Does Copyright Law Need to Be Reformed?

Considering the issues involved in developing a simplified new copyright law and associated administrative mechanisms.

The U.S. Copyright Act of 1976 (1976 Act), like kindred laws of other nations, is too long, complex, incomprehensible, and unbalanced. It is also sadly lacking in normative heft. This column will consider why it might be a good idea to reform copyright laws, why it may be difficult to undertake such a reform, and how one might go about making copyright laws simpler, more comprehensible, more balanced, and more normative. (For further discussion of the issues explored in this column, see [1].)

WHY IS COPYRIGHT PROBLEMATIC?
The first modern copyright law, the Statute of Anne, was quite short and comprehensible. It only covered maps, charts, and books. One reason why copyright laws became longer and more complex is that over time, legislatures extended copyright to new subject matters, such as musical works, photographs, and choreography, that required some rules tailored to the manner in which such works were exploited.

But in the past few decades, copyright laws have become unnecessarily long, complex, difficult to comprehend, and biased toward the copyright industry groups who have largely written them to serve their interests.

The incomprehensibility of many copyright provisions didn’t matter much as long as they only affected industry groups whose lawyers could decode the statute for them.

Advances in technologies have, however, democratized the creation and dissemination of new works of authorship and brought ordinary persons into the copyright realm not only as users of others’ works, but also as creators.

One reason why a simpler copyright law is needed is to provide a comprehensible normative framework for all of us who create, use, and disseminate works of authorship.

Another problem with U.S. copyright law is that it is the intellectual work product of a copyright reform process initiated in the late 1950s; it was enacted without serious thought to how it would apply to computers, com-
In 1965, the Register of Copyrights opined that “it would be a mistake, in trying to deal with such a new and evolving field as that of computer technology to include an explicit provision [on computer-related uses] that could later turn out to be too broad or too narrow.”

Technology developers, educational institutions and libraries, among others, were understandably displeased at the prospect of having to resolve foreseeable disputes over these questions through litigation based on a statute that was intentionally not clarified to deal with them.

The controversy over these and other new technology questions was so intense that the copyright revision process was stalled between 1965 and 1976 while various stakeholders debated how the revised law should handle the new technology issues. One scholar suggested that the revision bill should be rethought from scratch to take new technologies into account, but Congress was weary of copyright revision and in no mood to rethink how computer technologies should reshape copyright law. The 1976 Act was, consequently, passed with a 1950s/1960s mentality built into it, just at a time when computer and communication technology advances were about to start creating the most challenging and vexing copyright questions ever. Much the same is true of copyright laws of other nations.

Thirty years after enactment of the 1976 Act, with the benefit of considerable experience with computer and other advanced technologies, it may finally be possible to think through in a more comprehensive way how to adapt copyright law to digital networked environments as well as how to maintain its integrity as to existing industry products and services that do not exist outside of the digital realm.

WHY REFORM MAY BE DIFFICULT
Meaningful copyright reform is unlikely in the next decade for several reasons. For one thing, national legislatures, particularly the U.S. Congress, have many other challenges to deal with, including the Iraq war, global warming, immigration reform, tax reform, just to name a few. In the grand scheme of things, copyright law just isn’t very important.

U.S. copyright industries have, moreover, largely prospered under the rubric of the 1976 Act. It may be a flawed statute, but it is not so flawed that it is completely dysfunctional for the industries it principally regulates.

To paraphrase an adage, copyright industry groups and lawyers are likely to prefer the devil they know to the devil that might emerge from a copyright reform project. Those with the most clout in the copyright legislative process are unlikely to perceive the present copyright law as unbalanced, and they would almost certainly vigorously resist attempts to recalibrate the copyright balance in a way that might jeopardize the advantages they perceive the present statute as providing them.

A copyright reform project would also require significant amounts of time, money, and energy. It would likely bring to the surface many highly contentious issues, such as those manifested in the legislative struggles that led to the Digital Millennium Copyright Act (DMCA) of 1998. Even modest reform efforts, such as that undertaken to update library copying privileges, have proven difficult.

WHY REFORM IS WORTH A TRY
Copyright reform may be difficult to achieve, but still worthwhile. For one thing, many copyright professionals share my

Copyright Law used to be a lot simpler and more comprehensible than it is today; it can be made so again.

Legally Speaking
view that the current statute is akin to an obese Frankensteinian monster (even if we would not necessarily agree on every detail of the problems). Many would welcome a model law or principles project as a way to restore a positive and more normatively appealing vision of copyright as a “good” law.

Implicit in the criticism that many of us level at some aspects of the 1976 Act or at proposals to amend it to further strengthen author’s rights or otherwise add another provision on an ad hoc basis is that we have an inchoate vision of a “good” copyright law that a model law or principles project could potentially bring to light.

Second, a reform proposal could provide a platform from which to launch specific reforms (for example, amendments to the 1976 Act to address the orphan works problem) or to object to proposed amendments to the 1976 Act that would further imbalance that statute or contribute further to the clutter from which it currently suffers.

In order to say “no” to entertainment industry proposals to amend copyright law in a more principled way, it would be helpful to articulate a positive conception of copyright that a model law or principles document might bring to light.

Third, copyright reform proposals might, over time, prove useful as a resource to courts and commentators as they try to interpret ambiguous provisions of the existing statute, apply the statute to circumstances the legislature could not have contemplated in 1976, or extract some principled norm from provisions that as codified, are incomprehensible or nearly so.

Fourth, a model law or principles could stimulate discourse about what a “good” (or at least a better) copyright law might look like. That, in itself, would be valuable. It may be a valuable resource when a more officially sanctioned copyright law reform project is undertaken in the future.

Fifth, it seems to me the right thing to do. Copyright law used to be a lot simpler and more comprehensible than it is today; it can be made so again.

**Core Components of Copyright**

One way to shrink the size of a copyright law is to determine what core elements it needs to contain. Here is a condensation of U.S. law today:

- What is the subject matter of copyright protection? “Works of authorship.”
- What are the eligibility criteria for works and owners?
  a. Who is eligible: the “author” (but there are special rules for works made for hire);
  b. What qualities a work must have to qualify for protection: a work must be “original” (the product of some creativity) and “fixed” in a tangible medium of expression; and
  c. What is the procedure for obtaining rights: rights attach automatically as a matter of law from first fixation of the work in a tangible medium (notice of © and registration are no longer required, but are advisable for effective protection; registration is necessary for U.S. authors to bring infringement suits).
- What exclusive rights do authors own: to reproduce the work in copies; make derivative works; distribute copies to the public; publicly perform the work; publicly display the work; import the work into the U.S.
- How long do rights last: life of the author plus 70 years for natural persons; 95 years from first publication for corporations.
- What limitations and/or exceptions to the exclusive rights should the law recognize: fair use, certain library and educational uses, making backup copies of software, among others.
- How to judge infringement: infringement occurs when someone violates one of exclusive rights and does not qualify for an exception; the usual test is whether there is substantial similarity in protected expression in the two works and copying of that expression by that defendant.
- What remedies are available if infringement is found: preliminary and permanent injunctive relief; money damages; destruction of infringing copies; attorney fees; costs.

**What to Keep, What to Change?**

Copyright law should continue to focus on protecting original works of authorship that have been fixed in a tangible medium of expression. Some countries
protect unfixed works, such as performances, by copyright, but the U.S. Constitution speaks of “writings” and seems to call for fixation as a requirement.

Authors should, of course, be the initial owners of any copyrights in their works. Economic efficiency considerations support giving employers ownership of copyrights in works made for hire. For almost 200 years, U.S. copyright protection was available only to works whose authors complied with a few simple rules about giving notice of their claim of copyright. Published works without a copyright notice were in the public domain and available for free copying and derivative uses.

Although the 1976 Act allowed authors to cure defective notice to some extent, it was not until 1989, in a move little noticed outside the copyright industries, that U.S. copyright law flipped this presumption.

Now, unless you know for sure that something is in the public domain, you dare not use it, even if you can’t locate the author in order to take a license. This, along with the extension of the copyright term for 20 additional years, has deprived the public access to many works that should be in the public domain.

The Copyright Office has proposed legislation to limit remedies for reuse of works whose copyright owner cannot be located after a reasonably diligent effort. This “orphan works” legislation is a step in the right direction, but the problems of too many copyrights and not enough notice of copyright claims and ownership interests run far deeper than that.

With the rise of amateur creators and the availability of digital networked environments as media for dissemination, the volume of works to which copyright law applies and the universe of authors of whom users must keep track have exploded.

Creative Commons has done a useful service in providing a lightweight mechanism for allowing some sharing and reuses of amateur creations, but copyright formalities, such as notice and registration, may have a useful role in reshaping copyright norms and practices in the more complex world that has evolved in recent years.

The exclusive rights provisions need to be rethought. The reproduction right, in particular, has proven particularly vexing in the digital age. In the early 1990s, the MAI v. Peak case opined that every temporary copy made in the random access memory of a computer triggers the copyright owner’s exclusive right to control reproductions of their works in copies. MAI involved a computer repair firm that was held liable for infringement of computer program copyrights because of RAM copies made when the firm turned on the computer in question to repair it.

MAI was such an outrageously wrongheaded decision that Congress overruled it by amending the statute, but Congress did not at the same time expressly repudiate the dicta that RAM copies infringe unless they have been authorized.

It is, of course, impossible to access, use, read, view, or listen to copyrighted works in digital form without making numerous RAM copies of the work. The 1995 Clinton Administration White Paper on Intellectual Property and the National Information Infrastructure took the position that this was and should be the law and sought to inject this rule in the WIPO Copyright Treaty of 1996. This strategem did not succeed, and later cases have called this conclusion into question. The RAM copy theory should be rejected.

We should probably consider returning to a framework for copyright in which the exclusive rights are narrowly tailored and construed, and in which acts not falling within them were free from copyright constraints.

There should also be room for courts to create new exceptions and limitations, as they did with the fair use and the first sale exceptions, when this is necessary and appropriate to achieving a balance of private and public interests in copyright law.

In the guise of simplifying the exclusive rights provision and articulating certain exceptions to these rights, the 1976 Act broadened the rights substantially. The unregulated spaces of copyright seem to have shrunk considerably, but we can open them up again
through careful construction of new rights provisions. It is also time for copyright law to be more articulate about what rights users have.

Most works of authorship do not need such a long duration of rights as copyright laws now provide. More works should get into the public domain sooner. Shortening the duration of the copyright term would be one way to achieve this objective. Another would be to require periodic renewals of copyright claims for a small registration fee. International treaty obligations will surely be asserted as a reason not to make structural changes to the life + X-years approach to copyright duration, but it is worth thinking more carefully about durational limits.

Although the 1976 Act provides that infringement occurs when someone trespasses on an exclusive right (and this trespass is not excused by an exception or limitation), the statute is silent about how judges or juries should determine whether an infringement has occurred. Although the courts have developed tests for judging infringements and for saying which issues experts can testify about and which they can’t, case-based infringement standards are confusing and unpredictable. They too should be clarified.

Courts should have power to stop infringements and to order infringers to pay damages for the harm. The remedy issue most in need of serious rethinking is under what circumstances so-called statutory damages should be recoverable. U.S. copyright law provides that regardless of whether a copyright owner has suffered any damages at all from an infringement, he or she can ask for statutory damages, and the court can award any amount between $750 and $30,000 per infringed work, as the court deems just.

This can go up to $150,000 per infringed work if the infringement is willful. There are no guidelines at present for how statutory damages are to be awarded. This is too arbitrary to be a fair and reasonable provision.

All parts of a copyright law should be written in plain language so ordinary people, and not just the “high priests” of copyright, can understand what it means and the normative reason that it should be part and parcel of the basic statutory framework.

A good copyright law should also articulate the purposes it seeks to achieve and offer some guidance about how competing interests should be balanced, perhaps through a series of comments on the model law or principles.

In addition to considering what substantive rules should be part of a model copyright law or principles document, it is important to conceive a way to restructure copyright institutions and policymaking processes so the dysfunctions that currently beset copyright lawmaking can be averted or at least mitigated to some degree.

It makes little sense to develop a new copyright law that is simple, comprehensible, and coherent if there is no mechanism to prevent it from getting cluttered by the same kinds of industry-specific “fixes” and compromises that have made the 1976 Act so bloated.

The simplest way to achieve this objective would be a legislative delegation of rule-making authority to the government office responsible for carrying out copyright-related responsibilities. Many of the industry-specific exceptions now in the 1976 Act, for example, should probably be the byproduct of agency rule-making rather than being in the statute. Perhaps a restructured, more administratively rigorous government copyright office could take on some adjudicative and policymaking functions as well.

A good copyright law is possible, but will only be achievable if someone gets to work in trying to bring it about. This will be an important project for me in the next several years. I welcome suggestions from Communications readers about what a good copyright law would look like.

Reference

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The Promise and Problems of the No Electronic Theft Act

The information age has generated its fair share of new statutes, some of which may be considered criminal.

Advances in technology have always caused difficulties for societies. Frequently, the reaction is a quick call for new laws. When these laws are criminal in nature, the liberties of individuals can be held hostage for economic concerns.

The information age has generated its share of new statutes, many of them criminal. By and large, they address legitimate concerns and proscribe wrongful conduct. However, their scope and breadth give challenge to notions of fair play and reasonableness, and raise questions of the deliberate advancement of ulterior agendas. One of these new laws give a firm basis for such concern: the No Electronic Theft (NET) Act.

This column will examine how the NET Act goes beyond what is justified, and why a call to the technical community to prevent similar excesses in future laws is needed.

The NET Act: Origins and Purpose

Intellectual property can be reduced to digital form, and digital information can be disseminated globally by fiber optics and cable at little cost to those involved. The Internet as the ubiquitous copying machine gave rise to a demand from the software and media industries that such action be punished when the information disseminated was protected by copyright, regardless of whether the distributor intended to gain financially or commercially. Until recently, the Copyright Act supplied civil, but not criminal penalties for such conduct.

United States vs. LaMacchia, filed in the District of Massachusetts federal court, was a test case brought by the Department of Justice. The indictment sought criminal penalties under the general conspiracy and wire fraud statutes for the alleged conduct of the defendant, David LaMacchia. LaMacchia, a college student, was charged with causing the distribution of copyrighted software by means of the Internet, to the financial detriment of the owners of the copyrights of the works distributed. The indictment was struck down by U.S. District Judge Richard Stearns in a strongly worded opinion that made it clear: for constitutional reasons, any criminal charge of a copyright violation must be brought under the copyright laws, and cannot be brought under general federal criminal laws.

The government's response to this ruling was the enactment of the NET Act. Its purpose appears noble enough: in essence it criminalizes the dissemination
of copies of copyrighted information by electronic means. However, when analyzed under the twin microscopes of the legal rules of statutory construction and the technical understanding of how things work, two serious problems with the Act become glaringly apparent.

Scope of the Act
The first problem is the scope of the statute. Prior to the amendment, the pertinent parts of the criminal provisions of the Copyright Act follow:

1. Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished [as provided elsewhere in the criminal code].

The NET Act amended this language to read as follows:

2. Any person who infringes a copyright willfully either
   (1) For purposes of commercial advantage or private financial gain shall be punished as provided [elsewhere in the criminal code].

The term “infringes a copyright” has had, until the instant amendment, a well-understood meaning, specifically, that someone had made an unauthorized “fixed,” or nontransient, copy of a copyrighted work. Ostensibly, the purpose of the NET Act and its addition of the new prohibition found in the second clause was merely to establish a criminal punishment for a new means of infringing a copyright. This clause, however, goes beyond this limited purpose and introduces a change to the up-to-now, well-established definition of the term.

To make this change clear, compare the wording of the first clause with that of the second. The first creates the following prohibition: a person who “infringes a copyright willfully” for purposes of commercial advantage or private financial gain commits a crime.

The language of the second clause also results in a prohibition: a person who “infringes a copyright willfully by the reproduction or distribution, including by electronic means of one or more copies of copyrighted works having a retail value of more than $1,000 commits a crime. A plain reading of this italicized wording of the second clause implies that the meaning of “copyright infringement” has been expanded. Now, in addition to such infringement occurring by means of a fixation, an infringement can occur by the mere distribution, by electronic means, of a copyrighted work, regardless of whether or not the work is ever printed on paper, downloaded onto a floppy disk, or even maintained on a hard drive. By a literal language of the amended statute, the mere viewing of a copyrighted work posted on the Internet is a copyright violation punishable by criminal penalties, whether or not there is a reproduction of that work.

Net browsing, in-and-of itself, is closer to the exercise of constitutionally protected free speech than it is to infringement of anyone’s intellectual property. Under the First Amendment, it cannot be denied that a collateral to the right to publish is the right to read what is published. Might this, then, be an innocent accident in legislative drafting? Or was there, instead, a guiding hand somewhere in the background that intended an expansive redrafting? The history leading to the NET Act suggests the latter.

In 1995, the year before the passage of the NET Act, the Clinton administration issued a study formally called “Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property.” This was also known as the White Paper. The group responsible for


did not provide the text of the study.
the drafting of the White Paper was heavily represented by individuals overt in their support of the software, video, and music industries. The White paper took a position on the proper definition of the term “infringement” in the age of the Internet. Specifically, it argued that the mere viewing of copyrighted material over a computer network is an act of infringement. The rationale for this position is that viewing a document over a network requires a downloading of information into the receiving computer’s memory; the consequential maintenance of this information in such memory is a “fixation,” no matter how briefly the information may be stored, and regardless of whether or not such information was later copied or printed. In hindsight, it appears the inference can safely be drawn that the same pressures influencing the position found in the White Paper made their presence felt in the drafting of the NET Act.

Was such an expansive redefinition of “copyright infringement” necessary to satisfy the needs of the affected commercial industries? In short, the answer is no. A narrower and yet adequate means of protecting the interests of copyright holders would have been to model the new prohibition of the NET Act upon the general conspiracy statute. That statute makes it a crime to “conspire” to commit a crime against the U.S., or to conspire to defraud the U.S. The term “conspire” is defined to include an agreement, tacit or express, to accomplish an unlawful plan.

As can be readily seen, the statute borders perilously close to criminalizing thought and mere speech. To draw a clear line around the proscribed conduct, and to insure that the First Amendment will not be infringed, this statute as enacted contains an additional requirement: one or more of the co-conspirators must commit an overt act. What this means in practice is that the government in any prosecution must not only prove that the co-conspirators talked about committing a crime, but that one of them actually went out and engaged in some conduct that was clearly in furtherance of carrying out the crime.

Similar protections could have been built into the NET Act in order to protect the legitimate First Amendment rights of individuals to read and discuss copyrighted works. First, in those instances where an intentional distribution of a copyrighted work has occurred by electronic means, the conduct could be held as criminal where one or more of several possible additional elements can be found to have occurred, such as:

- Where the electronic distribution occurred with the intent to destroy, damage, or impair the value of the copyright.

Second, in place of the suspect language found in the second clause, which reads, “by the reproduction or distribution, including by electronic means,” the clause should have been drafted separately from the first. It should then have been written in a manner similar to the following:

A person who willfully and through electronic means reproduces or distributes a copyrighted work, and who engages [in one of the aforementioned additional elements], infringes the copyright of such work and is punishable [as provided elsewhere in the criminal code].

The question might be asked: Is all lost? That is, has fixation as we knew it until the NET Act came along irretrievably gone? Fortunately, there is hope. The argument exists that Congress did not intend to expand the meaning of the term “copyright infringement.” In the same Congress that enacted the NET Act, there were also two bills introduced, H.R. 2441 and S. 1284, which would have explicitly amended this term in the manner in which the NET Act seems to do only implicitly. It remains possible that the courts, when eventually faced with this issue, will look to the decision of Congress to reject these attempts to explicitly broaden the definition of “copyright infringement” as a clear sig-
nal that Congress did not, in fact, do the same with the NET Act. What remains unfortunate is that we must leave it to the courts to protect what should never have been put at risk.

**Punishment Under the Act**

There is another troublesome aspect of the NET Act, arising from the punishment provisions applicable to the second clause. Put briefly, a person who electronically reproduces or distributes copyrighted works having a retail value of $1,000 or more may be convicted of a misdemeanor, and someone who commits the same offense where the copyrighted works have a retail value of $2,500 or more may be convicted of a felony.

Under the best of circumstances, using retail value is an inappropriate and dangerous standard for pricing intellectual property. Particularly for software, there is a tremendous disparity between the official retail price set by a vendor, and a realistic street value. Further, the functional value of intellectual property can depreciate drastically over a short period of time, as engineering advances swiftly redefine the meaning of the “state of the art” for computer technology. Finally, unique or specialized intellectual property may not have a value that can be easily determined. A concrete example of this last difficulty resulted in a federal prosecution being dismissed during the middle of trial. In this case, a systems manual, valued by the “victim” company at approximately $80,000, was found to be available to the public in substantially the same form for the price of $13. It is anything but reassuring to know that the vagaries of this unstable and somewhat illusory concept of “retail value” may determine whether an individual will or will not be subject to a criminal prosecution.

In the same vein, the distinction between $1,000 and $2,500 is, under the best of circumstances, much too minor to determine whether a conviction should be a misdemeanor or a felony. Few criminal statutes have such a narrow gap, with most requiring a threshold of $5,000 or $10,000 before a felony prosecution can be considered. Furthermore, many of these other statutes were enacted decades ago, when $5,000 was much more valuable than it is today. It seems difficult to justify a felony conviction, with the concomitant loss of civil liberties, the risk of jail time, and the destruction of reputation and career, on a retail value of $2,500.

The misdemeanor threshold of $1,000 poses its own difficulties. The provable conduct of few, if any defendants, will fall between $1,000 and $2,500. For this reason, individuals will typically be threatened with felony prosecutions. The real-world effect of the narrow monetary gap between a misdemeanor and a felony offense will be wholesale plea bargaining: defendants will rarely risk a felony prosecution if they can avoid one by pleading guilty to a misdemeanor. Furthermore, prosecutors will be encouraged to bring weak cases under the Act, knowing they will be readily able to resolve such cases by offering defendants misdemeanors in lieu of felonies in plea deals. The ultimate result will be questionable prosecutions brought and resolved by plea bargaining, with misdemeanor plea deals accepted by persons not because they are guilty, but because they fear the risks they will take if they insist on asserting their constitutional right to trial in order to establish their innocence.

**Conclusion**

The NET Act as enacted chills legitimate conduct and overpunishes questionable conduct. However, what must be asked is not so much what is wrong with this Act, but rather how the political process produced it. The NET Act is but the first of a series of new laws that have been enacted, and will continue to be enacted, in response to legitimate threats to commercial interests arising in the information age. The technological community, which gave birth to this age, must recognize it has a responsibility to educate Congress on the full implications of the new laws it considers.

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Copyright is in trouble. Like many wounded creatures, however, its death throes are both a danger and a wonder to behold.

I am writing this shortly after Adobe reversed its stand on the criminal prosecution of Dmitriy Sklyarov for violating the Digital Millennium Copyright Act.¹ I am sure that developments will moot whatever I might consider saying about the eventual success of that prosecution. However, Sklyarov’s arrest and a legally related civil suit filed by Edward Felten² are excellent starting points to examine a severely flawed attempt to preserve historic notions of copyright in the modern age.

The Digital Millennium Copyright Act (DMCA) is of recent vintage. It was enacted by Congress in 1998 for the purpose of protecting information that is transmitted, stored, published, and otherwise used in electronic form. However, the statute goes beyond a mere restatement of prohibitions concerning misuse of another person’s copyrighted work. The DMCA contains prophylactic prohibitions: it prohibits the reverse engineering and public disclosure of the means whereby someone attempts to protect copyrighted property through encryption, digital signatures, and the like. By way of analogy, the DMCA makes it a criminal or civil offense to crack the lock of a safe, in the hope that by doing so it will add further protection to the contents of that safe, here, the copyrighted work.

The flaw in this logic is the locks with which we are concerned are in themselves information, and, therefore the DMCA proscribes the otherwise legitimate study and dissemination of speech in violation of the First Amendment.

Let us briefly examine the critical provisions of the DMCA:

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commer-

¹ United States v. Elcom Ltd., aka Elcomsoft Co. Ltd., and Dmitriy Sklyarov. No. CR 01-20138-RMW (N.D.Ca.).
cially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title or in a work or portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumvent- ing protection afforded by a technol- ogical measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

The Act further provides that the term to “circumvent a techno-

logical measure” means to “descramble a work, to decrypt an en- crypted work, or to otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copy- right owner . . . .”

When applied to computer code, this language poses particular problems in academics and research: it restricts the communication of ideas and, as such, it viol- ates the First Amendment.

Computer code is speech.3 This is not an easy concept for a non-
technical person to understand. To a lawyer, computer code is some-

thing built into his or her com- puter. As such, it is part of a machine: it does something, that is, it makes the machine work. For this reason, Congress and the courts, which are populated pri-

marily by lawyers and other non-
technical professionals, view computer code as part of the hard-

ware. For them, it is axiomatic that computer code; being part of the hardware, is not protected by the First Amendment.

It is instructive to observe how, in the DMCA, software and the scientific analysis of software were equated to the manufacture and mass production of hardware devices. Let us look at the words and phrases the Act uses: “manu-

facture,” “offer to the public,” “provide,” “traffic in,” “technol-

ogy,” “product,” “service,” “device,” and “component.”

Unfortunately, the view embod-

ied by the Act is incomplete: com-

puter code is the expression of logic, and logic is the embodiment of thought. Thought is speech, pure and simple, and for this rea-

son code is speech.

If this was where the DMCA stopped, that is, by declaring the code of a program to be hardware and thus not under the protec-
tions of the First Amendment, I believe scientists and society could live with the results. After all, the

New York Times, the adventure books of Harry Potter, and Star Wars movies are speech, and copy-

right law restricts their distribu-
tion. Society functions fairly well despite this inconvenience. How-
ever, our difficulty is that the DMCA does not stop here.

The Act prohibits the “traffick-
ing” in anything, not merely com-
puter code, which may be used to decrypt or otherwise circumvent copyright protection mechanisms, including those mechanisms expressed by computer code. More precisely, the Act states that no one shall “offer to the public, provide, or otherwise traffic” in such technology.

Here is the problem. To ana-
lyze an encryption algorithm is to analyze a thought. Thereafter, to discuss, communicate, debate, criticize, or collaborate on that thought is to engage in speech. Under the Act, such discussion, communication, debate, criticism, and collaboration constitute trafficking in the subject thought; offering it to the public; and, generally, providing it to third parties. Going one step further, this is so regardless of whether the thought is written entirely in English, or is embodied in a sci-
entific presentation using a lan-
guage of mathematics, such as computer code.

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3 Bernstein v. U.S. Department of Justice. 176 F. 3d 1132 (9th Cir. 1999).
The Rub
Now we reach the heart of the scientific and academic communities' problem with the DMCA. If I want to understand a field of endeavor, I must study the latest developments in that field. For each community, as a whole, to understand these developments, the conclusions resulting from such study must be communicated to its members. This is how a field of knowledge advances. Included in these attempts to understand and to communicate are: analyses of a development's strengths and weaknesses; identification of any unique and novel ideas conceived or implemented; comparisons with other methods available or pondered; and methods of superseding, improving, or defeating new methodologies.

Put into the words of the DMCA, the community must “offer to the public, provide, or otherwise traffic” in new technology. When that new technology includes an anti-circumvention device, the scientific or academic discourse concerning that technology constitutes a violation of federal law, that is, the DMCA. Thus, we have an infringement of the First Amendment. This infringement is complete not only with the dissemination of the protected code itself, but also through discussions about that code that address its strengths, weaknesses, novelty, uniqueness, and any other aspect that might lead to a method of defeating the intent of the code, that is, its anti-circumvention feature.

The Civil Concern
The legal arena has provided us with concrete examples of the DMCA in action.

The first case we visit is that of Edward Felton. For our purposes the following facts are relevant: Felton and some associates intended to publish a research paper regarding encryption mechanisms being used by the recording industry to prevent the unlicensed duplication of copyrighted works. They were threatened with a civil suit by that industry, and withdrew the paper. The threatened suit would have been brought under the DMCA. Eventually, the industry withdrew the threat in writing. Nonetheless, Felton brought a lawsuit under the Declaratory Judgment Act asking a federal court to strike down the DMCA as an unconstitutional infringement of his right to free speech.

Civil enforcement of federal laws is not uncommon. Several statutes include what are known as “private inspector general” provisions, permitting an individual having some interest in the enforcement of the law involved to privately file a lawsuit seeking injunctions or penalties (or both) against the person who may be violating the law. Sometimes the statutes permits the federal government to intervene or take over the case.6

The U.S. Department of Justice (DOJ) eventually filed its own motion in the Felten case, asking the court to dismiss the suit. The DOJ relied upon several provisions in the DMCA which, at first glance, seem to provide exceptions or safe harbors to its prohibitions. Among these are conduct necessary to engage in encryption research; and conduct necessary to engage in security testing of a computer system.7 The statute also carries a catchall, stating that nothing in the Act “shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.” In short, the DOJ argued the DMCA provided all the protection to Felten’s rights to free speech that might be necessary for him to carry on academic research. Unfortunately, this is the wrong standard to use when examining freedom of speech, and demonstrates the flaw inherent in the DMCA.

The first problem is the term “necessary” used in some of the safe harbors. Who is to determine what is necessary? The courts? Law enforcement? The U.S. Attorney General? Must a researcher obtain

6The most famous example in this category of “private inspector general” statutes is the federal False Claims Act, which permits individuals, known as Relators, to bring a lawsuit in the name of the U.S. to recover double or triple damages against persons doing business with the government who cheat by submitting false or fraudulent claims. The suits are also known to the public as qui tam law suits. In exchange for bringing the case, a successful Relator is rewarded with a share of the government’s recovery.
7Other conduct included in these safe harbors is that by law enforcement; and that for achieving interoperability of computer programs.
permission from all before he or she is safe to present a paper? In the arena of First Amendment law, the answer to these questions is clear: the statute is unconstitutional merely because the term “necessary” is ambiguous, is subject to various interpretations by parties with different interests, and serves to chill the expression of free speech before any words are ever uttered. Courts simply will not permit individuals to be afraid to talk because of a government-sanctioned threat of prosecution.

The recording industry tried to get around this problem, and avoid the risk that Felten might succeed in having the DMCA struck down. It gave Felten a letter saying the industry had changed its mind, and now did not intend to sue him if he presented his paper. From the industry perspective, removing the immediate threat of prosecution from Felten’s shoulders made his lawsuit moot. Again, First Amendment protection is not so easily evaded.

There exists a principle known as the “Overbreadth Doctrine” which states: if a real threat to free speech exists for person A, then I (person B) can challenge that threat even if the threat does not apply to me. Courts consider First Amendment rights precious, they relax the normal judicial standing requirements and permit individuals not immediately threatened with harm to go to court in order to vindicate their rights based upon the impact the threat might have to third parties. As applied here, the fact the recording industry could conduct itself as a private inspector general, deciding who gets free passes and who gets civilly prosecuted under the DMCA, is itself a threat of sanction and a chill on the expression of free speech. Thus Felten has standing under the Overbreadth Doctrine to challenge the Act regardless of whether he is one of the fortunate few given a free pass from the recording industry.

Another provision of the Act is the catchall clause quoted earlier. This clause does not save the DMCA because it is too narrow. It protects free speech rights for activities using consumer electronics, telecommunications, and computing products. What we must be concerned about are matters far beyond these trivial activities, to the basic, underlying academic and scientific research on which these products and others are founded. The First Amendment does not protect my use of a computer program; it protects the speech I distribute via that program, and it protects my discussion with others as to how to build a better program and how to protect the information I manipulate using the one I have now. Again, Congress’ erroneous conception that computer programs, and their code, are mere products shines through.6

The Criminal Risk

In the criminal arena, the scope for such liability under the Act is significantly more restricted than that for civil liability. In summary, it is a criminal offense to violate the DMCA provisions “willfully and for the purposes of commercial or private financial gain.” Nonprofit libraries, archives, and educational institutions are entirely exempt from criminal liability.

In some ways the restrictions make one breathe more easily. After all, there is a difference between reading a copyrighted poem to a group of friends in order to enjoy and discuss it versus making bootlegged copies of the work and then selling them for profit. In addition, the U.S. federal courts have, at various times, given and taken back greater restrictions regarding what is termed “commercial speech,” usually business advertisements.

Nonetheless, the restrictions leave many troublesome potholes. Corporate, private, and commercial research in general still falls under the criminal ban. Making a brief comparison over the years between the contributions of Bell Labs with those of MIT clearly demonstrates the vitality of commercial research is no less than that of academia. Similarly, the right to exercise speech in furtherance of commercial research can be no less than that for academic research. Yet, this need is ignored by the DMCA.

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The case of Dimitry Sklyarov involves a Russian programmer whose company, Elcom, wrote and marketed a computer program that invoked the wrath of Adobe Systems, Inc. The company chose to refer its concerns to the U.S. Attorney’s Office in the Northern District of California rather than proceed with a private lawsuit, probably because they figured the pertinent perpetrators resided outside of the U.S. The U.S. Attorney’s Office, in turn, decided to prosecute criminally.

Sklyarov and his company were each indicted for trafficking in and marketing to the public a product whose primary purpose was to circumvent a copyright protection device, specifically for selling a computer program that would enable a user to avoid the built-in, licensing-protection features of Adobe’s e-book system.

The Sklyarov case differs from the Felten suit because Sklyarov is charged with distributing a finished product whose primary purpose is to enable a user to make multiple copies, and make unauthorized use, of a copyrighted work without paying for those extra copies or that unauthorized use. One might be tempted to compare the product to a Xerox copying machine, and conclude the fair-use doctrine should apply. However, to be fair, one must clarify the analogy by comparing it to the copying of negotiable instruments, such as bonds and bank checks, which have color codes embedded in them that impede duplication by copying machines, and then using a mechanism to circumvent these color codes. In this analogy, Elcom’s program would be the circumvention mechanism for the color codes.

This analogy demonstrates a logic in the application of the DMCA to Sklyarov’s and Elcom’s activities: no First Amendment infringement is apparent, and criminal prosecution of bootlegged, copyrighted works has a long history of approval in the U.S.

Problems with the Sklyarov prosecution still exist, however, and they are twofold. First, they do not take into account the fact that, unlike paper, computer code is infinitely malleable and distributable. It invites anyone with the least understanding of how a computer operates to tamper with such code, and allows anyone with access to the Internet to globally distribute the code. To adopt another legal term, it is “an attractive nuisance.” To this end, the marketplace must assign the risk of code being tampered with or distributed to the person who chooses to put that code into the stream of commerce for his or her own commercial reasons. Using criminal laws to enforce a paradigm of intellectual property rights that is technologically obsolete is an ill-advised use of law enforcement resources or the imposition of criminal penalties.

The second problem involves the global nature of Sklyarov and Elcom’s activities. They reside in Russia, where the DMCA is not applicable. They market on the Internet, which transcends all state, local, and national jurisdictions. There is no allegation in the indictment that the defendants marketed their product primarily in the U.S., or sought to do so. In such circumstances, the wisdom of applying U.S. laws to global commerce—and our criminal laws to foreign nationals based solely on their Internet activities—is highly questionable if for no other reason than other countries might apply the same logic to our own citizens.

Conclusion
The primary problem with the DMCA is its supporters fail, or perhaps refuse, to understand that the old means of doing business no longer apply in the digital age. Moreover, attempts to maintain those old means impermissibly infringe on our fundamental freedoms, as well as upon generally accepted notions of fair play and international comity. In summary, the DMCA represents the dead hand of the past obstructing society’s advance to the future. Its removal cannot come too soon.

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Law and Technology

Remix Nation

Assessing the threat the anticircumvention provisions of the Digital Millennium Copyright Act pose for fair use.

Imagine a person who decides to make a Downfall video, using a scene of Hitler receiving bad news to mock some current event. Assuming this is her first attempt at a remix, she might do some searches to figure out the best way to go about it. She will easily find guides online showing her how to use various software programs—many of the alternatives are free—to rip clips from a DVD and import them to her video editing program to create her remix.

Asked about copyright issues, she might say that what she is doing is a fair use allowed by copyright even without the owner’s permission: it is noncommercial, uses only a portion of the movie she is remixing, offers new meaning that cannot be found in the original, and does not interfere with any market the copyright owner wants to participate in. And she would be right. The only problem is that, until recently (and potentially starting again in 2012), U.S. law made her method of remixing illegal under the anticircumvention provisions of the Digital Millennium Copyright Act (DMCA). Circumventing the “access controls” of a commercial DVD—the code that tells it to work only on a licensed player that does not allow any copying, no matter how minimal—was unlawful regardless of whether the purpose was to make a fair use. To make matters worse, the DMCA applied only to particular ways of getting those fair use clips: someone who set up a separate camera to film the screen on which the DVD was playing would not be violating the DMCA, even if he filmed the whole movie. Though the film studios touted this as an alternative to circumvention, they also pressured the federal government and many states to enact laws making using a camcorder in a theater illegal, so that one woman was jailed for two days for filming her sister’s birthday party, which involved a trip to see the blockbuster The Twilight Saga: New Moon.

Moreover, the Copyright Office has also stated that a person who used screen capture software to record a DVD’s output as it played would not be subject to DMCA liability (though major copyright owners are not prepared to agree with that conclusion—they say that using screen capture might violate the DMCA). Under this bizarre system, only using the standard, widely available programs like DVD Decrypter for making clips would break the law, even if the output of the camcorder version and the screen capture version looked the same as the decrypted version.

The Digital Literacy Test and the Digital Poll Tax

The DMCA created a trap for the unwary. Indeed, someone who downloaded a full unencrypted movie from an unauthorized source might be better off, legally speaking, than someone who circumvented the controls on a DVD she had paid for to get 30 seconds’ worth of clips, because at least the former would be able to argue that fair use justified her conduct. Historically, the literacy test required prospective voters to interpret an often arcane...
era, a tripod for stability, a perfectly dark room to prevent light pollution, and a large TV. In combination, the qualitative and financial burdens imposed by compliance with anticircumvention law erected profound barriers to effective use of video clips, for anyone who managed to learn about them. None of this was difficult to predict when the DMCA was enacted, and from the beginning critics denounced its effects on fair use. Courts, however, considered the structural disadvantages created by the DMCA too hypothetical and general to justify any limits on the scope of the law.\(^a\)

**Rulemaking as Safety Valve**

This legal regime had particularly damaging effects on members of marginalized groups who are already likely to have limited resources and to be uncertain about expressing themselves. There is a narrow avenue for relief: the DMCA provides for a triennial rulemaking procedure allowing the Librarian of Congress to create temporary exemptions to the ban on circumventing access controls where

\(^a\) Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001).

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The DMCA hits hardest at transformative, critical uses by people interested in conforming with the law.
the ban is harming noninfringing uses of copyrighted works. Although the Librarian initially accepted only extremely limited proposals, leaving most fair uses unprotected, in 2006 it allowed media studies and film professors to circumvent DVD encryption to use clips in teaching. Building on this exemption, representatives from the Organization for Transformative Works (OTW)—on whose legal committee I serve—testified in the most recent DMCA proceedings on behalf of noncommercial remix artists, supporting an exemption proposed by the Electronic Frontier Foundation.

Fair use remixes abound online, and we submitted many examples. For nonlawyers, American University’s Center for Social Media has developed a set of best practices for fair use in an online video, offering comprehensible rules that require good judgment, but not a lawyer’s services, to apply.2

One reason so many laypeople are dismissive of copyright law is because it is counterintuitive and arcane, resulting in seeming unfairness and futility; the anticircumvention provisions are a good example of that. While they encourage disrespect from some people, incomprehensible rules also deter risk-averse remixers who are vaguely aware of the DMCA from making fair uses. Even the ones who continue may find themselves unable to assert fair use defenses for fear of DMCA liability. Some remixers have received takedown notices and wanted to make fair use claims so their works could be restored, but decided they could not because they were unsure about the method they used to capture the clips.

Hiding the (Legal) Wiring
The solution, as a British government report put it, is to “hide[e] the wiring”—to simplify copyright law so that it comes into better alignment with ordinary logic.4 Fortunately, the Copyright Office agreed with these arguments, at least in part, in its most recent rulemaking. The rulemaking allowed circumvention to access content on DVDs “when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circum-

There are several lessons from the battle to keep fair use from being eliminated via technological means.

vention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use” for certain educational uses by professors and film students, documentary filmmaking, and noncommercial videos.5 Notably, that last option not only covers most YouTube remixes, but also most educational uses, even those not allowed by the first, limited educational exemption. As long as they reasonably believe that circumvention is necessary—and given the expense and flaws of the alternatives, it will routinely be necessary—noncommercial video artists can remix at will.

The creativity of remix culture comes from many far-flung individuals, some of whom invent or reinvent remix for themselves without even knowing about other remixers and others of whom work within existing communities, aware in varying degrees of the artistic traditions they are updating, continuing, and disrupting. But when it comes to dealing with the effects of law on creativity, individual creators need organized representation. Otherwise, as copyright policymaking has repeatedly shown, their interests will simply be ignored. Henry Jenkins, a leading scholar on the interaction of corporate and individual creativity in the digital age, argues that media fandom, from which many remixes derive, is “the experimental prototype, the testing ground for the way media and culture industries are going to operate in the future.”6 If so, then without further activism, “testing ground” might be a far-too-apt metaphor, with the copyright industries trying out their best new heavy ordnance—technological and legal—on individual remixers.

There are several lessons from the battle to keep fair use from being eliminated via technological means. The rulemaking process of the DMCA is far from a panacea. Among other things, exemptions will be lost if advocates do not show up to argue for them every three years, or if the Copyright Office changes its mind about the value of particular uses. Also, distribution of circumvention technology remains unlawful, even though people entitled to an exemption are unlikely to be able to accomplish circumvention on their own and even though the copyright industries admit that this ban has failed. Regardless, since it is easy to find circumvention technology and not unlawful to possess it, people entitled to circumvention can easily find the means to do so, but this remaining barrier is a reminder of the costs of poorly thought-out lawmakers.

The U.S. has successfully pressured many of its trading partners to adopt U.S.-style anticircumvention provisions, generally without U.S.-style limitations and exemptions. The U.S. experience with DMCA overkill demonstrates that the DMCA as written is not right for anyone, and that other countries should be wary of copying a law that suppresses artists and educators. Laws will be made with or without the input of those who understand what technology enables (and threatens); the challenge is to ensure that we do not, in aiming at commercial pirates, hit the fans and critics who are trying to participate in a cultural conversation instead.

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Copyright held by author.

viewpoints

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Legally Speaking
Why the Google Book Settlement Failed—and What Comes Next?
Assessing the implications of the Google Book Search settlement.

On October 28, 2008, Google, the Authors Guild, and the Association of American Publishers (AAP) announced a settlement of lawsuits charging Google with copyright infringement for scanning in-copyright books from the collections of major research libraries. While litigants can ordinarily settle lawsuits without judicial oversight, different rules apply in class action lawsuits. Because class action settlements affect the rights of many people who were not directly involved in the lawsuit or settlement negotiations, judges must determine whether the proposed settlement is “fair, reasonable, and adequate” to the class on whose behalf the lawsuit was being settled.

Just over 13 months after the fairness hearing on the proposed Google Book Search (GBS) settlement, Judge Denny Chin finally ruled that this agreement did not satisfy the fairness standard. The litigants did not appeal rejection of the settlement. The default next step is for the case to go back into litigation on the fair use or infringement issue.

In this column, I explain why Judge Chin disapproved the GBS settlement, speculate that the fair use issue may not be decided by the courts, and discuss the possibility of a new settlement and of legislation as alternatives.

“A Bridge Too Far”
The single most important factor in Judge Chin’s ruling against the GBS settlement lay in his agreement with the U.S. Department of Justice (DOJ) that it was “a bridge too far.”

The actual issue in litigation was whether scanning books to index their contents and provide snippets was copyright infringement or fair use. Yet, the settlement proposed an extremely complex forward-looking commercial regime under which Google could commercialize all out-of-print books (unless rights holders showed up to say no) and display up to 20% of contents of these books in response to search queries, as long as it shared 63% of the revenues with rights holders who registered with a new collecting society to be known as the Book Rights Registry (BRR).

Google never claimed it would be fair use to sell individual copies of out-of-print works to the public, nor to construct an institutional subscription database (ISD) of out-of-print books to
license to institutions of higher education, among others. Nor could it credibly make such a claim. Yet, the proposed GBS settlement would give it rights to do both of these things (and more).

The scope of the settlement, in other words, went far beyond the issue in litigation. At the fairness hearing the DOJ lawyer pointed out it was the duty of class counsel to litigate the claims they brought or to settle those claims. They had instead used the existence of a dispute about GBS scanning to remake the market for e-books and change the default rules of copyright law (which generally require a prospective user to get permission in advance before making commercial uses of the works), as the proposed GBS settlement would arguably do.

Litigation or Legislation?
Judge Chin also agreed with the DOJ that the only legitimate way to restructure rights and e-book markets in the manner proposed in the GBS settlement was through legislation.

The quasi-legislative character of the settlement was most evident in its solution to the so-called “orphan works” problem. Works are deemed orphans when their rights holders cannot be found through a reasonably diligent search. A book published in 1953, for instance, may still be in copyright its owner is a firm that no longer exists, or an author who died without heirs. In 2006, the U.S. Copyright Office proposed legislation to allow orphan works to be made more accessible, but so far this legislation has not been enacted by Congress. (The EU has recently proposed a directive addressing the orphan works problem.)

The proposed settlement would have given Google the right to commercially exploit all orphan books because their rights holders were members of the class that would have virtually consented to these uses through the judge’s approval of the settlement. Judge Chin decided it was for Congress, not the courts, to address the orphan works problem.

Adequacy of Representation
The Authors Guild complaint named three of its member authors as representatives of the class of authors affected by GBS scanning. These authors, Guild lawyers, and lawyers designated as counsel for the class have an obligation to represent the interests of all members of the class.

In my submissions to the court, I argued that the plaintiffs and their lawyers had not adequately represented the interests of academic authors. Unlike Guild authors, academic authors would be inclined to think that scanning books to index them was fair use, not copyright infringement. They would, moreover, be likely to want their out-of-print books to be available on an open access basis rather than through a profit-maximizing scheme such as the GBS settlement proposed. Judge Chin agreed with me that academic authors had different interests than Guild authors and that the Guild’s lawyers had not adequately represented our interests.

Judge Chin was also plainly affected by the large outpouring of opposition to the GBS settlement from other copyright owners. He noted that 6,800 authors had opted out of the settlement because they did not wish to be bound by it. He quoted at length from author objections to GBS and to the settlement. The governments of France and Germany and many foreign rights holders also opposed it. Although not ruling on contentions that the proposed settlement violated U.S. treaty obligations, Judge Chin made it clear he was troubled by these assertions.

Although saying that it was not a ground for disapproval of the settlement, Judge Chin also expressed concern about the lack of user privacy protections. The GBS settlement called for extensive collection of data about individual reader uses of GBS books, but had virtually no provisions limiting what Google could do with this information. In addition, he expressed reservations about the antitrust concerns raised by the DOJ and by Yahoo! and Microsoft about the extra advantage that Google would have in the search market by getting a license to improve its search engine with GBS books.

Benefits of the Proposed Settlement
Controversial as it was in some respects, the GBS settlement, if approved, would have brought about many socially beneficial results. Chief among them was a vast expansion of access to out-of-print but in-copyright books. Up to 20% of their contents could have been displayed to users in response to search queries. Millions of these books would have been freely accessible at terminals at public libraries (one per library) and at institutions of higher education (one per so many students), as well as through institutional subscriptions available to libraries and other institutions. E-book versions of these out-of-print books would also have been available for purchase by consumers, which they could access “in the cloud.” In addition, Google pledged in the proposed settlement to make digitized copies of these books available in formats accessible to print-disabled persons (such as versions in Braille or with enlarged typography).

There are already more than 15 million books in the GBS corpus, the overwhelming majority of which come from the collections of major research libraries. These collections are dense with the accumulated knowledge of the ages, and Google is scanning more of them every day. It was thus no exaggeration to assert that approval of the settlement would have vastly expanded access to our cultural heritage.

The GBS settlement would have permitted Google to provide its library partners with copies of scans of books from their collections that could be used for preservation purposes and for “non-consumptive research” (for example, tracing the influence of a thinker over time or the origins of words). Google itself would have been privileged by the settlement to engage

The actual issue in litigation was whether scanning books to index their contents and provide snippets was copyright infringement or fair use.
in non-display (computational) uses of books in the GBS corpus for purposes such as improving its search technologies and automated translation tools.

The proposed settlement would also have been socially beneficial in providing new income streams to authors and publishers through the BRR. These benefits cannot be realized through a class action settlement, but can they be achieved in other ways?

What's Next?
Judge Chin made clear that he would look more favorably on an opt-in settlement (that is, requiring Google to get permission from rights holders before commercializing their books) than he had on the opt-out settlement proposed in 2008. However, lawyers for Google and the Authors Guild have told the judge that Google has no interest in an opt-in settlement. An opt-in settlement would also not bring about the socially beneficial results envisioned in the proposed GBS settlement. Yet, because litigation is very expensive, takes a long time, and poses risks for both sides, settlement is far more likely than resuming litigation at this point, although Judge Chin has indicated that because the parties have not yet reached a new settlement, the case will be scheduled for trial next July.

Legislation would be another way to accomplish some of the socially beneficial aspects of the GBS settlement. Maria Pallante, the newly appointed Register of Copyrights, and James Billington, the Librarian of Congress, have written to key Congressional leaders to indicate their willingness to undertake a study of legislative options in the aftermath of the GBS settlement disapproval.

Having studied the settlement and assessed its possible benefits, I have developed a framework for a legislative proposal that would aim to achieve these objectives.1 In brief, I recommend: 1) creating a privilege to scan in-copyright works for preservation purposes, to allow their contents to be indexed, and to allow non-display uses of the scans, including non-consumptive research uses; 2) allowing “orphan works” (works whose rights holders cannot be found after a reasonably diligent search) to be made available on an open access basis; 3) expanding the right of libraries and others to improve access for print-disabled persons; and 4) ensuring that reader privacy interests are respected. Unfortunately, the political economy of copyright in the U.S. does not bode well for these proposals.

I also suggest that consideration be given to creating an extended collective licensing regime for out-of-print, non-orphan books so that an ISD such as the GBS settlement proposed might be created. Extended collective licenses have been used with considerable success in Nordic countries to provide rights holders with compensation while at the same time allowing users the assurance they can get a license to make a large number of works available even when transaction costs of clearing all rights, one by one, would be excessive or possibly prohibitive.

Many, even if not all, of the social benefits that would have flowed from approval of the GBS settlement can be achieved in other ways. Some reforms can be done through private ordering (for example, professors making their books available on an open access basis), some through fair use (for example, scanning to index contents), and some through legislation. We should not let the failure of the GBS settlement stand in the way of finding new ways to make cultural heritage more widely available.

Reference

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The emergence of the Internet has put enormous pressure on the rights model of U.S. copyright law. That model is premised on the notion that copyright holders are entitled to control the making of copies of their works, but technology has made that control somewhere between fragile and nonexistent. Content creators have struggled to restore the control assumed by copyright law. Two recent developments, one pending federal legislation and the second an industry-wide agreement between Internet service providers and content distributors, provide new looks at this ongoing issue.

Technology and copyright have a complex relationship. New waves of technology have created novel expressive opportunities and dramatic improvements in the ability to distribute copyrighted works. But new technology rarely asks permission, and with each technical advance, we have seen new opportunities and new clashes. Perforated rolls for player pianos in the early 1900s came from sheet music and roll producers were not eager to write checks to copyright holders. Radio saw recorded music as a way to fill the airways even though disks came with a legend stating that the music was not licensed for radio broadcast. And the VCR introduced a new vocabulary—time shifting—and the chance to watch TV on your schedule, not broadcasters’ schedules. It did so without offering any compensation to broadcasters or show producers and even created the risk that the financing model for free broadcast TV would be put at risk by viewers with nimble fingers who fast-forwarded through commercials.

Since at least the advent of Napster, the music industry has struggled to find a strategy to control illegal downloads of music. Technology made it very easy to rip CDs and share the results with the world. The music industry responded with lawsuits, first against Napster, Aimster, and Grokster, and then against individual consumers, leading to prominent examples such as the ongoing saga of Jammie Thomas-Rasset. The suits have been on the whole quite successful, at least as measured by the standards that lawyers use. Grokster lost 9-0 on the question of whether it might be liable for inducing copyright infringement (there was much more division on the question of how the U.S. Supreme Court’s prior Sony case should apply to this situation). Thomas-Rasset has faced juries multiple times and each time jurors have come back with damage awards—the first time $1.92 million and second time $1.5 million—that judges found too high.

Notwithstanding all of that, the
music industry sees these as paper victories, as file sharing has continued largely unabated. In some basic sense, law has failed the music industry. Technology has changed the integrity associated with distributing copies of copyrighted works by making copying easy and worldwide distribution instantaneous. To distribute a copy of the work is to put the means of production into the hands of consumers.

The rights model of the law has not changed—authors are entitled to control copying—but the practical ability to enforce that right has shrunk. The music industry started by chasing firms that were facilitating peer-to-peer file swapping. But this was like chasing quicksilver: even if you got your hands on one version, another would quickly reappear and the hive-mind of the P2P networks would reorganize around the new version.

The litigation clock is wildly out of sync with the speed of P2P organization. Ordinary law enforcement scales poorly and it is easy to see why the content industry would like a scalable way to enforce the key right to control whether copies are made of copyrighted works.

The Rojadirecta Case

In late 2008, Congress passed the Prioritizing Resources and Organization for Intellectual Property Act of 2008. The sole virtue of such a clumsy name is that it shortens to the PRO IP Act. The new act made it possible for the federal government to seize domain names associated with Web sites where allegedly infringing behavior was taking place or being facilitated. And seize it has. On June 30, 2010, the U.S. Immigration and Customs Enforcement bureau launched Operation in Our Sites and seized nine domain names and physical assets connected to commercial movie and television piracy Web sites. The program has expanded with additional domain name seizures for 77 sites in November, 2010 and with three additional sets of seizures of domain names through mid-2011.

Take a closer look at one of these cases. On February 1, 2011, the U.S. government seized the rojadirecta.com and rojadirecta.org domain names. Before the seizures, rojadirecta.com and rojadirecta.org offered up a guide to Internet TV focusing on sports (a lot of what the U.S. calls soccer but the rest of the world calls football). Like the early Napster, Rojadirecta offers links, not direct hosting, to facilitate what it calls P2P TV.

But if you go to those domain names today, when you type the .com or .org sites into a browser after the seizure, you are not offered links to the beautiful game. The URL bar for your browser will indicate you have indeed reached your intended destination, but when you look at your screen you see three U.S. governmental enforcement seals. The rest of the page briefly sets out the basis for the seizure—a search warrant under two federal statutes—and states that copyright infringement can be a federal crime.
The Rojadirecta saga should make clear why the content industry is looking for new enforcement tools.

New Enforcement Tools
The Rojadirecta saga should make clear why the content industry is looking for new enforcement tools. New legislation passed in 2008 in the form of the Pro IP Act, domain names seized and yet the activity continues elsewhere outside of the country. What might a solution look like? A technological approach by companies with the market position and financial stakes to make something work, companies with something to lose if they fail to comply with their obligations. Digital rights management was a technical response, but one that embedded the technical protection in the digital object itself, and not in the Internet’s infrastructure. Something based in the U.S., so the firms can’t just exit overseas. The natural target might be big firms with bottlenecks. This sounds like Internet service providers, search engines, and the like. It sounds like, in fact, S.968, the draft act on Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011—the Protect IP Act for those of you quick to coevolve and to do that we need to talk across the disciplines in a coherent way. If we fail to do that, we will produce a sloppy result that will not accomplish anything for law or for technology.

Conclusion
The ISP Memorandum and the draft acts represent the current bleeding edge in the ongoing struggle between copyright and technology. We have moved from piano rolls to DNSSEC, but the conflicts recur. The legal regime gives copyright holders the right to control the making of copies, but no one told that to technology. Technological engineering is frequently easier to do than institutional engineering and yet these systems need to coevolve and to do that we need to talk across the disciplines in a coherent way. If we fail to do that, we will produce a sloppy result that will not accomplish anything for law or for technology.

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