reality of a pluralistic authorship process. *See, e.g,* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992) (arguing that the notion of romantic authorship on which copyright law is based fails to reflect the reality of contemporary polyvocal writing) [hereinafter, *On the Author Effect*]. *See also* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 307 n.97 (1996) (listing - but disagreeing with - several copyright and literature scholars who "assert that a misguided natural rights approach, together with vestiges of nineteenth-century Romanticism, has pushed copyright in the direction of a full common law property right that is immune from claims of public access.").

one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction.[23]

If the author is dead, or must be dethroned, then the reader not only lives, but reigns supreme. Readers give meaning to the texts they peruse; reading itself becomes a creative act. Reception becomes regeneration, and you can see how the distinction between consumptive and transformative use can be blurred. That is, if consumptive use presented rather weak claims, while transformative use rose in the fair use pantheon to become the strongest challenger to authors' exclusive rights, then, let's enhance user rights by stressing the transformative nature of consumption.

In fairness to what I'll dub techno-postmodernism, copyright and authorship critics also stress new kinds of authorship. "The" author may be dead because *individual* creativity is discredited; the new golden calf is not a single idol but a herd of glistening baby bovines. Authorship has become (or is becoming) "polyvocal . . . increasingly collective, corporate and collaborative."[24] Hypertext and the Internet give concrete effect to the theory of the reader as creator, for all readers can remanipulate the text, and none can impose unilateral significance.[25] It might follow that none can claim exclusive rights under copyright, either.[26]

Recent times have not only witnessed the death of the author, they have also marked the death of the benevolent publisher. And this brings me to the third cause for the rise of consumptive user rights. In popular perception, publishing was once a profession in which editors nurtured authors, and executives took chances on books for love of literature and quest for quality.[27] Today, blockbuster-mad publishers are jettisoning "midlist" writers, base book acquisitions on talkshow topics, and despoil authors through over-reaching all-rights arrangements. Publishing compa-

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[23] *Authorship in the Post-Literate Millennium*, *supra* note 22, at 143 *citing* Michel Foucault, *What is the Author*? (Donald F. Bouchard & Sherry Simon, trans.) in ROBERT C. DAVIS & RONALD SCHLEIFER, CONTEMPORARY LITERARY CRITICISM: LITERARY AND CULTURAL STUDIES 274 (Longman, 1989).

[24] *On the Author Effect, supra* note 22, *at* 302.

[25] *See, e.g.*, Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992).

[26] But not necessarily so, see discussion *infra* of copyright ownership and the amazon.com serial novella.

[27] *See, e.g.*, *The Middling (and Unloved) in Publishing Land*, N.Y. TIMES, Aug 18., 1997, at D1, ("Cutbacks in the number of books are a sobering reality for authors who began their careers in the 1960's still believing that there was a social contract with publishers who would nurture them through lean times until they bloomed into best-selling authors . . . William Faulkner and John Irving had modest sales at the starts of their careers . . ."). For the same observation in the trade press, *see* PUBLISHERS WEEKLY, June 5, 1995 at 38.

nies have been engulfed by media conglomerates.[28] In a word, Maxwell Perkins has become Gordon Gekko. When authors are divested of their copyrights, or are the mercenaries of Rupert Murdoch and the like, copyright loses much of its moral lustre. Then suppose that Hollywood, Inc. proposes to bill you, the user, for every millisecond online; and to encrypt you out of any ability to copy and share with friends. No surprise if, in the popular (i.e., end user) imagination, Jolly Roger begins to look like Robin Hood.

There is one more contribution to the shift in copyright rhetoric from authors to users to which I would like to allude. It concerns an evolution in copyright lawyers and academics; Hugh Hansen provocatively described it in his "Unorthodox Analysis" of international copyright. My context is different, but Hugh's observations still apply. In the past, Hugh notes, the copyright bar and professorate were a small cadre of initiates (Hugh calls them "secular priests"), who practiced in traditional industries, believed in the entitlement of authors to copyright, and felt an emotional bond with creators. Copyright lawyers of that day (among whom I include myself) adapted George Bernard Shaw's acerbic remark about teaching[29]: "If you can't *be* an author, help one." Today's copyright lawyers and academics, whom Hugh calls "Agnostics and Atheists," often come to copyright from high tech backgrounds or affinities, and see a rights-owning landscape populated more by moguls than by creators. These advocates identify with users, and "are imbued with the culture of the public domain."[30]

III.

If these are some causes of the denigration of copyright and the elevation of user rights, are there any cures? I would like to evoke two responses. First, regarding authorship in the digital era, I believe that the reports of the death of the author have been greatly exagerrated. I have no doubt that digital media promote new kinds of authorship, from "hyperfiction," to chain novellas, to kinetic graphics. Nor is it necessary to brand these endeavors as solipsitic and silly, as did a New York Times book review editor recently.[31] "Polyvocal" works are an interesting new

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28 *See, e.g., The Corporatization of Publishing: Books are Becoming like Everything Else the Mass Media Turn To*, THE NATION, June 2, 1996, at 29; *The Literary-Industrial Complex: How the Corporate Mentality Has Undermined the Profession of Publishing*, THE NEW REPUBLIC, June 8, 1997.

29 "He who can, does. He who cannot, teaches." GEORGE BERNARD SHAW, MAN AND SUPERMAN, *Maxims for Revolutionists* (1903), in BERNARD SHAW, FOUR PLAYS 485 (Washington Square ed. 1965).

30 Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 VAND. J. TRANSNAT'L L. 579, 583-84 (1996).

31 Michiko Kakutani, *Never-Ending Saga*, N.Y. TIMES SUNDAY MAGAZINE, Sept. 28, 1997 at 40, 41.

form, and who is to say that they will produce more junk than single-authored works?

Moreover, it is worth noting that the promoters of polyvocal works need not, and apparently have not, eschewed copyright. For example, the recent serial novella organized by amazon.com invited participants to continue a short story begun by John Updike. Forty-four days later, Updike wrote the ending, the middles having been posted daily on amazon.com's website as amazon.com's editorial committee selected the contest winner from among each day's entries. The terms and conditions of participation in this polyvocal serial required contestants to assign all intellectual property rights in their submissions to amazon.com; the winners signed a contract in which they confirmed their assignments. Updike also assigned his copyright interest to amazon.com.[32]

But my point is not only that polyvocalism need not be inimical to copyright. It is also that monovocal works will persist, whether because we still value individual genius, or because not all audiences will want to be participatory all the time. Recombinant and instant authorship may or may not be passing fancies; those whom I will dare to call "real" authors will still be with us, at least so long as the writing and other creative trades furnish adequate remuneration. As my colleague Jeremy Waldron put it, the author may be dead, but she still responds to economic incentives.

The care and feeding of authors in the digital era furnishes the matter of the second response. Some of the same factors that cause copyright to be derided may also come to the aid of individual authors. The technology that brings works directly into users' homes no longer requires traditional publishing's infrastructure of intermediaries. Maybe every reader is not truly an author, but every author can be a publisher. At least, every author can make her work directly available to consumers via the Internet. (It is another matter to be able to attract consumer interest to the author's work.) And, to an increasing extent, every author can set the financial and other terms and conditions for access to and copying of her work, by electronic copyright management information, and/or by copyright management collectives, such as the Author's Registry.[33] Hence, even assuming that publishers have become overreaching both in claiming all rights from authors, and in imposing onerous terms on consumers, publishers — by

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[32] Interview with Lisa Lewis, marketing, amazon.com, October 15, 1997.

Cf. Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1469-74 (1995)(posing hypothetical of author who initiates a mystery story on her website and invites participants to continue the story, and raising questions of copyright ownership in the result; life imitates law review article).

[33] www.webcom.com/registry/ (visited 11/22/97).

whom I mean the gamut of traditional dissemination intermediaries — no longer enjoy a de facto monopoly on the public distribution of works of authorship.

IV.

But will authors in fact be paid if they self-publish over the Internet? Will they be able to preserve the integrity of their work, and the accuracy of the attribution of authorship? Or will their works be caught in a polyvocal vortex, in which authorship is denied or the document distorted, and payment never made? This brings me to the issue I identified as the watershead problem for digital copyright. I propose to test the respective places of authors' and users' rights in the emerging cyber-order by examining the question of private copying. How should private copying be analyzed in the digital environment?

Unlike many continental countries' laws, the U.S. Copyright Act does not contain a general exemption for private copying.[34] There is a specific exemption/levy statutory scheme for digital audio equipment and media, which includes an exemption for private copying of analog sound recordings.[35] As a general rule, however, we have no formal doctrine of free private reproduction.

The Supreme Court has said that temporary private reproductions ("time shifting") of free broadcast television programs are fair use, but the court avoided deciding the fate of permanent private copies, or of copies made from paid transmissions.[36] In the analog world, private copying can be understood as non infringing because it is *de minimis*,[37] or as technically infringing, but too expensive and complicated to prohibit. The latter is the "market failure" justification for private copying; the transaction costs of enforcement exceed the value of any remedies or licenses.[38]

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[34] *See, e.g.,* Art. L122-5, "Code de la propriété intellectuelle," J.O. 3 Jul. 1992, as last amended by Laws Nos. 94-361 of May 10, 1994, and 95-4 of Jan. 3, 1995 (France), *translated in* Industrial Property and Copyright: Monthly Review of the World Intellectual Property Organization (hereinafter, IPC WIPO) (September 1995); Art. 53 "Urheberrechtsgesetz," BGGl I pg. 1,273, as last amended by the law of July 19, 1996 (Germany), *translated in* IPC WIPO (April 1997); Art 31 "Ley de propiedad intelectual," B.O. 17 Nov. 1987, as last amended by law No. 43/1884 of Dec. 30, 1994 (Spain), *translated in* IPC WIPO (October 1995).

[35] *See* 17 U.S.C. §§ 1001 et seq.

[36] *Sony Corp. of America*, 464 U.S. 417.

[37] *See, e.g.*, Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. Rev. 1449, 1457-58 (1997).

[38] *See, e.g.,* Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600 (1982).

Under that approach, private copying is not so much a "right" as an activity tolerated in the absence of effective enforcement.

There is an additional rationale for private copying, partially implicit in the *Sony* justification of fair use time-shifting. Where one has lawful access to the work, there may be an implied right to enjoy the work in a manner convenient to the consumer. The Supreme Court in *Sony* rejected the argument that copying for convenience could never be fair use.[39] One could therefore contend that one who buys a video for home is entitled to make an extra copy for the vacation house. The owner of the video is not making extra copies for friends; he is simply "place shifting" his enjoyment of the work.[40] The convenience rationale may be a manifestation of a broader principle of user autonomy. According to this principle, end-users should enjoy works of authorship free of the author's surveillance.

How do these rationales apply in the digital world? Perhaps I should divide the digital world into online access, and free-standing digital copies, such as CD ROMs. With respect to online access, the transaction costs justification should no longer apply, since individual billing and tracking are fully possible, and indeed have long been in place in private networks, such as LEXIS and Westlaw. Moreover, it is not clear that *any* private copying justification applies to unauthorized *access* to a work of authorship, as opposed to subsequent copying from a lawfully-acquired copy. That is, I may or may not enjoy a private copying privilege to make additional copies of a document I download from the Net; that privilege should not extend to hacking into a site to acquire the work for free when the author offered it for a price.

What about free-standing digital copies, such as a CD ROM, or the document I downloaded from the Net? Here, the transaction costs problem may return, since the document is no longer connected to the online meter. One can, however, imagine free-standing digital documents whose perusal requires registration through a modem, in effect reconnecting the user to the counter. This, in fact, is the principle on which the forthcoming Divx pay-per-view video disk system would work.[41]

The convenience, or place-shifting, rationale might continue to apply to free-standing copies. For example, suppose I copy the work to a floppy disk to take to another computer, or I e-mail the work to myself to access on another computer. Assuming my initial copy was lawfully acquired, these further copies would come within the scope of my reasonable enjoyment of the work, especially since they are the functional equivalent of taking the original disk with me wherever I go. I would enjoy the latter

[39] *Sony Corp. of America*, 464 U.S. at 448 n.31 and 445 n.40.

[40] Thanks to Jacqueline Ewenstein for coining the term "place shifting."

[41] *See*, Joel Brinkley, *It's a Made for Television Controversy*, N.Y. TIMES, Oct. 15, 1997 at D1, col 2.

prerogative by virtue of the first sale doctrine, under which the copyright owner's rights in the physical copy stop with the sale of that copy; thereafter, my rights as a chattel owner permit me to dispose of my copy as I will.[42] The first sale doctrine, however, does not entitle me to make further copies. Nonetheless, where my copying substitutes not for a sale of the work, but for carrying the original copy around with me, then so long as I do not make further copies for other people's enjoyment,[43] my "place-shifting" should not be infringing because it does not adversely affect the potential market for the work.

Or does it? The future "celestial jukebox" is designed to make it possible to access and enjoy works at anytime, from any place. There will be no need to copy to floppies or send files to myself if I can always access the work from the great database in the sky. By making copies for place shifting, I save myself the access fee of re-requesting the work from the celestial jukebox. If that fee is less than the cost (in money or time) of making my own copies, then private copying for convenience loses its appeal. But suppose it is cheaper to make my own copies. Suppose also that the author offered the work under two pricing policies: the first, higher, price included authorization to make a certain number of additional copies. The second, lower, price withheld authorization to make more copies, and directed the purchaser to the online source for additional access, for a further fee.[44] Finally, suppose that I elect the lower price, but then violate the terms of the sale by making further copies. Does/should a fair use concept of user autonomy nonetheless permit me to make the copies?

V.

Fair use analysis, whether applied to transformative or consumptive uses, tends to concentrate on the potential market impact of the copying. This approach is consistent with the international copyright norm of the Berne Convention, which permits member countries to create exceptions to the reproduction right, "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[45] If there is a market for convenience copying, or, more generally, if there is

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[42] *See,* 17 U.S.C. §§ 106(3), 109(a).

[43] Outside of the context of private performances of the work, in which the copyright law entitles users to engage, see 17 U.S.C. § 106(4).

[44] *Cf.* DVD ($25 for unlimited playback) vs. Divx ($5 for one playback; subsequent playbacks for a fee). *See,* N.Y. TIMES, Oct. 15, 1997, *supra* note 41.

[45] Berne Convention for the Protection of Literary and Artistic Works, art. 9.2. The WIPO Copyright Treaty [WCT], concluded in December 1996 and awaiting ratification, generalizes art. 9.2 to all rights under copyright, not just the reproduction right *See,* WCT, art. 10.

a market for private copying, then unauthorized private copying would conflict with both U.S. fair use policy and international obligations. Note also that as more and more works are marketed directly to end users, private copying should no longer be characterized as "certain special cases": it will become the leading mode of exploitation.

Admittedly, the market impairment approach is vulnerable to manipulation. First, there is the increasingly-voiced criticism that the analysis is circular.[46] That is, the analysis reduces to the proposition that if the use can be licensed, then its unlicensed use is not fair. That formulation would allow copyright owners to define fair use, and that result, one could contend, makes no sense because fair use is supposed to be a *limitation* on copyright, not a marketing option for copyright owners. I will return to the question whether that result is in fact nonsensical.

Another way of manipulating the market impairment analysis is to declare that there is *no market* for some kinds of uses. This is a normative, not a descriptive, market definition. The Supreme Court adopted this approach in placing parody outside the realm of copyright licensing.[47] This did not mean that the parody could not itself become the object of licensing, but that the derivative work rights of the copyright owner of the parodied work could not extend to parodies. The "no market" conclusion, however, best applies to transformative and critical uses that strongly implicate the transforming author's first amendment rights.

Arguably, if one subscribes to the post-modernist critique that to receive works is inherently to transform them, one could contend that the "no market" characterization should also apply to consumptive copying.[48] Whatever its rhetorical appeal, however, this move seems entirely too self-serving. Moreover, the Supreme Court has stressed that even transformative uses may not be fair if they deleteriously affect the potential market for other derivative versions of the original work. Thus, having held that 2 Live Crew's version of "Oh Pretty Woman," could be considered a parody, the Supreme Court nonetheless remanded to the Sixth Circuit to determine if the defendants had copied so much of the work as to undermine

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[46] *See, e.g.*, American Geophysical v. Texaco, 60 F.3d 913, 937 (2nd Cir. 1994) (Jacobs, J., dissenting); Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1407-8 (6th Cir. 1996) (Ryan, J. dissenting); Amy Groves, *Princeton University Press v. Michigan Document Services, Inc.: The Sixth Circuit Frustrates the Constitutional Purpose of Copyright and the Fair Use Doctrine*, 31 GA. L. REV. 325 (1996).

[47] *Campbell*, 510 U.S. at 592.

[48] *See, e.g, Left Out, supra* note 3, at 240.("Theses of media imperialism invariably ignore the creative work people do in reception of media work, and the transformation of meaning effected in practices of interpretive recording and reworking of commodified texts.")

the prospects of non parody derivative works (in that case, rap versions) that the copyright owner might license.[49]

VI.

Returning to the question whether it is fundamentally incoherent to permit the copyright owner to define fair use, I suggest that where the copying is non transformative (post-modernism notwithstanding), the copyright owner should be permitted to price discriminate around whatever private copying privileges may remain in the digital environment. As we have seen, the primary justification for exempting private copying as fair use has been transaction costs, but these are much attenuated in the digital world. Professor Robert Merges has pointed out, however, that one may view fair use not only as a concession to market failure, but also as a subsidy from the copyright owner in favor of uses that benefit the public.[50] In effect, the copyright owner acknowledges that she may not receive full value for all exploitations of the work; fair use is a *de jure* discount enjoyed by some classes of users for some kinds of copying. Fair use thus becomes a kind of "redistribution" of the value of the work to some users;[51] even so, that does not mean that *all* users need apply.

Moreover, it is not clear *why* authors and copyright owners should redistribute income to "fair" users. After all, where is this redistribution coming from? Most likely, from those who purchase copyrighted works at full price, that is at a price that builds in extra profit to compensate for the profits lost to fair users. This is also true for transformative fair uses, but perhaps we are comfortable saying society as a whole pays a hidden tax for critical creativity. Do we feel the same way about consumptive users? Lord Macaulay once branded copyright a "tax on readers for the benefit of authors."[52] Is consumptive use a "tax on readers for the benefit of"

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49 *Campbell*, 510 U.S. at 582, 595. Justice Souter went on to suggest, in n. 10, that a transformative work whose economic impact on plaintiff's work is too prejudicial to qualify as a fair use might nonetheless continue to be disseminated, subject to payment of a court-fashioned license fee. *Id.* at 578, n. 10.

50 Robert Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 Berkeley Tech. L.J., 115, 134-35 (1997). *See also* Jane C. Ginsburg, *Libraries Without Walls? Speculations on Literary Property in the Library of the Future*, 42 Representations 53, 63-64 (1993).

51 *See*, Merges, *supra* note 50, at 134-35.

52 Thomas B. Macaulay, Speech before the House of Commons (Feb. 5, 1841) in VIII The Works of Lord Macaulay 195, 201 (Trevelyan, ed. 1879). That same day, however, Lord Macaulay also declared, "The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books: we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright." Speech before the House of

other readers? If copyright owners could build the redistribution into the pricing scheme, then users would pay only for the use they actually make, rather than paying for other users' private copies. So perhaps the idea that authors could price themselves out of at least some user-based exceptions to copyright is more appealing than it first appeared.

But does the idea imply that authors must make the work available in copiable form at *some* price? Suppose the author decided to make the work available only in digital pay-per-view, under terms and conditions (and perhaps copy-protect codes as well) that prohibited retaining a copy of the transmitted work. Does the concept of user rights entitle the recipient nonetheless to make a copy to retain? In the analog world, we do not oblige authors and copyright owners to disseminate works in readily copiable formats. For example, a motion picture producer has no duty to release home video versions of the film, or to televise it so that viewers may hometape it.[53]

But, even if, in the analog world, a work's availability does not imply a consumer's right to copy, should the result in the digital world be different? The nature of digital copies might counsel a negative response. Digital copies are uniquely replicable: not only can one copy be fruitful and multiply, but its quality, copy after copy, remains as good as the original. This feature illustrates the potential anomaly of recognizing a private copying exemption in the digital world: not only can the author now charge for copying, but individual copies can no longer be considered *de minimis.* Private copying in perfect copies does substitute for sales of the work. One might respond that it suffices to set the price to cover the copy retained from the pay-per-view transmission. But that obliges those who seek only pay-per-view to pay for the others' retention; this in turn would encourage everyone to make retention copies. And what then becomes of those copies? Their proclivity to turn into more copies, especially more copies that can be further transmitted, poses a substantial threat to the author's management of and remuneration for her work. In other words, "private" copies may not remain "private" for long.

Commons (Feb. 5, 1841, *reprinted in* MACAULAY, PROSE AND POETRY 733-34 (G. Young ed. 1952).

[53] Note that the Supreme Court in *Sony* did not purport to address the fair use status of copies that VTR users would *retain*; the court's analysis concerned only deferred access to the "freely broadcast" work. Nor has a work's accessibility in other contexts carried with it a right to copy. For example, J.D. Salinger's uninvited biographer had access to Salinger's unpublished letters that recipients had deposited in libraries. Salinger did not authorize copying from the letters, and the Second Circuit held that, despite the letters' availability for public perusal, the incorporation of extensive quotations was not fair use. Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).

VII.

As a matter of legal analysis, then, justifications for consumptive private copying in the digital world do not abound. But reality intervenes: wander around the Web and you will find a multitude of sites that assemble other authors' text, images, and sometimes sounds. This is particularly true of the so-called "fan-zine" genre of webpage. Some of these sites carry disclaimers to the effect that all material reproduced on the site came from publicly disclosed sources, and therefore is freely available for inclusion in the website.[54] (This conflation of public availability with the public domain is, unfortunately, not uncommon on the Web.) Others state that all material has been used without authorization, and that if any copyright owners have a problem with that, they should notify the website operator, and he will remove the offending work.[55] In other words, "if it's out there . . ." it can be on my webpage, and the burden is not on me to seek permission; it's on the author to find me and object. From a legal perspective, this assertion is exactly backwards.

But it may not matter. Recall the *Sony* decision. The purported legal basis of the majority opinion, the analysis of the fair use economic harm

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[54] *See, e.g.*, http://www.intersurf.com/~beam/temple/temple.html ("The graphics . . . in this page were obtained from public sources on the Internet, therefore this page is given back to the public domain from which it came.") (visited 12/3/97); http://www.cruzng.com/marilyn/marilyn.htm ("all the images contained in this tribute are believed to be in the public domain, if there are any images where this is not the case please notify me and they will be promptly removed.") (visited 12/1/97); http://mozart.lib.uchicago.edu/marilyn/about.html (" . . . I have scanned and edited [the images] all myself . . .) (visited 12/1/97). *See also*, http://sd02.znet.com/bogart/ ("[O]n April 1, 1996, I removed from this site all images and sound clips from the 50 Bogart movies owned by Turner Broadcasting System and its subsidiary, Turner Entertainment Company (TEC), at the request of Turner's attorneys. After numerous attempts to secure permission to restore the materials to the site failed, on January 19, 1997, I decided to put them back up. Why? It is now my opinion that their inclusion in this site falls within the *Fair Use statute* of the U.S. Copyright Act.")(emphasis in original)(visited 12/2/97).

[55] *See, e.g.*, http://www.quarsarcom.com/lady/schiffer/schiffer.html, a webpage featuring pictures of super model Claudia Schiffer, offering the disclaimer: "All images have been acquired through the Internet, I assume no responsibility for their origin. If one of your images are on our homepages, please feel free to Email details and images will be removed if deemed necessary." (visited 11/22/97); http:/www.jimsplace.com/jim/dm.htm, a gallery of Demi Moore photographs with the disclaimer: "All pictures were found on the internet or usenet and are presented for your viewing pleasure. If any are a copyright violation would the copyright holder please inform me at jk@thewebdepot.com and I will remove them immediately." (visited 11/23/97).

factor, was most unpersuasive. The question should not have been whether the video tape recorder [VTR] harmed *old* markets for the works; it should have been whether the device created a new market for reproductions of the works, a new market that normally would come within the copyright owners' control. The majority's deficient legal analysis barely masked what Alan Latman believed was the true holding of *Sony*: there are millions of VTRs in daily use in American households; the Supreme Court just cannot hold that millions of Americans are committing copyright infringement every day.[56] In other words, if everybody's doing it, it must be fair use.

Is this really true? Does it have to be? Consider speeding: millions of Americans every day exceed the speed limit. Often they travel in packs: if everyone is going 70 in a 55mph zone, there is apparent safety in numbers. But that doesn't make it legal. Widespread disregard of speed limits does not bar the highway patrol from enforcing them. The driver takes the risk that someday a highway patrol will pull him over. If that happens, it is no defense that everyone else was speeding, too. Nor is it a defense that, since it is legal to sell cars that are capable of going 120mph, it is implicitly lawful to take advantage of the car's capabilities.

Perhaps, as a society we more readily concede the State's ability to impose highway safety rules than we admit the principle that copyright is a property right, entitling authors to control and be paid for the exploitation of their works. When it is so easy to copy, respecting copyright becomes inconvenient. We have come to expect not only a right of access to works of authorship, but to access in the most convenient form. The right to know becomes the right to have, and free speech means not only what Roger Zissu calls "freedom to make your *own* speech,"[57] but freedom to acquire other people's speech for free. Hence, while "everybody does it" may not insulate the speeder, it can exculpate the private copier.

VIII.

One solution may be to make licensed copying more convenient. Authors can increase users' awareness that works of authorship *are* protected

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[56] *Accord*, Douglas Baird, *Changing Technology and Unchanging Doctrine: Sony Corporation v. Universal Studios Inc.*, 1984 S.Ct. Rev. 237.

[57] Oral Argument for Readers Digest Assoc., Inc, Plaintiff-Appellee Cross Appellant, Harper & Row, Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d. Cir. 1983), September 14, 1983; Record at 28, lines 19-22. ("The freedom of speech which we cherish is the freedom to make our own speech but not the freedom merely to copy someone else's and the question is doesn't that restrict the press, you ask?")

by copyright,[58] and can facilitate the acquisition of permission to copy. New technology assists this effort: works disseminated in digital form can carry copyright management information, alerting the user to the work's protected status, disclosing terms and conditions of use, and directing the user (possibly by hyperlink) to the author, publisher, or licensing collective to obtain permission.[59] (I recognize, however, that this solution will not apply to works that users scan from analog to digital format.) As a practical matter, if it is cumbersome and complicated for users to obtain permission, they will give up trying. Authors will have to make it as easy to copy *with* a license, as without.

Alternatively, if the justification for private copying is "everybody does it," then another solution is to make it harder for everybody to do it. This implies, first, that works for which the author seeks payment, and whose subsequent copying the author wishes to limit, will not be made available over open networks. Second, these works will not be disseminated without technological controls against unauthorized access or further copying.[60]

This in turn may imply that authors who make their works available in easily copiable free-standing digital format or on the Internet, and do not provide click-on licenses or impose copy controls (or no controls beyond initial access and downloading to disk), should be presumed to have consented to the unrestricted non profit "private" copying of their works. (This presumption does *not* apply to hardcopy media, even though this media is susceptible to conversion to digital media by scanning.) I might call this kind of private use "non commercial," but that would be misleading as well. While the websites that recirculate the copied material may not charge for access or copying, the author's later ability to license that material for commercial gain may well be impaired. Why buy a license

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[58] Although some user rights advocates find this kind of information pernicious. See, e.g., A LAW OF USERS' RIGHTS, *supra* note 5, at 182-186. *See also, The Copyright Grab, supra* note 3, at 191; Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 299-300 (criticizing National Information Infrastructure White Paper proposal to educate school children about Copyright law); Mark A. Lemley, *Copyright Owners' Rights and Users' Privileges on the Internet: Dealing with Overlapping Copyrights on the Internet*, 22 DAYTON L. REV. 547, 577 n.185 (1997) (agreeing with Jaszi that the NII proposal "smacks . . . of a program of mind control.")

[59] Article 12 of the WIPO Copyright Treaty would oblige member states to protect copyright management information that authors and copyright owners include with their works. Legislation is now pending in Congress to implement this requirement. *See, e.g.*, H.R. 2281, 105th Cong., 1st sess. (1997).

[60] Article 11 of the WIPO Copyright Treaty obliges member countries to protect against the circumvention of technological measures used by authors to protect their copyrights. Legislation is now pending in Congress to implement anti-circumvention protection, *see, e.g.*, H.R. 2281, *supra,* note 59.

from the author when you can download it from a third party website for free?

Nonetheless, one can imagine that many authors would be willing to make their works available in digital format for non profit "private" use, knowing that their works will be recopied and recirculated. These authors will be happy with the exposure multiple copying gives them. They may also be able to sell advertising space alongside their works. Or they may employ free copying networks as a teaser for works that they sell in traditional hardcopies or over paying networks.

In conclusion, I believe there is no "right" to consumptive use copying, but there is, and will be, a great tolerance for unlicensed "private" copying. In the past, transaction costs and relatively modest economic harm underlay that tolerance. Today and tomorrow, those justifications do not apply, or do not suffice. But there will be good reason for many authors to choose to tolerate private copying. That does not mean they should be *compelled* to do so. Compulsory and unpaid dissemination of works of authorship will not in the long run foster the "Progress of Science." Copyright is *not* "a law of users' rights." End-users are indeed the *ultimate* beneficiaries, but they benefit because copyright is a law that seeks to promote *authorship* by ensuring authors a financial return from and reasonable control over the exploitation of their works. Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption.