The U.S. Copyright Act of 1976 (1976 Act), like kin
dred laws of other nations, is too long, complex, incompre-
hensible, 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 copy-
right laws simpler, more compre-
hensible, 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 copy-
right 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, diffi-
cult 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 cre-
ation and dissemination of
new works of authorship
and brought ordinary
persons into the copy-
right realm not only as
users of others’ works,
but also as creators.

One reason why a sim-
pler copyright law is
needed is to provide a
comprehensible
normative frame-
work for all of us
who create, use, and dis-
seminate works of authorship.

Another problem with U.S.
copyright law is that it is the intel-
lectual work product of a copy-
right 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
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 incompressible 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 stratagem 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.

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Legally Speaking

Andrew Grosso

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
Under the First Amendment, it cannot be denied that a collateral to the right to publish is the right to read what is published.

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:

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:

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

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2 17 U.S.C. 506(a) (as amended 1997).
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.4 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-

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3\[^{3}\] Id. n. 315.

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 “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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While on a scuba diving trip in the Seychelles Islands earlier this year, I found myself worrying about pirates. Real pirates, as in people who attack boats, take hostages, and sometimes kill their prey. This kind of piracy has become unfortunately common in that part of the world.

On board our ship were four former British special forces soldiers who served as security guards. They were armed with semiautomatic weapons and on patrol, 24/7, for the entire trip. The danger was not just hypothetical. The frigate berthed next to us as we boarded had 25 pirates in its brig.

Waking up every morning to the prospect of encountering real pirates added brio to our excursion. It also induced reflections on use of the word “piracy” to describe copyright infringements. Downloading music is really not in the same league as armed attacks on ships.

As we were cruising from Mahe to Aldabra, I expected to be far away from it all. But the ship got a daily fax of the main stories being published in the New York Times. Among them were stories about the controversy over the proposed legislation known as the Stop Online Piracy Act (SOPA). SOPA would have given the entertainment industry new legal tools to impede access to foreign “rogue” Web sites that host infringing content and to challenge U.S.-directed Web sites that the industry thought were either indifferent or acquiescent to storage of infringing materials.

For a time, it seemed virtually inevitable that SOPA would become law. Yet because strong opposition emerged from technology companies, computer security experts, civil liberties groups and members of the general public, SOPA has been put on hold. It is unlikely to be enacted in anything like its original form.

This column will explain the key features of SOPA, why the entertainment industry believed SOPA was necessary to combat online piracy, and why SOPA came to be perceived as so flawed that numerous sponsors withdrew their support from the bill.

**Blocking Access to “Foreign Rogue Web Sites”**

As introduced, SOPA would have empowered the Attorney General (AG) of...
the U.S. to seek court orders requiring foreign Web sites to cease providing access to infringing copies of U.S. works. Because “rogue” Web sites seemed unlikely to obey a U.S. court order, SOPA further empowered the AG to serve these orders on U.S. Internet intermediaries who would then have been required to take “technical- ly feasible and reasonable measures” to block their users from accessing the foreign Web sites. This included “measures designed to prevent the domain name of the foreign infringing site...from resolving to that domain name’s Internet protocol address.” These measures needed to be undertaken “as expeditiously as possible,” but no later than five days after receipt of the orders.

Upon receiving a copy of a rogue Web site order, search engines would have been required to block access to the sites even if users were searching for items that would otherwise have brought the sites to their attention. Internet service providers would have had to ensure that users who typed certain URLs (for example, http://thepiratebay. se) into their browsers could not reach those sites. Payment providers (such as Visa or Mastercard) would have had to suspend services for completing transactions. Internet advertising services would have had to discontinue serving ads and providing or receiving funds for advertising at these sites.

Those who failed to comply with the DNS blocking obligations could expect the AG to sue them. The AG was also empowered to sue those who provided a service designed to circumvent this DNS blocking (for example, a plug-in or directory that mapped blocked URLs with numerical DNS representations).

Frustrated by the weak enforcement of intellectual property rights (IPRs) abroad, the U.S. entertainment industry urged Congress to adopt SOPA as the best way to impede online infringements. Foreign rogue Web sites might still be out there, but if U.S.-based Internet intermediaries blocked access to the sites, users would not be able to access infringing materials through U.S. intermediaries.

Because ISPs in the U.S. and abroad have no duty to monitor what users do on their sites, it is easy for sites to become hosts of large volumes of infringing materials. Some operators seemingly turn a blind eye to infringement, some encourage posting of infringing content, while other sites may just be misused by infringers. By cutting off sources of transactional and advertising revenues, the hope was to discourage these sites from continuing to operate.

**Challenging U.S.-Directed Web Sites**

SOPA would also have given holders of U.S. intellectual property rights (IPRs) power to challenge “U.S.-directed sites dedicated to the theft of U.S. property.”

At first blush, it might seem that reasonable persons should support a law that is designed or operated for the purpose of, ha[d] only a limited use other than, or [wa]s marketed by its operator or another acting in concert with that operator in, offering goods or services in a manner that engages in, enables, or facilitates” violations of copyright or anti-circumvention laws.

SOPA would have enabled firms who believed themselves to be harmed by one of these sites to send letters to payment providers and/or to Internet advertising services to demand that they cease providing services to sites alleged to be “dedicated to the theft of U.S. property” shortly after receiving such letters.

Payment providers and Internet advertising services were then tasked with notifying the challenged sites about the “dedicated-to-theft” allegations against them. Challenged sites could contest these allegations by sending counter-notices to the payment providers and Internet advertising services. But without a counter-notice, payment providers and Internet advertising services had to cease further dealings with the challenged Web sites.

Content owners could also sue dedicated-to-theft sites directly to enjoin them from undertaking further actions that evidenced their dedication to theft. SOPA also authorized content owners to sue payment providers or advertising services who failed to comply with demands that they cease dealing with challenged Web sites.

**SOPA’s Flaws**

The main problems with SOPA insofar as it would have employed DNS blocking to impede access to foreign rogue Web sites were, first, that it would undermine the security and stability of the Internet as a platform for communication and commerce and second, that it would be ineffective.

SOPA is fundamentally inconsistent with DNSSEC (DNS Security Extensions), a protocol developed to avoid abusive redirections of Internet traffic, whether by criminals, autocratic governments, or other wrongdoers. Computer security experts spent more than a decade developing DNSSEC, which is now being implemented all over the world, including by U.S. government agencies.

As the USACM Public Policy Committee observed in a letter sent to members of Congress, DNSSEC Web site operators cannot reliably block offending sites “and so may be faced with the choice of abandoning DNSSEC or being in violation of issued court orders.”

This letter explained why DNS blocking would be ineffective. “[I]t is effectively impossible to bar access to alternate DNS servers around the globe because there are millions of them on the Internet.” Use of those servers “allows for bypassing of DNS blocking.” Circumvention of DNS blocking is, moreover, “technically simple and uni-
versally available." Browser add-ons to avoid DNS blocking have already been developed and would be available on servers outside the U.S., even if illegal in the U.S.

The main problems with the dedicated-to-theft provisions of SOPA were, first, that it was too imprecise and second, that it represented a dramatic change in the rules of the road affecting Internet intermediaries.

What does it mean, for instance, for an Internet intermediary to take “deliberate actions to avoid confirming a high probability” of infringement on the site? If Viacom tells YouTube it has found infringing clips of “South Park” shows on its site, does YouTube become a site dedicated to the theft of Viacom’s property if it does not investigate these claims? If Universal Music Group objects to the resale of MP3 files of its music on eBay, does eBay become a site dedicated to the theft of Universal’s property because one or more of its users offer the MP3 files for sale there?

Many Internet companies considered the dedicated-to-theft definition to be fundamentally inconsistent with the safe harbors established by the Digital Millennium Copyright Act (DMCA). Under the DMCA, Internet intermediaries are obliged to take down infringing materials after they are notified about specific infringements at specific parts of their Web sites. They have no obligation to monitor their sites for infringement. The safe harbors have been an important factor in the extraordinary growth of the Internet economy.

It may be apt to characterize sites such as Napster, Aimster, and Grokster as having been dedicated to the theft of U.S. intellectual property, but existing copyright law supplied copyright owners with ample tools with which to shut down those sites.

Had the entertainment industry sought more narrowly targeted rules aimed at inducing payment providers and Internet advertising services to stop the flow of funds to sites that were really dedicated to infringement, such a law might have passed. But that was not SOPA.

Conclusion
The collapse of support for SOPA was principally due to concerted efforts by Internet service providers (including Wikipedia, which went “dark” one day to protest SOPA), computer security experts, civil society groups, and millions of Internet users who contacted their Congressional representatives to voice opposition to the bill.

Because SOPA was a flawed piece of legislation, the collapse was a good thing. It would, however, be a mistake to think the battle over Internet intermediary liability for infringing acts of users has been won for good.

The entertainment industry is almost certainly going to make further efforts to place greater legal responsibilities on Internet intermediaries. This industry believes intermediaries are the only actors in the Internet ecosystem who can actually affect the level of online infringements that contributes to entertainment industry panics.

An odd thing about the entertainment industry is its deeply skewed views about piracy. In movies such as Pirates of the Caribbean, the industry glamorizes brigs who attack ships by depicting them as romantic heroes who have great adventures and engage in swashbuckling fun. Yet, it demonizes fans who download music and movies as pernicious evildoers who are, in its view, destroying this vital part of the U.S. economy. Something is amiss here, and it is contributing to a profound disconnect in perspectives about how much the law can do to bring about changes in norms about copyright.

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Calendar of Events

July 15–16
Extreme Scaling Workshop, Chicago, IL, Contact: Bill Kramer, Email: kramer@illinois.edu

July 15–19
26th ACM/IEEE/SCS Workshop on Principles of Advanced and Distributed Simulation, Zhangjiajie, China, Sponsored: SIGSIM, Contact: Jason Liu, Email: liux@cis.fiu.edu

July 15–20
International Symposium on Software Testing and Analysis, Minneapolis, MN, Sponsored: SIGSOFT, Contact: Mats Heimdahl, Email: heimdakhl@cs.mnu.edu

July 16–18
ACM Symposium on Principles of Distributed Computing, Funchal, Portugal, Sponsored: SIGOPS, Contact: Francois Bry, Email: br@im.unibe.ch

July 16–20
the 6th ACM International Conference on Distributed Event-based System, Berlin, Germany, Sponsored: SIGSOFT, Contact: Dariusz Kowalski, Email: darek@dib.vi.ac.uk

July 16–20
User Modeling, Adaptation and Personalization, Montreal, Canada, Contact: Nkambou Roger, Email: nkambou.roger@uqam.ca

July 22–25
International Symposium on Symbolic and Algebraic Computation, Grenoble, France, Contact: Josip van der Hoeven, Email: vdhoeven@lix.polytechnique.fr

July 24–27
International Conference on e-Business, Rome, Italy, Contact: Prof. Mohammad S. Obaidat, Email: obaidat@monmouth.edu
Copyright-related industries have been threatened by technological change in the past decade. Events raise questions about whether copyright policy, or its enforcement, requires rethinking. Evidence-based policy-making requires, of course, evidence. That begs the question: what do we really know about piracy and its effects?

As it turns out, there has been an outpouring of research on some copyright-related issues in the past decade. The results may surprise some readers. Reports of shrinking revenue in the copyright-protected industries are a cause for concern and further exploration, but many of the answers needed to inform sensible policy are not yet available. Sensible policy has to ask the right questions, and it has to inform the answers with the right data.

Napster Started It

Much of what is known about copyright concerns the recorded music industry. Yet, recorded music makes up a relatively small part of the copyright-dependent sectors of the economy, which includes motion pictures, software, video games, and publishing, among others.

Why is the music market the favored topic among researchers even though music itself is not intrinsically important? Blame it on Napster. Because file sharing has been widespread since Napster, the music market has experienced a shock with observable effects, namely, a weakening of copyright protection. Most observers agree that technological change has sharply reduced the effective degree of protection that copyright affords since 1999.

From an economist’s perspective, copyright is the grant of a monopoly right as a reward—and inducement—for creative innovation. Monopolies...
are, of course, bad. They raise prices and restrict output. Beyond that, they either transfer resources from buyers to sellers, or worse, they employ high prices that frustrate mutually beneficial transactions. Why do governments grant these monopoly rights? It provides an incentive for creative activity.

Napster illustrates that copyright’s effectiveness depends crucially on technology. While the recent technological challenge to copyright could have affected any product that can be digitized—text, audio, or video—in reality the recorded music industry was the first to face the new challenge. And the decade since Napster has seen a dramatic reduction in revenue to the recorded music industry.

The struggles of the recorded music industry have spawned an outpouring of research seeking to document the effect of file sharing on the recording industry’s revenue. Organizations representing the recording industry have argued that piracy is the cause of the reduction in revenue they have experienced. They further claim that their experience foreshadows in other creative industries, and that it will have serious consequences for bringing artists’ work to market.

What Do We Know?
While the question of whether file sharing displaces legal sales and weakens copyright is interesting—and a vital question for industry—it is clearly not the only question raised by file sharing. Copyright has traditionally allowed the recording industry to generate revenue from recorded music. Weakened copyright may be bad news for sellers of recorded music, but its consequence for consumers depends on what is arguably more important: whether new music continues to be made available. In this column, I consider these issues in more detail.

Although stealing has long been understood to be bad, the effects of stealing on the sellers of products produced with zero marginal costs (the additional cost required to make one more unit available) are somewhat subtle. To see this, first consider the analysis of stealing music that has already been recorded. There are two separate questions: whether stealing harms sellers and whether stealing harms society as a whole.

The effects of stealing on sellers depend on its effects on consumers, who differ in their willingness to pay for the product. Some attach valuations high enough so that, had stealing been impossible, they would instead have purchased the product. When they steal, each unit of theft reduces paid consumption by one entire unit. Thus, their stealing harms sellers one-for-one.

But other consumers attach lower valuations to the product. If stealing had been impossible, they would not have purchased the product. When they steal, it brings about no reduction in revenue to the traditional sellers.

Summarizing, does stealing harm sellers? It depends on whether the instances of unpaid consumption would otherwise have generated sales. That also explains why sellers and society should not view stealing the same way. When low-valution consumers steal, their theft does not harm sellers. But their consumption does generate a gain that otherwise would not have occurred.

This is society’s paradox of piracy. If stealing could somehow be confined to these circumstances, then its effects would help consumers without harming producers. Generally, it cannot, and that is why the revenue reduction experienced by sellers can have long-term consequences beyond their direct losses. Indeed, because new products need some threshold level of revenue in order to be made available profitably, transfers from producers to consumers are not benign.

New Products
The need to cover costs motivates the biggest unanswered question in this
debate. Does piracy slow new products from being brought to market? If so, and if consumers care about new products—and there is compelling evidence they do—then in the longer run, stealing can have a devastating effect on both producers and consumers. What does the evidence show?

Quantifying the effect of piracy on sales is an inherently difficult question. First, piracy is an illegal behavior and therefore not readily documented in, say, government statistics. As a result, it is difficult to get data on volumes of unpaid consumption, particularly in ways that can be linked with volumes of paid consumption (more on this later in the column). A second and equally important difficulty is the usual scourge of empirical work in the field, that is, its non-experimental nature.

Broadly, what we know about music piracy is this: the rate of sales displacement is probably far less than 1:1. Supporting this view is corroborating evidence that consumers steal music that, on average, they do not value very highly and would not otherwise purchase.

Still, the volume of unpaid consumption is quite high. So even with a small rate of sales displacement per instance of stealing, it is likely that stealing explains much if not all of the substantial reduction in music sales since Napster. That is, stealing appears to be responsible for much of the harm to the recorded music industry (for an overview, see Leibowitz4). Yet, that does not answer the whole question. Another crucial question is whether the reduction in revenue reduces the flow of new products to market.

Perhaps because this is a difficult question to study, there has been almost no research on the topic. Recorded music is the only industry that has experienced a massive reduction in revenue. This can play the role of an “experiment” to see whether the flow of new products declines following a weakening in effective copyright protection. However, it is only one experiment, and researchers do not have the option of rerunning it with slightly different circumstances, so getting definitive answers is challenging.

While some researchers have documented an increase in the number of new recorded music products and independent labels since 2000, this evidence is ambiguous. Most of these products are consumed little if at all (for example, see Handke1,3 and Oberholzer-Gee and Strumpf4).

It is tempting instead to ask how many products released each year sell more than, say, 5,000 copies. But not so fast! That approach is undermined entirely by the fact that stealing is on the rise, so that the meaning of selling a particular number of copies changes over time.

In recent work I took a new approach (see Waldfogel1,5). I document the evolution of quality using critics’ lists of the best albums of various time periods (for example, best of the decade). Any album on one of these lists surpasses some threshold of importance. The number of albums on a list released in each year provides an index of the quantity of products passing a threshold over time. I “splice” nearly 100 such lists, and I can see how the ensuing overall index evolves over time, including—importantly—during the “experimental” period since Napster. The index tracks familiar trends in the history of popular music: it rises from 1960 to 1970, falls, then rises again in the early 1990s. It is falling from the mid-1990s until the 1999 introduction of Napster.

What happens next? Rather than falling—as one might expect for an era of sharply reduced revenue to recorded music—the downturn of the late 1990s ends, and the index is flat from 2000 to 2009. While it is of course possible that absent Napster, the index would have risen sharply in a flowering of creative output, it nevertheless seems clear that there has been no precipitous drop in the availability of good new products.

The stable flow of new products appears to be a puzzle when set against the sharply declining revenue. Its resolution may lie in the fact that the costs of bringing new works to market have fallen. Creation, promotion, and distribution have all been revolutionized by digital technology and the Internet.

The Debate Continues?

Beware of simple answers in debates about piracy. Our knowledge remains incomplete. Representatives of copyright-protected industries are understandably concerned about threats to their revenue from piracy. In some cases—for example, recorded music—they can point to compelling evidence that their revenues are down. That is, most evidence available so far shows harm to sellers from consumer theft.

On the longer-run question of continued supply, however, we know far less. Has the supply of quality music declined due to piracy? Probably not. Finding desirable intellectual property institutions—that properly balance the interests of various parties—requires attention to the interests of both producers and consumers. Reports of shrinking revenue in the copyright-protected industries are a cause for concern and further exploration, but they are not alone sufficient to guide policy-making.

References


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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.

Asking 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—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*.\(^1\)

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 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
The DMCA hits hardest at transformative, critical uses by people interested in conforming with the law.

The provision of the law, asking questions irrelevant to the capacity to vote. Under the DMCA, fair users needed to understand that a digital file created in one way is illegal, while a digital file of the same movie created in another way is legal. Yet the issue of how to define and identify a circumvention technology has no relation to artistry or to fair use—nor even to deterring copyright infringement, given the alternatives discussed previously.

Then the digital poll tax kicked in: remixers were supposed to use a camcorder or screen capture software, both of which often produce degraded results. We do not usually tell artists they have to use bad materials to make their creative works, even in the name of protecting previous artists. Visual quality can be especially vital to cultural critics. If pop culture has luscious imagery, and critics have to speak in hard-to-watch forms, their already-marginal work is further hampered by looking incompetent. Ironically, camcorders and screen captures can work for making first-generation copies that are good enough to watch—and thus passably satisfying for true pirates—but not good enough to survive the multiple generations of digital manipulation and editing often involved in a remix, since each iteration involves some image degradation just as it would in analog editing. For example, screen capture tends to produce dropped frames, making time editing all but impossible. Thus, the DMCA hits hardest at transformative, critical uses by people interested in conforming with the law, and does the least damage to pure copiers.

The poll tax also came in the literal financial expense of using the camcorder setup recommended by major copyright owners for making clips: hundreds of dollars on a separate cam-

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...
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 “hid[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 intersection 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-handed—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 circumvent can easily find the means to do so, but this remaining barrier is a reminder of the costs of poorly thought-out lawmakering.

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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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 and/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
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.

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**Controversial as it was in some respects, the GBS settlement, if approved, would have brought about many socially beneficial results.**

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**Reference**


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