

Finding New Paths Through the Internet: Content and Copyright

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I. INTRODUCTION

I hope that this Article will help to generate some discussion on the future of copyright by addressing some of the disparate notions in copyright law, and by identifying some emerging patterns. The premise of this Article did not come to me immediately, but more as a result of evolution. Whatever one may say about the workability of traditional copyright principles as we have come to know them in the analog world of hard copy, I have become increasingly convinced that these concepts simply do not work as currently designed when applied to the Internet. The current laws do not and will not fit conditions on the Internet; what follows in this Article are the reasons why I believe that is so, what I see happening, and what I think it all actually means.

When copyright law developed, the world saw it only as a means to give authors and disseminators the ability to recover their investment for creating their works in the face of commercial piracy.¹ During that time, commercial pirates were the people who, for example, tried to copy

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1. See Doris Estelle Long, *Dissonant Harmonization: Limitations on "Cash n' Carry" Creativity*, 70 ALB. L. REV. 1163, 1174-75 (2007) (discussing the development of copyright as a way to protect and promote distribution and trade in the face of piracy); Diane Leenheer Zimmerman, *It's an Original!(!): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 190-94, 201-04 (2005) (discussing the history of the Stationers Company and British copyright).

another's book and put it out under their own imprint, or release another's record and put it out under their own label.² They tended to operate in the visible world because they were directly competing with the original authors in trying to sell their copies. That made them relatively easy to find. Once you found them, you could deal with them using approaches that had proven themselves over a long period of time.

II. INDIVIDUAL COPYING

The Internet, I think, is different in a number of ways from the hard-copy world. Individual copying, that is, making copies for personal use (hand- or photocopying for example), was occasionally an issue, but was not something that upset the basic copyright system during the nineteenth and twentieth centuries. But the digital universe added an entirely new dimension that had to be taken into account. While the problems of copyright in cyberspace are familiar to most, it is still useful to name them.

First is the issue of impracticality, by which I mean that it is very difficult to put together all the different permissions that you would need to do the ordinary things that people do on the Internet. People post media on a Web site and somebody else accesses that Web site and downloads that information, just to look at it. Doing so may implicate performance rights, distribution rights, and rights to reproduce the work.³ And if the user wants to manipulate the work, she may need to obtain a right to make a derivative work.⁴

The second thing that is different from the analog world is the problem of impossibility. Because copying is so cheap and easy in the online world, a lot of it can happen very quickly outside of the visible market, and that makes it very difficult to find and control. The copyright industries have tried all sorts of approaches to address this issue, with the most current being an attempt to outsource the enforcement of copyright by pushing it onto the shoulders of Internet service providers.⁵ Nevertheless, it continues to be very difficult to

2. See *Goldstein v. Cal.*, 412 U.S. 546, 549-50 (1973) (state law claim for record piracy); *Overseas Piracy of U.S. Books*, 131 Cong. Rec. E5699-5700 (1985) (comments of Rep. Thomas J. Downey); *Sound Recording Amendment*, Pub. L. No. 92-140, § 3 (1971) (establishing federal copyright protection for sound recordings fixed on or after Feb. 15, 1972).

3. See 17 U.S.C. § 106 (2006).

4. See *id.*

5. See COMMERCE DEPARTMENT, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURES: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS* 117-18 (1995).

enforce traditional copyright on the Internet. People want to copy; they do it without permission, and it is very hard to catch and stop them.

The third issue is one of culture—that is, what people who use the Internet think is legitimate and acceptable to do with a digital work to which they have access. There already have been studies looking at this phenomenon: the results show that the average person does not think there is anything immoral or wrong about copying a digital work and giving it to her friends.⁶ People may think that there is something a little bit suspect about sending a song out to 150 or 200 people. But if they want to make several copies for themselves, put them on a variety of digital devices, or give them to their best friends or family members, users do not think they are doing anything wrong. Instead, they think the copyright industry is wrong when it tries to stop them from doing so.⁷ The situation for copyright owners is further complicated by the fact that it is now easy, with the newly available array of digital tools, for individuals to create derivative works from copyrighted ones for their own enjoyment, and also to share them with their friends on social networking spots like MySpace and YouTube.

Finally, we should not forget that there is a difference in the potential of the Internet as compared with that of the world of hard copy: the Internet makes all kinds of new uses possible that would not previously have been feasible. Think, for example, about digital preservation, the possibility of being able to produce copies of all kinds of cultural content, plus back-ups, in a way that could not be duplicated in hard copy. Or consider the new possibilities for aggregation projects, allowing people on Web sites around the world to put together vast bodies of related materials that have never been available from a single source before, so that others may access them. The notion of remote access, of people being able to sit at a computer terminal in South Africa to read something that is in a library in Chicago, makes this a world where access to information takes on new meaning, with the result that novel public interest claims now demand to be weighed against the property interests of copyright owners.

6. Jared M. Hansen & Eric A. Walden, *It's Not Stealing, It's Just Borrowing: Understanding Consumer's Perceptions of the Legal and Ethical Implications of Sharing Intellectual Property* 41-43 (Dec. 5, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311988; see also Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004).

7. See Hansen & Walden, *supra* note 6, at 35-36.

III. FOUR STRATEGIES OF COPYRIGHT

Now, what is actually going to happen in the future? Well, let us first talk a little bit about what has been happening recently. Although copyright owners continue to talk about the importance of being able to enforce their copyrights in the online environment, if you look at the strategies that they rely on when they put material on the Internet, you do not see evidence of much confidence in the notion that copyright will actually work. In an essay I wrote a couple of years ago, I identified four different noncopyright strategies that can be observed in the real world.⁸ The first strategy is that of the Naysayer; the second I call the Locksmith strategy; the third is the Subverter strategy; and the fourth is the Explorer strategy.⁹ Each is explained below.

A. *Naysayers*

Naysayers are people who look at the Internet as such a risky place that they simply do not want to go there; they try to keep their content out of digital distribution until such time that they can be confident of their ability to control its dissemination and its use.¹⁰ The largest groups of Naysayers for a long time, of course, have been the recording industry, and to some extent the publishing industry.¹¹ For example, you still cannot get legal downloads of the Beatles performing their music. I actually came across a Norwegian site that claimed it had finally broken the barrier and was going to be able to make the Beatles' music available online this year.¹² But two days after that story broke, the Norwegian site had to put up a disclaimer saying that the deal had broken down and was not going to happen.¹³ Another example is J.K. Rowling, who has opposed having her books digitized, and whose publisher spent twenty million dollars trying to keep the last volume of the Harry Potter series from getting out before the publication date.¹⁴ As I am sure that most people are aware, either by reading the newspaper or going online, the

8. See Diane Leenheer Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. 1375 (2007).

9. See *id.* at 1378-82.

10. See *id.* at 1378.

11. See *id.* at 1378-79.

12. See Cory Doctorow, Free, Legal Downloads of Every Beatles Song (Jan. 5, 2009), <http://boingboing.net/2009/01/05/free-legal-downloads.html>.

13. See NME News, Beatles Downloads Removed from Internet: Norwegian Podcasts Have Been Taken Offline, Jan. 7, 2009, <http://www.nme.com/news/the-beatles/41919>.

14. See Farhad Manjoo, The Potter Leak: Winners and Losers (No Spoilers) (July 18, 2007), http://mobile.salon.com/tech/machinist/blog/2007/07/18/potter_leak/index.htm.

book was all over the Internet before the publication date anyway.¹⁵ Therefore, I would venture to say that the Naysayer strategy, though it still has adherents, is the dinosaur strategy of the Internet age. It is a loser. If the work is out there in analog form, it is going to be online, at which point there is very little that a publisher or record company can do to prevent it.

B. Locksmiths

The Locksmiths, Subverters, and Explorers, on the other hand, are still forces to be reckoned with, though not always in the ways we had anticipated. The Locksmiths are those who rely not on copyright but on technology for controlling the way their works are used.¹⁶ They use often amazingly restrictive click- and shrinkwrap contracts¹⁷ and digital rights management systems (DRMs) on their works; they even persuaded Congress to pass the Digital Millennium Copyright Act (DMCA) in the United States.¹⁸ They have created draconian sanctions to prevent people from stripping off those DRMs to gain unprotected access to the content.¹⁹ In fact, so vigorous was the adoption of the Locksmith strategy early on that many people in the academic community expressed the fear that the content industry's use of these "technolocks" would give the industry power over users beyond anything that copyright provided.²⁰ They feared that the copyright industry would be able to control the extent to which, and under what circumstances and conditions, users could access and interact with the work, and possibly even mete it out its use to the user community in tiny bits, paid for by the use.²¹ Luckily, the worst case has not come to pass.

The fact that it has not worked that way is a good thing, and there are several causes for the failure of extreme Locksmithian tactics. One

15. See Harry Potter and the Deathly Hallows Leaked to bitTorrent (July 17, 2007), <http://torrentfreak.com/harry-potter-and-the-deathly-hallows-leaked-to-bittorrent/>.

16. See Zimmerman, *supra* note 8, at 1379-81.

17. Clickwrap and shrinkwrap licenses are typically contracts dictated by a content provider indicating that the user is only a licensee, not an owner, of a copy of a work and is limited to nonnegotiated conditions. *Id.*

18. Digital rights management tools allow the copyright owner to manage how and whether online content can be used. See Elec. Frontier Found., Digital Rights Management, <http://www.eff.org/issues/drm> (last visited Oct. 10, 2009). The Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1205 (Supp. 1998) (making it illegal to remove or to enable others to remove such technological controls from copyrighted works).

19. See 17 U.S.C. §§ 1203-1204.

20. See Mark Gimbel, *Some Thoughts on the Implications of Trusted Systems for Intellectual Property Law*, 50 STAN. L. REV. 1671, 1680-86 (1998).

21. See *id.* at 1683.

of them is that the user community revolted against such strategies.²² In addition, the use of restrictive contracts has raised questions of copyright preemption as well as questions about the enforceability of some of the more extreme terms.²³ In the end, I think nobody really wanted to go to court and see whether these contracts would be enforced or if some contract terms would be found to be preempted by formal copyright law, or whether courts would say that contracts that are nonnegotiable and usually not read by the people who agree to them can actually be enforced.

Unlike the Naysayers, the Locksmiths have not slid into irrelevancy, but rather have turned to a somewhat different strategy. They are trying to see if they can harness things like digital fingerprinting to track copies of their work online.²⁴ Whether that strategy is going to effectively return control over their copyrights is, as of yet, far from clear. However, one thing about the Locksmith strategy that is really quite clear is that whenever the industry moves to employ a new technology, a raft of hackers springs up to defeat it. That makes it very difficult to employ technology to protect works when so many skilled and dedicated people out there are determined to undo the copyright owners' work. In fact, when I was preparing for this Article, I found in my file an article written back in 2000 discussing how the music industry was relying on its secure digital initiative to keep music from being pirated and how sure they were that they could get it to work.²⁵ Now, nine years later, we know it did not work at all.

C. *Subverters*

The Subverters take a different approach altogether; while they do rely on copyright, they do not rely on it the way we would normally expect. They look at formal copyright as a starting point and proceed from it to give up the rights that copyright promises them.²⁶ For example, Creative Commons licenses can be attached to digital works to allow the owner to specify the exclusive rights that he or she does not intend to

22. See, e.g., About DefectivebyDesign, <http://www.defectivebydesign.org/about> (last visited Oct. 9, 2009).

23. See Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323, 365-66 (2004).

24. See Digital Rights Management: Fingerprinting, <http://www.managingrights.com/fingerprinting/> (last visited Oct. 9, 2009).

25. See Janelle Brown, SDMI: We're Not Hacked Yet (Nov. 8, 2000), http://salon.com/tech/log/2000/11/08/sdmi_tests/index.html.

26. See Zimmerman, *supra* note 8, at 1381.

claim.²⁷ Thus, the license makes clear that the public has the freedom to use these works without permission for these purposes.²⁸

The most radical form of subversion is the General Public License (GPL), which is used by about half of the open source software developers and has the peculiar characteristic of preventing people from being able to assert copyrights in their own work.²⁹ The original programmer posts a work for anyone to use and improve. If a subsequent creator produces a derivative work that relies on programming supplied under the GPL, the new innovator cannot assert a copyright in what he has added.³⁰ The idea is to keep the entire, evolving work out there free for others to build on. As each participant adds a new piece, what has been added must be freely usable by others in the collaborative community.³¹ These are examples of Subverter strategies.

D. Explorers

The Explorer strategy is radically different, because pure Explorers pretty much ignore copyright altogether.³² They just open the back gate of the statutory enclosure and stroll right out.

Early advocates of this approach, people like John Perry Barlow and Esther Dyson, were scoffed at by traditional copyright scholars when they first began to say that owners would have to cope with the Internet by giving their content away.³³ Now, we see people doing exactly that, and some are making it work for them. One interesting version of the Explorer approach was suggested by Bruce Schneier and John Kelsey in what they called the Street Performer Protocol.³⁴ Under their approach, artists would offer to create new works if a sufficient number of people

27. See Creative Commons, About Licenses, <http://creativecommons.org/about/licenses> (last visited Oct. 10, 2009).

28. See *id.*

29. See GNU General Public License, <http://creativecommons.org/licenses/GPL/2.0/> (last visited Oct. 9, 2009).

30. See *id.*

31. See *id.*

32. Zimmerman, *supra* note 8, at 1381-82.

33. John Perry Barlow is a cofounder of the Electronic Frontier Foundation, an organization which promotes freedom of expression in digital media and he is a Berkman Center for Internet & Society Fellow Emeritus. See John Perry Barlow Bio, <http://cyber.law.harvard.edu/people/jbarlow> (last visited Oct. 9, 2009). Esther Dyson is a past chairperson of the Electronic Frontier Foundation and the Internet Corporation for Assigned Names and Numbers (ICANN), and a catalyst for many start-ups in information technology. See Esther Dyson's Bio, <http://www.edventure.com/new-bio.html> (last visited Oct. 9, 2009).

34. See John Kelsey & Bruce Schneier, The Street Performer Protocol (1998), <http://www.schneier.com/paper-street-performer.pdf>.

agree in advance to pay for them.³⁵ The famous author Stephen King actually put out one of his books using a system very much like the one suggested by Schneier and Kelsey.³⁶

IV. CURRENT PRACTICE

Clearly, in practice a number of different approaches to the Internet have developed that depart drastically from traditional copyright, whether by using technology to enforce terms for which copyright makes no provision, by subverting traditional copyright to make works more easily usable, by the outright abandonment of copyright for some other strategy, or by some combination of those approaches.

Let me give some examples of this changed thinking, how it affects copyright owners' behavior on the ground, and some implications for the future of copyright. First, the Internet carries with it the potential for the artist to kick out intermediaries because of the cheapness and ease of distributing digital works. For the first time, it is thinkable for artists to ignore the publishing and recording industries and to try to go out and build audiences on their own. Some of them do this by essentially giving away their work online while hoping to be able to retain paying markets in other areas. In other cases, they "market" their work online by asking people to pay them what they think the work is worth.³⁷ In neither case do they depend on copyright licensing for their distribution model. In an interesting recent interview in the magazine *Wired*, the music group Radiohead explained their decision to "go Explorer."³⁸ They released their album *In Rainbows* online and asked people to pay whatever they wanted for it.³⁹ Although only forty percent of people who downloaded the album paid for it, the group said they made more money on that album—three million dollars—than they had on any of their prior albums, and their take from their concert tours also increased.⁴⁰ This is important because they claim that they make most of their money from tours—not only from people buying tickets, but because it is also a venue in which they can sell CDs, t-shirts, and all sorts of other goods.⁴¹

35. See *id.* §§ 4-6.

36. See Zimmerman, *supra* note 8, at 1391-92.

37. See Daniel Kreps, *Radiohead Publishers Reveal "In Rainbows" Numbers*, ROLLING STONE, Oct. 15, 2008, <http://www.rollingstone.com/rockdaily/index.php/2008/10/15/radiohead-publishers-reveal-in-rainbows-numbers/>.

38. *David Byrne and Thom Yorke on the Real Value of Music*, WIRED, Dec. 18, 2007, http://www.wired.com/entertainment/music/magazine/16-01/ff_yorke?currentPage=1.

39. See *id.*

40. See *id.*

41. See *id.*

A similar strategy has been used by Nine Inch Nails. The group recently gave away nine tracks from its album *Ghosts* and then offered a group of subsidiary or ancillary products, such as autographed CD sets, for which they charged money.⁴² Admittedly, my examples involve people who are already relatively famous and who can afford to step outside the traditional framework. Perhaps unsurprisingly, they have a pretty good chance of making a fine living from their creative works without depending excessively on copyright.

What is more surprising is that these experiments also work for the not so famous. There are an increasing number of Web sites that are acting as what I would call editorial boards. These boards select what they view as promising young bands and put them online. For example, you can go to Magnatune, which operates with using Creative Commons licenses, download the music of young musicians who appear on the Web site, and decide for yourself how much, within a wide range, you want to pay for it.⁴³ They explicitly tell purchasers that they can copy the recording they have downloaded as often as they want for their own use and also make copies for up to three friends.⁴⁴ After that, purchasers are supposed to be honor-bound to not distribute it any further, but there is no indication that anyone will go out and enforce that prohibition against them.⁴⁵

This is but one example of new mechanisms that have moved away from traditional industry and copyright boundaries and are being tried out on the Internet to help young talent get discovered and established. In fact, we are now seeing people uploading their work onto sites like MySpace and being discovered by talent scouts. There was a story in the *New York Times* not long ago about a young woman whose music is now being used on *Grey's Anatomy*; she was picked up by a talent scout who had found her on MySpace.⁴⁶

This is not merely a phenomenon in music; we see equivalent developments in the publishing industry. The Social Science Research

42. Nine Inch Nails Declare Freedom from Record Labels, <http://machinist.salon.com/blog/2007/10/09/nin/index.html> (Oct. 9, 2007 21:45 PDT); *Ghosts* I-IV Order Options, http://ghosts.nin.com/main/order_options (last visited Oct. 9, 2009).

43. See What Is "Open Music"?, <http://www.magnatune.com/info/openmusic> (last visited Oct. 9, 2009); The Plan: Problems with the Music Industry and How Magnatune Is Trying to Fix Them, <http://magnatune.com/info/plan> (last visited Oct. 9, 2009). The suggested price for downloading an album is between \$5 and \$18, with the buyer deciding what to pay. See *id.*

44. See Give 3 Free Copies to Your Friends, <http://magnatune.com/info/giv> (last visited Oct. 9, 2009).

45. See *id.*

46. See Devan Sipher, *Ingrid Michaelson*, N.Y. TIMES, Dec. 14, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9D0DE2D71139F937A25751C1A9619C8B63>.

Network (SSRN), a scholarly publishing site on which people can post their work, allows any user to view and download copies of those works once the authors make them available.⁴⁷ Many universities also maintain open access sites for faculty to deposit their research and scholarship. There are also increasing numbers of attempts by people who publish purely creative works in written form to make them available outside the ambit of copyright.

What I think is really the most telling about how important the changes in intellectual property are is that now the big guys are starting to join in. Consider two significant events affecting publishing and the music industries. The Google Library Project settlement, which of course, may or may not be approved by the court and thus may never be implemented, tells us quite a bit about how the online market, even in the minds of copyright traditionalists, is diverging from the old model.⁴⁸ And then there are changes in the music industry, which was dragged by its feet kicking and screaming into the twenty-first century. People talk about the great success of iTunes, but what is often forgotten is how long it took Steve Jobs to convince the music industry to allow even a little bit of freedom for people to copy music onto a variety of devices and share it with friends.⁴⁹ That concession did not come easily, but now, suddenly, we see the industry removing DRMs from its music downloads, and a new arrangement with Apple that will permit it to offer high-quality downloads through the iTunes store that no longer can be played only on Apple's own equipment.⁵⁰

47. See Michael C. Jensen, SSRN's Objectives and Commitments to Users, <http://www.ssrn.com> (follow "A 10th Anniversary Message from Michael C. Jensen" hyperlink from homepage) (last visited Oct. 9, 2009).

48. The original project was for Google to digitize as many books as possible from various library collections and make the texts searchable. Books in the public domain would be made fully available, but those presumptively under copyright would not be accessible on the Internet, except to the extent of three short snippets of text in response to a search query. Google Book Search Library Project—An Enhanced Card Catalog of the World's Books, <http://books.google.com/googlebooks/library.html> (last visited Oct. 9, 2009). The Authors Guild, the Association of American Publishers, and McGraw-Hill then sued for copyright infringement in relation to the scanning of copyrighted works. *The Author's Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (S.D.N.Y. 2005); *McGraw-Hill Cos., Inc. v. Google, Inc.*, No. 05 CV 8881 (S.D.N.Y. 2005). A proposed settlement was filed with the court in the cases on October 28, 2008. See Proposed Settlement Agreement, *Author's Guild*, No. OSCV8136-JES. The parties are now revising the original agreement in response to antitrust and other concerns of the U.S. Department of Justice. Miguel Helft, In E-Books, It's an Army vs. Google, *N.Y. TIMES* (Oct. 7, 2009), available at <http://www.nytimes.com/2009/10/07/technology/internet/07google.html>.

49. See Steve Jobs, Thoughts on Music (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/>.

50. See Greg Sandoval, Upgrading to a DRM-Free iTunes Library Will Cost You (Jan. 6, 2009), http://news.cnet.com/8301-13579_3-10132759-37-html?tag=mncol;txt.

What is even more extraordinary is that now, in Europe, at least one site is offering on-demand streamed music—in other words, a digital jukebox.⁵¹ To use the service, you can either agree to be subjected to a small number of ads every thirty minutes or to pay a small fee to get your music, sans ads, from the provider's library.⁵² What is amazing is that, in announcing this plan, the recording industry stated that offering music in this format would overcome the problem of digital piracy; why, after all, would anybody pirate something they can get for free?⁵³

Obviously, there is a real sea change going on in the industry's thinking. It does not make any difference to the user where "free" comes from. Whether it is from peer-to-peer file sharing or music on demand, he is getting the music he wants without having to pay for it. The real difference is that the industry has begun to figure out how to get something from the deal, even if it is not payment for each and every individual use. Thus, Spotify, which is the name of this European service, is no longer something that the industry is trying its best to keep from ever being offered; it is now its best strategy to counteract piracy.⁵⁴

The publishing industry, terribly worried about having an online presence without the ability to control piracy, has now entered into a settlement with Google, many parts of which are completely opposite to anything that a traditional copyright scholar would expect. The major part of the original Google settlement plan (revisions are being made as this Article goes to press) deals with out-of-print books, and while some might think that means it does not cover much, in fact, most books are out of print within two years from publication. Under the settlement, authors and publishers with rights to out-of-print books will be, unless they have opted out, bound by the agreement if and when it goes into effect.⁵⁵ The settlement permits Google to digitize these copyrighted books and put them online *unless* the author specifically objects.⁵⁶

Second, the settlement would allow any searcher using the Internet to "preview" up to twenty pages of any digitized book in response to a query before making a purchase decision.⁵⁷ Furthermore, full text access

51. See William Underhill, *Music for Free, and It's Legal*, NEWSWEEK, Mar. 30, 2009, available at <http://www.newsweek.com/id/190457>.

52. See *id.*

53. See *id.*

54. For a description of the terms of Spotify, currently available in Europe, see Frequently Asked Questions, <http://www.spotify.com/en/help/faq/> (last visited Oct. 9, 2009).

55. See Proposed Settlement Agreement, *supra* note 48.

56. *Id.*

57. See *id.* ¶ 4.3.

will be available for free on a computer terminal in every public library.⁵⁸ School libraries and other organizations can also become subscribers and can make the full texts of all the books that are in the Google library available to everyone who is entitled to use the facility.⁵⁹ These are blanket licenses, with the result that fees do not reflect the negotiated price of each individual work and authors share in the income based solely on quantity of use. In short, the system acts as a kind of en masse compulsory license.

One other major difference from normal copyright is that there will be formalities. Those who are familiar with copyright law know that one of the things the Berne Convention prohibits its members from doing is imposing formal requirements on copyright claimants.⁶⁰ But the Google settlement will impose such requirements anyway. A registry will be set up by the authors and the publishers with financial support from Google. Everyone covered by the Google settlement will need to list the copyright interests he or she claims on that registry.⁶¹ Anyone not in the registry, or whose records are incomplete or out-of-date, can lose her share of the subscription fees and the other fees that are generated out of the settlement.⁶² That puts a huge amount of pressure on authors and publishers to figure out what they actually own and to get those rights registered.

None of these examples, I would have to say, are in any instance copyright solutions. It is not a copyright solution to put your music online and tell people they can pay as much for it as they want (or maybe not pay at all), or to tell them they can download it and can make as many copies as they want for themselves and then more for their friends. It is not a copyright solution to say that you are in a licensing pool unless you affirmatively opt out of it, and that as a result of being in that licensing pool, a huge portion of the United States will have access to all of your out-of-print books. Nevertheless, these are in fact the practical steps that people are taking to distribute content on the Internet today.

58. *See id.* ¶ 4.8. Nonprofit institutions of higher education are also eligible for free terminals. *See id.*

59. *See id.* ¶ 4.1. Institutions of higher education can automatically offer remote access as part of their subscription; elementary and high schools, government and other public subscribers need permission to do so. *See id.* ¶ 4.1(a)(iv).

60. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 5(2), <http://www.wipo.int/treaties/en/documents/pdf/berne.pdf> (last visited Oct. 10, 2009).

61. *See* Proposed Settlement Agreement, *supra* note 48, art. 6, ¶ 6.1.

62. *See id.* ¶ 6.3.

V. WHAT THE CURRENT APPROACH MEANS

What message can we take from this? One observation, and make of this what you will, is that in the case of both the recording and publishing industries, no movement toward finding sustainable new business models happened until would-be users simply marched in and began taking what they wanted. Now, on the one hand I think that is a sad fact, but it also provides food for thought. Scholars had a lot of discussions when Google began digitizing books about whether the company could possibly succeed in making a fair use defense.⁶³ I think they had a chance at it, but it was not going to be a slam dunk, and they might well have lost. The authors and the publishers, I think, had a very good chance at winning their suit.

So, why did the likely winners not push to adjudicate and walk off with huge damages? I say it is because they are actually better off if the Google settlement goes through than they would be without it. Without it, they would have been relying on the mechanisms of copyright, which in the Internet setting are so clunky and carry such enormous enforcement and transaction costs that neither the creator nor the user can enjoy anything like the full benefit possible from exploiting these works. This realization has gone a long way, I believe, toward eroding the expectation of many copyright owners at the beginning of the digital era that they had both the right and ability to control every instance of copying. Technically, they do have a right to control all these uses, but it seems fairly clear that the industries are more willing now to cede some of their theoretical rights in the face of impossibility of enforcement.⁶⁴

If there is a continuing role for traditional copyright on the Internet, I think it is likely to be in the area of controlling initial commercial distribution, and not in the vast realm of distribution to the public for private, noncommercial use. The copyright community said for many years that individuals with the ability to make copies for themselves were as destructive to markets as commercial copyists because they could devastate them as effectively piecemeal as could a successful commercial infringer wholesale.⁶⁵ While there may be some truth to that argument, it

63. See Google Books, Legal Analysis, <http://books.google.com/googleebooks/legal.html> (last visited Oct. 9, 2009).

64. See 17 U.S.C. § 106 (2006).

65. See Stephen W. Webb, RIAA v. Diamond Multimedia Systems: *The Recording Industry Attempts to Slow the MP3 Revolution—Taking Aim at the Jogger Friendly Diamond Rio*, 7 RICH. J.L. & TECH. 5 nn.6-7 (2000) (discussing RIAA's stance on the emergence of recordable CD technology for use with home computers); Proposed Settlement Agreement, *supra* note 48, ¶¶ 5-8, 12-13 (discussing the RIAA's fight against the emerging MP3 player market by trying to apply the Audio Home Recording Act of 1992 to the manufacture of personal digital

has not been proven, and I would say that we are now seeing a retreat from that assertion to a greater acceptance of the idea that, realistically and by necessity, a distinction needs to be made between copying for personal use and copying for commercial use. While I do not think that very many creators would approve of commercial copying of their works (for example, I do not think that Radiohead would stand by silently if another record label picked *In Rainbows* off the Internet and began selling it), they can live with their fans making copies of their album and sharing them with friends. In fact, Radiohead acknowledges that it can live with the fact that sixty percent of the people who downloaded their music in the first instance never paid a thing for their copies.⁶⁶

What seems to be happening is a move away from a model that I think is basically unsustainable. The copyright industries have learned a lot from private piracy; they have begun to understand more about what the public actually wants and expects, and what is realistic to demand of one's audience. I think that designing a law for the distribution of content online is now a work in progress and that we have to be prepared for changes in our copyright law to occur, albeit in thoughtful and in gradual increments.

One thing we do not need is another DMCA. We did not need it in the first place. In my opinion, it would have been perfectly acceptable to allow copyright owners to experiment with digital technology to protect their works without Congress stepping in to put legal teeth behind that effort. And I do not think the statute has worked especially well, either. The DMCA is, in some sense, already outmoded as a result of peer-to-peer filesharing software. We should not step in again with new legislation designed to protect traditional disseminators of copyrighted works until we fully understand what sorts of interventions would actually be necessary, useful, or efficient. Maybe some industries will not survive. Is there really still a role for a traditional record company, for a traditional publisher? Or will those jobs be taken over by wholly different entities, such as bundlers, editors, or other as yet unrecognized aids to distribution? We should not use law to preserve industries in the Internet context simply because they have been useful and effective in the hard copy context. This is not the time for hasty lawmaking.

If legislation is going to be promulgated in the near future, we ought to be thinking of a different set of goals. In the past twenty-five to thirty

music players), *id.* ¶¶ 29-34 (analogizing the holdings of *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *R.I.A.A. v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999)).

66. See *David Byrne and Thom Yorke on the Real Value of Music*, *supra* note 38.

years, I would argue that we have been thinking about new law too little from the perspective of the public and the public's interest. One useful pro-user action would be to legislate in favor of technological transparency. If copyright owners are going to use technology to protect their works, they ought to tell the public what it is they are using and what the effects are going to be.⁶⁷ I do not see any serious downside to making that a requirement, although the remedy may become superfluous if, as seems possible, access-and use-controlling DRMs fade from use.

The next thing we might think about is embedding some protection for the public's interest into explicit legislation. If it is indeed true, as I believe it is, that we are beginning to make real distinctions between the private versus the commercial copyist, then maybe as industry expectations change, we ought to reflect some of those changes into our positive law.

The copyright statute, with one exception, has never really taken a position about whether or not there is a difference between people copying for their own use and people copying for commercial gain.⁶⁸ If the record industry, for example, is now going to allow people to make multiple copies of songs to put them on their computers and various kinds of portable digital devices, and make at least some copies for friends, then perhaps the industry should not have the option of changing its mind in five years and starting to seek penalties against people whose expectations have been shaped by these practices. We also need to start looking at some of the potential benefits of the Internet that cannot be realized because of the inordinately difficult transaction costs involved in getting permissions. Examples include projects like digital archiving, and the preparation of large databases that collect and make searchable bits and pieces of copyrighted works from a variety of different places. Can we come up with some fair way to promote public learning through digital remote access to copyrighted works without depriving the copyright community of reasonable compensation? In that regard, I think the Google model is interesting because what it has done is replace an individually negotiated payment system with a subscription fee system where the proceeds are divided according simply to usage.

67. See Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice About Their Use of Technical Protection Measures?*, 6 J. ON TELECOM. & HIGH TECH. L. 41 (2007).

68. See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); 17 U.S.C. § 1008 (exempting from liability users who copy music using analog or digital audio technology for their own use).

In summary, I think we can see change coming, and these changes are fundamentally inconsistent with the way that copyright has operated in the hard copy world. I cannot envision the continuation of these kinds of experiments and their absorption into the fabric of our cultural goods distribution system online, without the law ultimately acknowledging and conforming to those changes. Otherwise, copyright becomes a trap into which people accustomed to other ways of operation may fall unexpectedly and without warning.

I foresee a future in which we may actually have two different copyright regimes, one that operates in the world of hard copy (a world that is not going to go away because there will always be cultural goods that people will prefer in hard copy form), and one for the Internet. That may seem awkward, and lacking in both simplicity and conceptual neatness, but it is my prediction about where we may be headed. Am I right? Let us check back in ten years and see.