

Electrifying Copyright Norms and Making Cyberspace More Like a Book

By

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Abstract

The first half of this Article charts the evolving social norms of use of analog copyrighted works by individuals, and characterizes these norms as “what is” in real space, and “what ought to be” in cyberspace. The Author argues that while “what is” in the analog world may be imperfect, uncertain and unsatisfactory at times, it represents a discernible equilibrium upon which copyright holders’ ability to control and extract income from their works is balanced against the rights of fair users. Authors, content distributors and users all make decisions within a familiar longstanding copyrights framework within which lots of small scale unauthorized copying occurs, but content creation and distribution is still adequately incentivized. However “what is” in terms of real space copyright use norms is not making the transition to cyberspace, and will not, absent legislative intervention. Instead, copyright owners are using the attributes of digitalization to realize their own normative view of “what ought to be,” absolute control over copyrighted works that are embodied in electronic formats.

Using the specific example of nonprofit libraries, the second half of the Article explains how society will suffer if analog copyright use norms are not electrified, and “what is” becomes dramatically altered in the digital domain: Individuals will lose traditional levels of access to informational works, and be deprived of familiar ways and means of using copyrighted works.

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Introduction

Laws have both functional and expressive aspects.² When 30 million people exchange music files over the Internet,³ federal judges can rule that the file trading infringes copyrights, and they can enjoin online services and technologies that facilitate the file trading. What these jurists can't accomplish, however, is to make those 30 million people "obey" the copyright laws, as least not as a matter of collective conscience. Even more problematically, neither Congress nor the courts can seem to articulate in a meaningful way what it means for an individual consumer to respect copyrights. There is a growing disjuncture between the Copyright Act, copyright case law, and the ways individuals (in their consumptive capacities) have traditionally used, and would prefer to continue to use, copyrighted content.

Copyright law has long been driven by pragmatic concerns that shift and evolve over time, rather than by commonly held precepts of right and wrong. Copyright owners have a profit-maximizing normative view of copyrights best described as "absolute control." This vision of a world in which permission must be obtained for every use of a copyrighted work conflicts not only with the policies underlying the copyright laws, but also with the ways in which copyrighted works have traditionally been accessed and experienced by copyright consuming individuals. Yet recently large scale copyrighted content owners have effectively positioned themselves as the victims of an immoral citizenry that will "steal" copyrighted works at every opportunity unless the laws and the courts intervene. In response, the legislative and judicial branches of government have orchestrated and implemented changes to the copyright laws based on assumptions that copyrights (and the underlying creative works that copyrights "protect") are increasingly imperiled, and that guarding them from the ravages of popular infringement requires progressively stricter safeguards.

² E.g. C. Edwin Baker, *Injustice and the Normative Nature of Meaning*, 60 Md. L. Rev. 578 (2001).

³ Cite to number of users of Napster and other P2P file trading technologies

There has always been tension between how individuals actually utilize copyrighted works, and how copyright laws attempt to regulate such use. Content owners have, for example, tried (sometimes successfully) to use copyright law to prevent or control the use of photocopiers,⁴ the sale of used books⁵ and the rental of videocassettes containing motion pictures.⁶ However, friction between the owners and consumers of copyrighted works has increased dramatically as the “physical embodiments” of copyrighted works are increasingly available (often primarily and sometimes exclusively) in electronic formats.⁷

Some digital technologies offer copyright owners the possibility of increased ease and efficiency in the creation, distribution, monitoring and control of their copyrighted works. Other technological developments, however, threaten the ability of content owners to control and profit from their copyrighted content at all. Digital technologies and the Internet simultaneously increase both the risks of extensive copyright infringements, and the potential rewards of large scale controlled distribution of copyrighted works. As a result, large-scale copyright owners are trying, through lobbying and litigation, to tailor copyright laws to favor technologies that support their goals, and to enfeeble or eliminate those that do not. The consequences for individual copyright users are that copyrighted works in digital formats are increasingly subject to access and use controls.

Emerging copyright management techniques in the digital environment represent forced changes in the way copyrighted works are experienced by end users. Copyright consumers may

⁴ E.g. *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), aff’d 420 U.S. 376 (1975), *American Geophysical Union v. Texaco Inc.*, 37 F.2d 881 (2d Cir. 1994); *Princeton Univ. Press v. Michigan Document Services, Inc.* 99 F.3d 1381 (6th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1336 (1997).

⁵ E.g. *Bobbs-Merrill v. Straus*, 210 U.S. 339 (1908); *Doubleday, Doran & Co. v. R.H. Macy & Co.*, 199 N.E. 409 (N.Y. 1936).; more recently see M.J. Rose, “Are Authors Abused By Used?” posed to *Wired.com* on 3/19/02, accessed at <http://www.wired.com/news/culture/0,1284,51113,00.html>

⁶ E.g. *Columbia Pictures Industries v. Avco*, 800 F.2d 59 (3d Cir. 1896); *Columbia Pictures Industries v. Redd Horne*, 749 F.2d 154 (3d Cir. 1984).

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be chafing under these new access and use limitations, and reacting with increased hostility toward the very concept of copyright protections. New, rigidly enforced restrictions on use and access to copyrighted content, especially if accompanied by increased costs, may motivate otherwise law abiding copyright users to circumvent copyright controls (or at least to feel increasing sympathy for those who do so). While they may facilitate higher profits and more control over users, these restrictions do not appear to foster enhanced or principled respect for copyrights. Instead, they may actually be undermining the perceived legitimacy of the copyright laws among the copyrighted work consuming populace. One overarching theme of this Article is that if the government wants its citizens to respect copyrights, the copyright laws as they are promulgated and enforced, must be more consistent, comprehensible, and respectful of individuals' needs and experiences. Real space copyright use norms are defined for the purposes of this article as patterns of behavior associated with the end use of creative or informational works. The copyright laws, both as drafted by Congress and interpreted by the courts, must embrace and reflect longstanding copyright consumer use norms, rather than conflict with them, if they are to elicit widespread compliance.

This Article also analyzes the possibility of codifying real space⁸ norms associated with use of copyrighted works in traditional ink-and-paper mediums, in order to statutorily mandate a comparable level of access to information in digital formats. It posits that if individuals could access and use digitalized copyrighted works in old, familiar ways, perhaps they would also restrain themselves to analog levels of unauthorized copyright uses and infringements. It advocates adapting pre-existing real space copyright use norms to electronic formats as a mechanism for protecting the legitimate interests of copyright owners without depriving

⁷ e.g. the MyMP3, Napster, and DeCSS cases: ., UMG Recordings, Inc. v. MP3.Com, Inc., 92 F.Supp.2d 349 (S.D.N.Y. 2000); Recording Industry Ass'n of Am., Inc. v. Diamond Multimedia Systems, Inc., 29 F.Supp.2d 624; the DeCSS discussion in Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294 (S.D.N.Y. 2000).

⁸ The term "real space" is used rather than "meat space" largely because the author is a vegetarian.

individuals of the customary real space access to information provided by bound books and periodicals. The concept of codifying real space copyright use norms is then specifically explored as a mechanism for enabling non-profit libraries to provide library patrons with the same functional levels of access to information in electronic form, and through cyberspace, that have long been enjoyed in real space with respect to printed materials.

I. THE INTERSECTION OF NORMS AND LAW

Over a decade ago Robert Ellickson published a book that is widely regarded as a seminal work on the role of norms in regulating social interactions, entitled “Order Without Law: How Neighbors Settle Disputes.”⁹ After studying formal and informal dispute resolution among Shasta County, California cattle ranchers and their neighbors, Ellickson observed that the small, close-knit community had developed its own set of internal rules for addressing property damage caused by trespassing live-stock, and for ensuring the construction and repair of boundary fences. Based on the results of his research, he hypothesized that members of close-knit groups tend to govern their interactions by developing informal norms that maximized the objective welfare of group members.¹⁰ Where such informal governance occurred, Ellickson argued, a legal system could appropriately defer to the group’s informal practices by giving substantial weight to applicable custom. However, he asserted that legal rules would become more important when the social distance between disputants increased, when the magnitude of a

⁹ Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes*, (Harvard University Press 1991); see also Richard H. McAdams, “Accounting for Norms,” 1997 *Wis. L. Rev.* 625, 631-32 (1997) .

¹⁰ Ellickson book at 282-83. Ellickson identified five varieties of norms: Substantive norms, which define the conduct that is to be rewarded or punished; remedial norms, which establish whether reward or punishment is appropriate, and the form and degree of reward or punishment if any; procedural norms, which determine how information is gathered and acted upon by those who impose sanctions; constitutive norms, which establish the internal structures of norm governance, and controller-selecting norms, which administer choices between alternative sets of rules, such as between those of the relevant legal system and those of an informal, norm-based dispute resolution mechanism.

dispute increased, and when the legal system allowed disputants to externalize costs to third parties.¹¹

Informal norms are those that develop outside the confines of structured organizations, as contrasted with “formal norms” imposed by a centralized governing body, which are better described as rules. The norms referred to in this article are of the informal variety unless otherwise noted. They are also herein restricted to “end user norms,” those directly associated with the utilization of copyrighted works as a matter of ultimate consumption. The norms related to using copyrighted works to create new works that may enhance or compete with the original work are very important and equally deserving of exploration, but are not considered here.

Isolating a specific norm, establishing the precise moment when a norm is formulated or adopted, articulating the rationale for a particular norm, and charting the contours of any given cognizable norm are all subjective determinations that are invariably fraught with ambiguity. Eric Posner has written that norms resemble common law doctrines more than they resemble statutes, because they reflect a societal desire for flexible situational justice, but they are not constrained by the concern for consistency that jurists often impose on applications of common law doctrines.¹² This, he asserted, makes it more difficult to describe a norm than to articulate a doctrine of the common law. In Posner's estimation, “Norms are fuzzy.”¹³ Steven Hetcher has similarly observed that: “There is a systematic ambiguity...in the social-scientific conception of a norm, between norms understood as rules and norms understood as patterns of behavior.”¹⁴

Discussion of the role of norms in legal scholarship has frequently surfaced in conjunction with both the “law and society” and “law and economics” approaches to legal

¹¹ Ellickson book at 283.

¹² Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Penn. L. Rev. 1697, 1700 (1996).

¹³ Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Penn. L. Rev. 1697, 1700 (1996).

¹⁴ Steven Hetcher, “Changing the Social Meaning of Privacy in Cyberspace,” 15 Harv. J. Law & Tec 149, 154 (Fall 2001)

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analysis, which offer radically differing perspectives.¹⁵ One of Ellickson's many contributions to norms discourse was his overt rejection of the supposition that correctly evaluating the interplay between norms and the law requires a particular political or philosophical bent. As Richard McAdams has observed, "Ellickson criticized the extreme law and society claim that norms determine behavior to the exclusion of law – what he called 'legal peripheralism,' – and also the extreme law and economics claim that law determines behavior to the exclusion of norms – 'legal centralism.'"¹⁶ This article attempts to adopt the Ellicksonian approach of avoiding a stark doctrinal or philosophical orientation when discussing copyright use norms. In fact, to even characterize norm theory as a singular or unified construct is inaccurate. Even among self-identified law and economics adherents the word “norm” can have various meanings.¹⁷ For the

¹⁵ See Ellickson's book at 7-8 (“To exaggerate only a little, the law-and-economics scholars believe that the law-and-society group is deficient in both sophistication and rigor, and the law-and-society scholars believe that the law and economics theorists are not only out of touch with reality but also short on humanity. This book was written with one foot firmly placed in each of these two opposing camps.”) see also Etzioni article (socio-economic scholars embrace the importance of norms).

¹⁶ Richard H. McAdams, "Accounting for Norms," 1997 Wis. L. Rev. 625, 632 (1997).

¹⁷ Compare Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Penn. L. Rev. 1697, 1699-1700 (1996) (“A norm can be understood as a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior. Thus, a norm constrains attempts by people to satisfy their preferences. In these ways, a norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law. The rule-like nature of a norm should not disguise the fact that norms are not enacted and enforced like statutes. It is more plausible to say that when people observe some behavior, they more or less spontaneously approve or disapprove of it (or fail to react), and then reward, penalize, or ignore the actor.”) with Clayton P. Gillette, Lock-In Effects In Law and Norms, 78 B.U.L. Rev. 813, 832 and fn 54 (“By norms I mean regularities within the society to which we believe members of the society ought to conform, and that are enforced through mechanisms other than legal sanction.... This definition is consistent with that in David Lewis, *Convention: A Philosophical Study* 97-100 (1969). There exist other definitions that are less normative and thus refer only to regularities, wholly apart from the obligatory notion that follows from "ought." See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 350-51 (1997) (discussing the distinction between norms and regularities and stating his opinion that mere "intentional regularity or "convention" is not a norm). Because I am interested in norms as regulations analogous to governmentally imposed common or statutory law, I adopt this more restrictive and less descriptive definition. On the other hand, Robert Axelrod finds that a norm exists "to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in that way." Robert Axelrod, *The Complexity of Cooperation* 47 (1997). If the source of the punishment includes legal as well as extra-legal sanctions, Axelrod's definition seems to be too broad for my purposes. But to the extent that the existence of a norm entails any form of punishment for its violation, the concept of a norm involves a normative element.”). See also Robert Cooter, “Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1580 (November 2000) (“...a norm can be defined as an obligation backed by a nonlegal sanction. Sanctions such as criticizing, blaming, refusing to deal or shunning are nonlegal insofar as the people who impose them are not state officials.”), see also Richard H. McAdams, "Accounting for Norms," 1997 Wis. L. Rev. 625, 631-32 (1997) . (“If one scratches beneath the surface, it is clear that economic theorists have widely divergent views on what norms are and how they function.”)

purposes of this article, Steven Hetcher's characterization of social norms is adopted. Hetcher defines norms as follows:

[N]orms, at their core, are patterns of behavior, not rules, statements, or other linguistic entities. A norm need not be expressed in linguistic terms in order to have content, whereas a rule is by definition linguistic. A norm's content is defined in terms of its strategic structure. A norm, then, is behavior of a certain sort, which may or may not have an attached linguistic component. When characterizing a group's norms, it is necessary to keep in mind the difference between norms and rules, as it is important to be able to look at the actual practices of groups, rather than merely going by what they express linguistically. Talk is cheap; it is conforming behavior that creates benefits for conforming groups and externalities for third parties.¹⁸

Thus references to copyright-related norms in this article are allusions to actual practices of various groups with respect to exploitation of copyrighted content. For example, librarians and library patrons affiliated with a particular library may constitute a close-knit community. There may be rules which require the library to post "copyright warnings" on photocopiers that can be used by library patrons to photocopy works in the library's collections,¹⁹ but the library may not supervise use of these photocopiers or intervene even if individuals seem to be engaging in excessive photocopying. The library's "rules" concerning photocopier use are thus supplanted by an informal norm that permits unfettered photocopying. The library benefits from this norm to the extent that easy access to copiers makes library patrons happy, and from any income that the photocopiers generate for the institution. Library patrons benefit from the convenience afforded by the library photocopiers. Any acts of infringing copying that occur constitute externalities that affect third parties, the owners of the affected copyrighted works.

An articulation of recognized norms is putatively an objective expression of how individuals behave, but how norms are identified and defined is influenced by and subject to the normative biases of the observer, who has her own internalized vision of how the world is, and

¹⁸ Eric Posner, Law, Economics, and Inefficient Norms, 144 U. Pa. L. Rev. 1697, 1699 (May 1996).

¹⁹ See Section 108 (f)(1) and *infra*..

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how it ought to be.²⁰ That being said, if they are to be the basis for law, the norms of real space use of “analog” copyrighted works must be as fairly and impartially set out as is feasible, because to do otherwise would compromise the legitimacy of the undertaking. Thus, while the advocacy tone imbuing the description of why real space levels of information access needs to be legislatively mandated in the electronic environment will be unmistakable to the reader, it is hoped that the iterated norms themselves are rendered as neutrally and dispassionately as possible.

A. COPYRIGHT NORMS

**The secret rules of engagement
are hard to endorse,
when the appearance of conflict
meets the appearance of force.²¹**

Copyright use norms doubtlessly vary by category of work, and by the formats in which works are embodied. Entire CDs containing music are probably played and replayed more frequently than whole books are read and re-read, because people are less likely to want to read books repeatedly than they are to play songs over and over. As a result, music CDs on loan are probably “burned” more frequently than borrowed books are photocopied or scanned onto hard drives. This does not necessarily mean that as a moral or ethical matter copyrights in music are respected less than copyrights in literary works. It simply means that as a practical matter the works are consumed differently.

Respect for copyrights is not an inherent or natural part of the cultural infrastructure. Instead, it is learned, or it is not. Sheldon Halpern has suggested that because copyright law is fractured, inconsistent and difficult to understand, perhaps copyright laws do not have a normative role, and that the law is there because it is needed, so that appropriate energies can be

²⁰ This author admits a strong general preference for weak, “low barrier” copyright protections.

²¹ Lyrics excerpted from “Grace, Too” by the Tragically Hip on the Day for Night CD (MCA Records 1994).

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focused on enforcement of the law.²² Can there be law without legislation, or order without law, within the unauthorized use of copyrights framework? The unilateral authority over use and access that digitalization gives copyright owners makes evolution of mutually satisfactory norms unlikely with respect to electronic formats. In a more specific context Julie Cohen offered the following commentary to explicate her view that consensual norms are unlikely to develop in the realm of digital copyright management:

The parties affected by the impending digital copyright management regime exhibit none of the characteristics that Ellickson identifies as important for the development of such norms. First, the "community" of authors, owners, and readers of copyrighted works is neither well-defined nor close-knit. It encompasses, on the one hand, giant publishing and entertainment conglomerates such as Time-Warner and, on the other, anyone who has ever read a newspaper article or watched a movie. While all members of the copyright "community" depend on one another, in some sense, for the production, distribution, and consumption of creative works, the community's sheer size and diversity of tastes ensures that members do not depend on each other with the same immediacy as two Shasta County neighbors who share a boundary fence.

A second, and related, objection is that to the extent digital copyright management systems can be said to reflect shared extra-legal norms developed by repeat-player members of a copyright "community," that community does not include readers. The transient nature of the reader's interest in particular copyrighted works, compared with the more enduring interests of the authors and copyright owners in administering the rights to all of their works, marks the reader as the outsider. Ellickson offers a highway collision involving a passing tourist as an example of a situation in which Shasta County locals are content to leave adjudication of fault and determination of remedy to the legal superstructure. The passing tourist has no authority to invoke the system of third-party enforcement that has arisen among neighbors who are repeat players in interactions with each other. Similarly, it is extremely unlikely that the individual reader who wishes anonymous access to a copyrighted work will be able to pressure the owner to grant it by invoking shared norms that the reader helped create.²³

Thus, Cohen describes a dysfunctional macro digital copyright community in which overarching norms that are inclusive of, and responsive to, the needs of end consumers are unlikely to

²² Sheldon W. Halpern, Nies Memorial Lecture: Copyright Law in the Digital Age: Malum in se and Malum Prohibitum, 4 Marq. Intell. Prop. L. Rev. 1, 11 (2000).

²³ Julie E. Cohen, A Right To Read Anonymously: A Closer Look At "Copyright Management" In Cyberspace, 28 Conn. L. Rev. 981, 995 (Summer 1996).

emerge, largely due to the power imbalance between large copyright owners and discreet individuals. Cohen's specific concern underlying this analysis is that in real space the ability to read anonymously is a norm, but it is one that can be abrogated in electronic media by the adoption of digital copyrights management technologies. A new norm prohibiting anonymous access, imposed unilaterally by copyright holders, would permit and indeed facilitate rampant data collection, and data based profiling of readers.²⁴ It would also prevent people from reading (and possibly writing) online without revealing their identities.

Cohen allowed that in some situations, consensual private ordering may occur in cyberspace,²⁵ but seemed pessimistic about the possibility of real space copyright use norms moving unscathed into the digital realm. A parallel assumption of this article is that unless the norms are codified so that they have the force of (and indeed become) laws, they probably cannot survive digitalization. It will require legislation to move real space use norms into cyberspace. Full and accurate codification, however, will require that real space use norms be carefully and fully cataloged, regardless of how little they correspond with formal copyright laws or comply with the copyright precepts advanced by courts.

1. Imaginary Fences and Gates

**Was a big high wall there that tried to stop me
A sign was painted said: Private Property,
But on the back side it didn't say nothing –**

²⁴ Julie E. Cohen, A Right To Read Anonymously: A Closer Look At "Copyright Management" In Cyberspace, 28 Conn. L. Rev. 981, 985 (Summer 1996).

²⁵ Julie E. Cohen, A Right To Read Anonymously: A Closer Look At "Copyright Management" In Cyberspace, 28 Conn. L. Rev. 981, 996-97 (Summer 1996) ("This is not to say that Ellickson's model can never be valid in cyberspace. Geographic proximity need not be the touchstone for community. Thus, for example, the model of consensual private ordering based on shared extra-legal norms may have some validity in the case of a small, inherently self-contained online discussion group. This is so because the notion of consent plays a critical role in the process of community self-definition. As a result, all members of the community will assist in enforcing the extra-legal norms that have developed within the community. Members of online discussion groups have a shared interest in keeping the discussion within certain broadly defined parameters of relevance, and in making sure that fellow list members adhere to certain standards, however minimal, of courteous online behavior. Even those members who occasionally transgress group norms will assist in enforcing those rules of "netiquette" against others.").

This land was made for you and me.²⁶

As one commentator expressed it, “Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective.”²⁷ As is described below in more detail,²⁸ copyright law, as articulated by statutory provisions and court decisions is not particularly coherent, nor is it physically or cognitively accessible to typical end consumers of goods and services that embody or contain copyrighted works. Even more troubling, however, is the fact that even a good grasp of the Copyright Act and applicable case law (which is, of course, the hallmark of a top quality legal education) will not provide effective guidance about how to legally use another's copyrighted work.²⁹ In other words, not even someone with a firm knowledge of the copyright law can confidently expect to reliably identify the metes and bounds of copyright compliant behavior across disparate factual situations, because copyright laws are neither clear nor applied consistently or predictably.

Ordinary consumers who want to make a single unauthorized copy of a copyrighted work for personal use may know that this is “legal” in the sense that it is probably a legitimate and anticipated non-infringing use, but it is also possible that they rationalize what they do despite an underlying belief that unauthorized copying is wrong, illegal, or both.³⁰ The ramifications of making an unauthorized copy are largely indeterminate. As Sheldon Halpern has written:

Individual determinations of moral and ethical conduct require a moral and ethical context. The problem for intellectual property law in general, and the law of copyright in particular, is the lack of such an underlying clear context. The nature

²⁶ Woody Guthrie, lyric excerpt from This Land is Your Land, e.g. <http://angam.ang.univie.ac.at/roadcult/guthrie/Land.htm>

²⁷ Marci A. Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 Van. J. Transnat'l L. 613, 616 (May 1996).

²⁸ Infra re norm gaps, and supra re copyright "myths."

²⁹ Fair Use is set out in section 107 of the Copyright Act.

³⁰ See e.g. Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm> (observing the people come up with intellectual justifications for downloading music such as "information wants to be free," "the labels are thieves," and everything's going to the Net anyway.")

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of American copyright law makes it difficult, if not impossible to find or to construct an unambiguous moral compass.³¹

Copyright laws are not intended to create only locked gates or unscalable fences. The same barriers that are intended stand as bulwarks against piracy (defined here as large scale, for-profit commercial copyright infringement) are also intentionally designed to allow some unauthorized admissions to otherwise corralled copyrighted works. Because the gates are imaginary, individuals must make independent moral judgments about when it is acceptable to enter, and when unauthorized entry might constitute a trespass. These judgments are likely to be based on past experiences, observation of others' behaviors in similar circumstances, and some understanding of the precepts of copyright law.

The primary doctrinal justification individuals have for making non-permissive uses of copyrighted works is the concept of fair use, codified at Section 107 of the Copyright Act, and framed as a limitation on the exclusive rights of copyright owners. A "fair use" of a copyrighted work may be unauthorized, but it is not an infringement of a copyright.³² Section 107 explicitly sets out exemplary unauthorized uses that are potentially (but not necessarily) fair, including "criticism, comment, news reporting, teaching, scholarship or research." These examples were arguably chosen based on observed pre-existing norms of unauthorized use. It is difficult to imagine full and effective criticism, for example, unless access to the work being critiqued is free both in the sense of being unfettered, and also free meaning without cost, so that use of the work cannot be prevented or compromised by excessive access charges.

The listed archetypical fair uses are all socially valuable activities that copyright owners would be motivated to attempt to restrain or manipulate. Negative criticism or commentary, unfavorable news reporting, and inauspicious treatment by teachers, scholars and researchers are

³¹ Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 Ohio St. L.J. 569, 572 (2001).

³² Copyright Act Section 107

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all activities that the First Amendment protects, and for this reason alone must as a general proposition fall within the scope of fair use when aimed at (and therefore making use of) copyrighted works.³³ These are also uses of copyrighted works that are likely to result in the authorship of new creative works, so copyright law is doctrinally bound to allow (if not encourage) some unrestricted usage through fair use. The scope of fair use is always broader for unauthorized users who make a "transformative use" of a preexisting work, and thereby create something potentially worthwhile themselves.³⁴ A survey of fair use jurisprudence suggests that people who make unauthorized uses of copyrighted works for the express purpose of creating new original works are viewed as having earned the right to make fair uses of copyrighted works. Unproductive unauthorized uses are often viewed as less justifiable.

The end use copyright consumption that is the primary focus of this article does not directly implicate First Amendment speech issues, though burdens on the freedom to communicate are consequentially imbedded in any encumbrance on the ability to access and use copyrighted works.³⁵ Nor is consumption of copyrighted works extolled here for its role in stimulating the production of new works, though access to existing works assuredly generates new ones. Instead, the critical inquiry here is what fair use means when the anticipated use is not expected or likely to be linearly productive, and the scope of fair use is therefore not calibrated by concerns about free speech or the transformative use doctrine. If, for example, someone purchases a compact disk containing copyrighted music solely for personal entertainment purposes, which uses of the compact disk are unauthorized, and what unauthorized uses are

³³ See e.g. Lemley & Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (November 1998); C. Edwin Baker, *Copyright and First Amendment Theory*, 55 Vanderbilt L. Rev. __, (April 2002), Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 988 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1184 (1970).

³⁴ E.g. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994) (“[Transformative works]...lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”); see also dicta in *Kinko’s* and *Michigan Document Services* cases, etc.

unfair? Alternatively, assuming it was possible as a technological matter, is it fair to loan an e-book to a friend, or make copies of it, even though the copyright owner has requested that you do not?

Section 107 sets out statutory “factors to be considered” when a court is evaluating whether any given non-permissive use is a fair one. The enumerated factors include: the purpose and character of the use, including whether the use is of a commercial nature or for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion of the work used; and the effect of the use upon the value or potential market for the work.³⁶ Presumably, anyone contemplating an unauthorized use ought to be guided by these factors, and by the ways in which courts have applied them. However, what this all means to a person who photocopies newspaper clippings and mails the copies to friends; or to someone who checks a computer game out of the library, plays the game, and then returns it to the library several days later; or to a group of parents who share children’s videos and books-on-tape among themselves rather than each purchasing their own copies; or to a church that sponsors dances at which CDs of popular music are played, or a florist who plays the radio in her shop; or a hair stylist that posts pictures of well-coiffed celebrities on her salon wall is unclear. Few have likely heard of Section 107 of the Copyrights Act and even if they have, are unlikely to feel informed or constrained by it.

Fair use is an elastic and evolving concept that perplexes even those charged with applying the doctrine. Consider the teachings of the Sony Betamax case, one of the most important copyright disputes ever decided by the U.S. Supreme Court. In his Sony dissent, Justice Blackmun aptly stated: "The doctrine of fair use has been called, with some justification, 'the most troublesome in the whole law of copyright.'" As if to underscore this point, the five

³⁵ See e.g. C. Edwin Baker, Copyright and First Amendment Theory, 55 Vanderbilt L. Rev. ___, (April 2002).

³⁶ Section 107

DRAFT: Still a work-in-progress, comments very welcome!

Justices comprising the Sony majority and four dissenters managed to disagree over the doctrine's general application, and then specifically over how each and every one of the Section 107 factors should be applied to the facts of the case.³⁷

The Sony decision had a direct impact on the lives of almost everyone in the United States by finding that taping television programs in our homes using videocassette recorders, without the permission of those who owned the copyrights in those television programs, fell within the scope of fair use. Yet the majority opinion in Sony, like so much statutory and court made copyright law, is an expressive disaster. The Sony plaintiffs, largely producers of television programs and cinematic movies, brought an action against Sony in federal district court, alleging that consumers who purchased Sony's Betamax videotape recorders were engaging in the unauthorized and infringing recording of copyrighted works that had been exhibited on commercially sponsored television. The action asserted that Sony was contributorily liable for this copyright infringement because they marketed the Betamax and profited from its sale. The plaintiffs sought money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of videocassette recorders. The district court denied all relief, holding that noncommercial home recording of material broadcast over the public airwaves was a fair use of the copyrighted works, and that Sony could not be held liable as a contributory infringer even if the home use of a videocassette recorder was considered an infringing use.³⁸

³⁷ See .e.g A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 *Notre Dame L. Rev.* 47, 60-61 (1989) ("The Copyright Act subjects the "exclusive rights" to certain express exceptions. The "fair use" doctrine, as now codified in section 107 of the Copyright Act, provides one of the most significant exceptions to direct infringement. However, in the words of Justice Blackmun in the [Sony] Betamax case: "The doctrine of fair use has been called, with some justification, 'the most troublesome in the whole law of copyright.'" As if this point needed any further demonstration, the majority and dissent in [Sony] proceeded to disagree over the doctrine's application as a general principle and how each and every one of the factors were to be taken into account in its application.")

³⁸ cite to Sony

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The Court of Appeals reversed, found Sony liable for contributory infringement, and ordered the district court to fashion appropriate relief.³⁹ This “relief” could have enjoined the sale of videocassette players to consumers, or burdened such sales with licensing regimes or mandatory royalty payments. Instead, the Supreme Court reversed the Court of Appeals, but on a five-to-four vote that was unusual even in the annals of controversial 5-4 Supreme Court splits because of the atypical distribution of personages on each side of the decision: Chief Justice Burger and Justice Brennan voted with the majority, endorsing an opinion penned by Justice Stevens, and joined by Justices White and O’Connor, while Justices Marshall, Rehnquist and Powell joined Justice Blackmun’s dissent.⁴⁰ Thus the Sony outcome is not easily characterized as “liberal” or “conservative” as those terms are understood in the political context.

The Sony majority opinion is routinely cited as support for analytic arguments made by both plaintiffs and defendants in the pleadings of copyright infringement cases, because it manages to buttress a variety of conflicting propositions simultaneously.⁴¹ It covers so much rhetorical territory that language taken from the decision can be (and is) used to support a wide range of constructions of the fair use doctrine.⁴² In one passage the Sony decision goes so far as to assert a “presumption” that unauthorized commercial uses are infringing. A somewhat reconfigured Supreme Court was later obligated to explicitly disavow this assertion to reach the desired analytic outcome in *Campbell v. Acuff-Rose Music, Inc.*,⁴³ another important fair use case litigated in the wake of Sony.

At issue in *Acuff-Rose* was the rap group 2 Live Crew's commercially released parody of late musician Roy Orbison's song "Oh Pretty Woman." The Supreme Court’s verdict in the *Acuff- Rose* case was a unanimous one, but it reversed a court of appeals decision that had, in

³⁹ Cite to Sony

⁴⁰ Cite to Sony

⁴¹ e.g. the *Napster* and *DeCSS* pleadings, MP3 and *Diamond Rio*, my Pitt article

⁴² used to support both sides in e.g. *Napster*, the *Diamond Rio* case etc.

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turn, reversed a district court holding. The Sony opinion includes the express statement that “Every commercial use of copyrighted material is presumptively unfair.”⁴⁴ The Court of Appeals for the 6th Circuit relied heavily on this passage in rendering its decision for the copyright owner in *Acuff-Rose*, as 2 Live Crew's disputed song parody was clearly a for-profit endeavor. Yet in the *Acuff-Rose* majority opinion he penned, Justice Souter criticized the Court of Appeals decision for “inflating the significance” of the commercial nature of the work. He rather astonishingly took the Court of Appeals to task for inappropriately “applying a presumption ostensibly culled from Sony.”⁴⁵ A more charitable view is that the Court of Appeals was simply reaching for the bright line it assumed the Sony court had thrown down to help illuminate the fair use fog permeating copyright jurisprudence. As *Acuff-Rose* made clear, however, though the Sony decision constituted an important statement on the scope of fair use, not even federal judges can agree on the content, meaning, and further application of the statement.

Average consumers are probably oblivious to the judiciary's roll in keeping VCRs available and affordable. To them the Sony case largely means that using a VCR to tape situation comedies, soap operas, dramas, news programs, movies, concerts and sports events (indeed anything broadcast via television), is cost-free once they possess the necessary equipment, which is widely available. They are unlikely, however, to directly credit five Supreme Court Justices with interpreting copyright law in a way that makes unregulated taping possible.⁴⁶

Nor are they likely to comprehend why individual acts of copying are treated disparately depending on the copying mechanisms employed. For example, while the Audio Home

⁴³ *Campbell v. Acuff-Rose*, 510 U.S. 569

⁴⁴ *Sony*, 464 U.S. at 451.

⁴⁵ Cite to *Acuff-Rose*

⁴⁶ Cite prices of VCRs, blank tapes, tvs? Data about how widely owned?

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Recording Act *de facto* legitimized making a nonprofit copy of a song to share with another person using analog technology, using peer-to-peer file sharing software to accomplish the same end has been held to infringe copyrights.⁴⁷ Analog cassette tape recorders can make an unlimited number of copies of a work, while digital audio tape recorders are legally required to contain serial copy management systems.⁴⁸ The inescapable conclusion that the copyright laws permit making poor to mediocre quality unauthorized copies, but forbid making good ones, is apt to be quite confusing to the ordinary observer.

2. The Limitations of Consensual Fence Building

As a consequence of the ambiguity and uncertainty of the copyright laws, select copyright communities (those with at least some indicia of being close-knit) have engaged in, or least attempted, consensual rulemaking, though not particularly spontaneously or informally. Examples of this include CONTU, the "photocopy guidelines," and CONFU.

a. CONTU

The U.S. Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) to study and make recommendations about copyright issues related to computers and photocopiers.⁴⁹ Congress decided that the Commission should be comprised of four members to represent the interests of authors and publishers, four members from "copyright user" communities (largely libraries and educational institutions), four general public interest representatives, including a consumer protection expert, and the Librarian of Congress.⁵⁰

⁴⁷ Cite to Napster decisions...

⁴⁸ Copyright Act Section 1002

⁴⁹ See e.g. CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements -Final Report of the National Commission on New Technological Uses of Copyrighted Works, July 31, 1978, Library of Congress, Washington, DC, 1979, pages 54-55, accessible at <http://www.cni.org/docs/infopols/CONTU.html>

⁵⁰ Pamela Samuelson, "CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form," 1984 Duke L.J. 663, n.128 (September 1984).

Ultimately a majority of CONTU members recommended (among other things) that computer programs in machine-readable form should explicitly be deemed copyrightable subject matter.⁵¹ A spirited dissent by one Commissioner, author John Hersey, opined that computer programs were fundamentally different in nature from copyrightable works such as sound recordings, motion pictures and videotapes. He argued that those works used technology to communicate with human beings, while computer programs communicated only with machines, and were properly described as labor saving mechanical devices rather than as copyrightable literary works.⁵² Nevertheless, apparently relieved to have another entity make the call, Congress passed the CONTU majority's recommended amendments to the copyright statute without debate.⁵³ In this way informal (if not completely consensual) rulemaking begat statutory copyright law. Though in this case perhaps ill-advised, it represented the grafting of one set of real space norms, copyright protections for literary works, onto electronically embodied creations.

b. The "Photocopy Guidelines"

While the Copyright Act of 1976 was being debated and drafted, a coalition of twenty-five educational associations (the "Ad Hoc Committee on Educational Organizations on Copyright Law Revision") advocated a blanket exemption from infringement liability for copying done for non-commercial educational purposes.⁵⁴ Publishing interests forcefully opposed this proposal. In an effort to defuse some of the tension surrounding educational photocopying issues, three groups of authors, publishers and educational institutions (the

⁵¹ Pamela Samuelson, "CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form," 1984 Duke L.J. 663, 665 (September 1984).

⁵² Cite to Hersey's CONTU Dissent

⁵³ Pamela Samuelson, "CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form," 1984 Duke L.J. 663, 666 & 694 (September 1984).

⁵⁴ See Eric D. Brandfonbrener, Note, Fair Use and University Photocopying: Addison-Wesley Publishing v. New York University, 19 U. Mich. J.L. Reform 669, 682-83 (1986). Though this recommendation was ultimately rejected, § 107 was amended to include a specific reference to "multiple copies for classroom use." The first prong

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American Association of Publishers, the Ad Hoc Committee on Educational Organizations on Copyright Law Revision, and the Author's League of America, Inc.), were brought together and charged with finding common ground on the issue of educational photocopying. Together they negotiated "minimum standards of educational fair use," which were denominated the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," [hereinafter "Guidelines"]. These Guidelines were, and continue to be, controversial.⁵⁵ Both the American Association of University Professors

of § 107's four part test for fair use was also amended to direct consideration of whether a use was commercial or non-profit educational in nature.

⁵⁵ See Ann Bartow, Educational Fair Use in Copyright: Reclaiming the Right To Photocopy Freely, 60 U. Pitt. L. Rev. 149 (Fall 1998) (footnotes omitted):

Described by some academics as "a publishers' wish list of restrictions," the Guidelines authorize teachers to make a single copy of a chapter from a book, article from a periodical or newspaper, short story, short essay, short poem, or chart, graph, diagram, drawing, cartoon, or picture from a book, periodical or newspaper "for his or her scholarly research or use in teaching or preparation to teach." The "Guidelines" for making multiple copies are much more restrictive. Copies must be limited to one per student, and the reproductions must be brief. Complete works can be reproduced only if they are comprised of less than 2,500 words. With respect to longer works, only 1,000 words or ten percent of the work, whichever is less, may be reproduced, though copying up to 500 words is always permissible.

The decision to photocopy these short works or excerpts must also be spontaneous. "Spontaneity" under the Guidelines requires that the photocopying be at the "instance and inspiration of the individual teacher," and that the time span between the decision to use the work and the actual use be "so close in time that it would be unreasonable to expect a timely reply to a request for permission." According to at least one court, providing photocopies of copyrighted materials at the beginning of a semester that will not be assigned until later in the semester is a violation of the spontaneity requirement.

The Guidelines restrict "cumulative" photocopying by limiting the use of a brief or excerpted work to one course per school, and, with the exception of works contained in newspapers and "current news periodicals," confine a teacher to nine or less "instances of such multiple copying" per course. Teachers are further limited to copying only one short work or two excerpts per author, and only three works or excerpts per collective work or periodical volume per class term.

The Guidelines also set forth the following additional restrictions. Photocopies cannot "be used to create or to replace or substitute for anthologies, compilations or collective works." No copies can be made from "consumable" works that students could otherwise be required to purchase, such as "workbooks, exercises, standardized tests and test booklets and answer sheets." Copying cannot "substitute for the purchase of books, publishers' reprints or periodicals[,] be directed by a higher authority[, or] be repeated with respect to the same item by the same teacher from term to term." "No charge shall be made to the students beyond the actual cost of the photocopying," and all photocopies must carry a copyright notice.

This is what adherence to the Guidelines' construction of "fair use" means in practice: First, a professor makes the "spontaneous" decision to use a portion of a copyrighted work that is in no way "consumable" or a substitute for a reprint or other publication that she could have required students to purchase. Then, the Guidelines: dictate that the professor may photocopy only excerpts of about three pages or less from any copyrighted work (and less than two pages if the underlying work is a short one); require that the professor copy and distribute no more than nine of these

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(A.A.U.P.) and the Association of American Law Schools (A.A.L.S.) denounced the Guidelines as too restrictive of photocopying.

The Ad Hoc Committee answered these objections by emphasizing that the Guidelines were only minimum standards for educational photocopying, and expressed "hope that the interested parties would meet in the future to develop new guidelines for areas where the Guidelines did not apply or were inappropriate." This never happened, and educational photocopying disputes have since moved to the courtroom.⁵⁶ Though Congress specifically declined to incorporate these Guidelines into the Copyright Act, the few judges that have considered the issue have opined that educational photocopying which meets the Guidelines constitutes fair use of copyrighted works. No guidance has been given, however, about how far an educator can surpass the limitations of the Guidelines without exceeding the boundaries of educational fair use.

While in "real space" there are certainly tensions around the scope of educational fair use,⁵⁷ in cyberspace these are exacerbated by the ability of content owners to track copying online as they could never do with photocopy machines. A teacher might grant herself broad fair use privileges when it comes to photocopying a few chapters out of an out-of-print tome⁵⁸ for her students, taking a calculated risk that either she will not be caught, or will be successful if she

diminutive excerpts during the entire semester; and compel the professor to ensure that she is the only person in the entire school who multiple-copied each excerpt that term. The professor must additionally warrant that, in totality, the photocopied excerpts do not take on the appearance or function of an anthology or compilation. Finally, the professor must never use the excerpt again.

While compliance with the Guidelines almost automatically renders educational photocopying fair use, failure to comport with the Guidelines does not (yet) automatically constitute copyright infringement. Educational photocopying that does not meet the Guidelines is evaluated under the general fair use four part test set out in § 107.

⁵⁶ E.g. the Kinkos and Basic Books litigation

⁵⁷ string cite including Kenneth D. Crews, "The Law of Fair Use and the Illusion of Fair Use Guidelines," 62 Ohio St. L.J. 599, 658 (2001), my Pitt article...

⁵⁸ Some commentators argue that if a content owner fails to make a work available (such as by letting a book fall out of print) that non-permissive access to, and copying of the work would fall within the doctrine of fair use, see e.g. Fred Lohmann, quoted in Brad King, "Why You Can't Sell What You Buy," posted to Wired.com on 1/16/01, accessed at <http://www.wired.com/news/print/0,1294,41184,00.html>. However, at least one federal judge had ruled

mounts a fair use defense to any infringement allegation. When use and duplication of electronic content is carefully controlled and proactively monitored, however, the same teacher may not even have the option of making copies for her class, regardless of whether it would be fair use to do so. Recent efforts by the U.S. Copyright Office to hammer out written policies concerning educational photocopying that were acceptable to both content users and content owners have been unavailing,⁵⁹ and there is no indication that copying issues will be resolved consensually in the future.

c. CONFU

The Conference on Fair Use ("CONFU")⁶⁰ was an attempt by nonprofit educational copyright "consumers" such as libraries, and copyright "producers" such as publishers, to cooperatively draft a set of rules pertaining to the scope of fair use in electronic materials that both interest groups could live with. However, these negotiations failed because the parties were too far apart on many issues.⁶¹ One commentator noted:

[Ninety-three] organizations representing for-profit and nonprofit publishers, the software industry, government agencies, scholars and scholarly societies, authors, artists, photographers and musicians, the movie industry, public television, licensing collectives, libraries, museums, universities and colleges spent untold amounts of money and more than 2 1/2 years of their time and their energy to find agreement on the scope of fair use in various electronic contexts. Now it seems that not enough of their constituents, and in some cases, not even the participants themselves, agreed with the result to qualify the Proposed Guidelines as consensus documents. Forgive the overgeneralization, but users thought the

that out of print works present the most compelling case for royalty payments since there is no other mechanism by which a content owner can extract profits from the work. Kinko's??? MDS?

⁵⁹ Digital Dilemma, Chapter 4, fn 9: "One attempt at simplification and clarification of the intellectual property law is the set of guidelines for teacher photocopying distributed by the U.S. Copyright Office [in 1998]. Such guidelines can be the product of a negotiated compromise, but they are sometimes issued by an interest group. As desirable as guidelines are, political complexities have thus far made it difficult for truly workable guidelines (for teacher photocopying or other situations) to emerge."

⁶⁰ See generally The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use (November 1998).

⁶¹ Crewes article; Laura N. Gasaway, Impasse: Distance Learning and Copyright, 62 Ohio State L. J. 783, 799 (2001) ("CONFU's charge was to determine if it could develop fair use guidelines in areas such as interlibrary loan, electronic reserves, digital images, and distance learning. Although CONFU participants worked over two years to draft guidelines in some of the areas, the resulting guidelines did not receive broad support from either the library and education communities, or copyright holders.")

Guidelines were over restrictive and copyright owners thought they were giving away too much.⁶²

One area of CONFU contention was interlibrary loans.⁶³ Publishers manifested a powerful desire to curtail or eliminate interlibrary loans in the digital environment, thereby derailing a norm of library functionality.⁶⁴ Librarians objected strenuously, since this would interfere with libraries' ability to continue to offer their patrons the same levels of access and service. No effective consensual rulemaking developed. Instead, using their superior bargaining power, publishers have simply imposed their desired outcome on libraries through licensing agreements, at least in the context of electronic journals,⁶⁵ as is discussed in more detail below.

While these undertakings were far more formal and contrived than the rulemaking Ellickson observed in Shasta County, they still represented communitarian attempts to reach common understandings and build frameworks for informal dispute resolution of select copyright issues. However, the parties largely failed to informally agree upon how to characterize existing practices, or to reach anything resembling consensus on the most controversial issues. As a result, they do not form the foundation for emerging norms, as not even areas of agreement have

⁶² <http://www.utsystem.edu/ogc/IntellectualProperty/confu.htm>

⁶³ See e.g. <http://www.utsystem.edu/ogc/IntellectualProperty/illconfu.htm>

⁶⁴ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 148 9"More than once during the Conference on Fair Use, publishers' representatives stated that they were determined to eliminate ILL in the digital environment. Clearly, there is a fear of lost sales, etc., on the part of copyright entrepreneurs, which certainly is a core value to publishers. If ILL were eliminated, however, librarians believe that serious scholarship and research would be severely hurt, which impacts a librarian core value. Publishers then proposed that for digital works, the CONTU guidelines be inapplicable or, at a minimum, turned around so that the suggestion of five would apply to the lending rather than to the borrowing library. Not surprisingly, this was not acceptable to librarians since all of the ILL philosophy, and indeed the CONTU guidelines themselves place the burden on the requesting, i.e., borrowing, library. Recent license agreements for electronic journals have led to this outcome, however. Some licenses for full-text journals limit the number of times that the licensee may lend to other libraries from that journal, which puts the burden for record keeping, etc., on the lending library rather than on the borrowing library. This is additional evidence of the values conflict between librarians and publishers (Fall 2000).

⁶⁵ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 147 (Fall 2000).

been widely accepted, nor communicated to the interested groups putatively represented at these negotiations.

The law does not inform end consumers of copyrighted materials about the appropriate parameters of unauthorized use of copyrighted materials, and unless they are part of a particular copyright-using community, such as teachers, researchers, or librarians, individuals are unlikely to have any role in any ad hoc rule making, or even an awareness of it. Almost by default, the absence of cogent and accessible copyright laws and copyright rules leaves only norms, the actual practices and conventions of copyright use, which simultaneously influence and are shaped by both emerging technologies and individual acts.⁶⁶

3. Imaginary Fences and Gates Make Ineffectual Corrals

At a very general level most people would probably agree that respecting copyrights is a desirable social practice, especially if they understand the role that copyrights can play in compensating content creators, and in providing incentives for investments in new creative works. Dennis Chong has argued that "even when the substance of the group norm does not directly serve one's interest, it can be in one's interest to conform when the norm represents a social convention that everyone has an interest in supporting so long as others do so."⁶⁷ Forgoing unauthorized uses of copyrighted works might become a norm if it was assumed and expected that such forbearance would incentivize the creation and distribution of new copyrighted works. However, few average consumers are apt to believe, nor would it be logical or reasonable for them to presume, that respecting copyrights at a personal level will have a cognizable affect the price or selection of creative works available for their consumption.⁶⁸ Rather, they are more

⁶⁶ See e.g., Etzioni article, The imaginary fences and gates that people act as though they believe in represent copyright use norms.

⁶⁷ Dennis Chong, "Law, Economics & Norms: Values Versus Interests in the Explanation of Social Conflict," 144 U. Pa. L. Rev. 2079, 2083 (May 1996).

⁶⁸ In a different context C. Edwin Baker explained the disjuncture between the costs and benefits and the prices of media products as follows:

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likely to respect copyrights (if at all) because it seems ethical, or because they are forced to do so by technological means, or because they fear being sued or arrested if they do not.

An important threshold question, then, is when an unauthorized use of a copyrighted work is unethical and actionable. There are significant disagreements concerning what specifically it means to respect copyrights, and the level of respect that copyrights ought to be accorded.⁶⁹ At one end of the spectrum are copyright absolutists, who endorse broad "high barrier" copyrights, either because they believe that robust copyright protections are likely to spur investment in the creation and distribution of new works, or simply because they deem content owners entitled to strong copyrights as a matter of right.⁷⁰ One radically opposing view is that copyright protection should be very weak, presenting "low barriers" to use and protecting against little beyond literal copying. This precept is usually either based on the perception that all works build on a preexisting body of art, music, literature and knowledge, and therefore no new work is truly

Think for a moment about externalities of media practices and products. Members of the public benefit tremendously if a newspaper's reputation for investigative reporting deters misconduct by government officials or corporate executives, but effective deterrence means that the newspaper has no story to sell. The paper receives nothing for this valuable product. Even when an investigation uncovers spectacular misconduct and publication leads to reform, most people receive the benefit without buying or reading the paper. Similarly, even a person who buys no newspaper, biography, or novel can reap a reward from those who do if their media consumption leads them to be wiser voters or more cultured people. In contrast, you can be hurt by another person's media consumption if it leads to unwise voting, a boring personality, or damage to your material or cultural environment. Most dramatically, you are hurt if consumption by others is one factor in a causal chain that leads them to murder, rape, or rob you. These are all costs and benefits that are not taken into account in the selling or purchase decisions and, thus, lead the market to misprice media products.

In economic terms, these costs and benefits are not brought to bear on the entity producing the content: they are not "internalized" by publishers, for example. Products that create negative externalities are sold for less than their real social cost, while those creating positive externalities must be sold for more than their social cost. Given the economic maxim that a lower price generates more purchases, people will consume more media products that create negative externalities and less of those that create positive externalities than they would if charged the item's real cost. Given the huge externalities, both positive and negative, almost no relation can be expected between the media the market actually provides and the media it would provide if properly priced.

C. Edwin Baker, "Two Misplaced Objections," Boston Review, accessed at <http://bostonreview.mit.edu/BR23.3/baker.html>

⁶⁹ String cite?? From John Perry Barlow to Trotter Hardy....

⁷⁰ String cite of Hardy, Ginsburg, maybe Gorman...Gordon

original (nor entitled to be treated as if it is), or tied to the belief that an expansive public domain is the best way to encourage the creation of beneficial new works.⁷¹

Even advocates of the "low barriers" approach to copyright protection unequivocally recognize that acts of unauthorized copying can infringe copyrights. People who make multiple copies of others' copyrighted works without permission or permissible motive, and then sell the copies to others for financial profit are sometimes referred to colloquially as "pirates." Most observers would agree that extensive piracy represents the sort of quintessential feat of copyright infringement for which the copyright laws were drafted and are justifiably enforced. It is smaller scale acts of copying, in which the non-permissive copies may substitute for purchases of authorized ones but are not sold for financial gain, that incite disagreements with respect to the appropriate characterization of the copying, and the appropriate treatment of the copier by the copyright laws.

Some unauthorized copying is tied to professional mores and traditions. For example, Robert Ellickson asserted that academics chronically ignore the prohibitions of copyright law by non-permissively photocopying each other's scholarly writings, but in so doing adhere to professional norms designed to serve the specific interests of the academic community.⁷² The relevant externalities, the costs of any copyright infringement, fall on publishers, but benefits to publishers accrue as well to the extent the copying leads to the creation of new works that can be issued and profited from.

Other unauthorized acts of copying occur within a more deeply personal sphere, and therefore implicate notions of a right to autonomy over one's physical possessions within the home in addition to copyright concerns. Music, for example, might be copied so that several household members could enjoy it simultaneously in various rooms or automobiles, or so that one

⁷¹ String cite – Litman, Boyle, Aoki

⁷² Ellickson book

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person could listen to it in several different venues more conveniently, without having to move a compact disk or MP3 player back and forth. When, where, and how often the music will be played, are choices individuals may resist having monitored or proscribed by outsiders. The ability to make a few personal copies of the music increases the autonomy control have over use of the music. Whether copyright law provides individuals with a legal “right” to copy simply on the basis of a preference for this autonomy alone, when the copying does not directly advance any other social goal, is a source of great contention. Whether individuals have the actual practical ability to make personal copies, however, is largely determined by the capabilities of the technologies that are available to them, which in turn is increasingly a function of the copyright laws: Some copying technologies are openly permitted within the confines of the imaginary copyright corral, others are fenced out.⁷³

4. Norm Gaps

Sometimes "norm gaps," a disjuncture between actual and desirable social practices, can exist or develop in a given milieu. Steven Hetcher has explained:

Gaps between actual versus desirable social practices may emerge for a variety of reasons, including small group migrations or the discovery of new scientific information. Sometimes when a smaller group migrates into a larger group, some minority practices are deemed to be out of step with the morality of the majority group, and a norm gap exists between actual and desirable practice from the majority perspective. In the case of cigarette smoking, the disclosure of new scientific information about the health impacts of smoking has opened a gap between actual and desirable practices.⁷⁴

Some large institutional copyright owners lobby and litigate in an effort to close the norm gaps they perceive between actual and desirable social practices with respect to copyrighted works. Certainly there is little evidence of strong norms of cooperation and trust between copyright holders and their customers. Assuming that fostering and maintaining appropriate levels of

⁷³ Napster, MyMp3 and Scour are out, DAT is subject to statutory constraints, Diamond Rio okay after surviving litigation re: AHRA, VCRs and analog cassette recorders okay...

respect for copyrights are indeed advantageous societal objectives (and this author believes that as a general matter they are), it is worth considering some of the possible impediments to achieving them.

a. The Gap Creating Complexity of Copyright Law

Part of the explanation for any "copyright norm gap" may be that the copyright law is voluminous, complicated, and often counterintuitive to non-lawyers (and sometimes even to lawyers as well). This is quite problematic in contexts in which the cumulative behaviors and attitudes of individuals toward copyrights can significantly affect markets and industries.⁷⁵

Robert Ellickson maintained that when people find the costs of learning about the law and submitting to formal dispute resolution processes to be very high, they will prefer to fall back on common-sense norms, and that if obtaining information is costly, "one cannot assume that people will both know and honor law."⁷⁶ One important implication of high transaction costs for learning the law is that it may be meaningless for the government to reconfigure the law (or for copyright owners to lobby the government to reconfigure the law) if seemingly affected individuals will ignore or remain unaware of the law and any changes to it.

At present, most ordinary people are better versed in copyright myths and urban legends than in actual copyright law. Over a decade ago Jessica Litman observed that not even immediate and obvious stakeholders such as authors nor publishers comprehend very much about the particulars of the copyright protection structure.⁷⁷ She further asserted that while

⁷⁴ Steven A. Hetcher, Norm Proselytizers Create A Privacy Entitlement in Cyberspace, 16 Berkeley Tech. L.J. 877, 896 (Summer 2001).

⁷⁵ http://www.nap.edu/html/digital_dilemma/ch4.html ("The entire body of written copyright law is voluminous, and many of its subjects (e.g., retransmission royalties) are arcane and complex. This was less problematic when copyright was focused primarily on the behavior of large organizations, but now the behavior and the attitude of individuals can significantly affect markets and industries. Although companies have the resources to analyze, understand, and even help draft legislation, individual consumers do not. Consumers thus face the problem that the law is large, complex, and industry-specific.")

⁷⁶ Ellickson at 281.

⁷⁷ Jessica Litman, Copyright as Myth, 53 U. Pitt. L. Rev. 235, 236 (Fall 1991) ("Neither copyright law, nor the models that seek to interpret it, seem to pay great attention to the process of authorship. Perhaps because the

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members of the public do not find the overall idea of a copyright counterintuitive, they find the specifics of copyright law hard to grasp due to “its mind-numbing collection of inconsistent, indeed incoherent, complexities.”⁷⁸ Amendments to the Copyright Act and the promulgation of “copyright-related” statutory provisions in Title 17 have only made the law in this area more complicated and less accessible since Litman wrote her compelling commentary.⁷⁹ Otherwise intelligent people may not even believe doctrinally accurate explanations of pertinent facets of copyright law. As Sheldon Halpern related:

Let’s assume that you’ve got a client who says, “I’ve written a book, how do I copyright it?” Well, if you tell the client the truth, you will say, “You already have.” The client will say, “I don’t believe you,” and will go away. The client will go to somebody else who will tell the client, “If you pay me some money, I will file some papers in the Copyright Office.” But the fact is that the first answer is the correct one.”⁸⁰

Litman also made the important observation that those who view copyright law in economic or utilitarian terms inherently assume something abjectly false: that the authors for whom the copyright law seeks to create incentives for are generally aware of, or responsive to, this incentives framework. Mere passive consumers of copyrighted works are even less likely to be alert to, no less motivated by, their doctrinally assigned role in creating incentives for the authorship of new works and balancing the interests of content creators, content distributors, and society. Though they are theoretically constrained by copyrights, neither the substantive

universe appreciates the aesthetics of symmetry, authors appear to return the favor by paying little attention to the copyright law. One would think that the two realms scarcely overlapped for all the attention each receives from the other. One might posit that copyright law is written by lawmakers unfamiliar with the process of authorship and that authorship is committed by innocents unversed in the details of copyright. The hypothesis seems compelling if one has but slight acquaintance with both domains. Indeed, it is a hypothesis that remains persuasive notwithstanding that the copyright law was written not by lawmakers or bureaucrats, but by authors and publishers and the people who represent them. Although the community of industries that copyright affects paid close attention to the provisions of the copyright law during the long copyright revision process, individual authors and publishers appear to have internalized the substance of those provisions not at all”.

⁷⁸ Jessica Litman, *Copyright as Myth*, 53 U. Pitt. L. Rev. 235, 237-38 (Fall 1991).

⁷⁹ Cite re additions and amendment to Title 17 since 1991.

⁸⁰ Sheldon W. Halpern, *Nies Memorial Lecture: Copyright Law in the Digital Age: Malum in se and Malum Prohibitum*, 4 Marq. Intell. Prop. L. Rev. 1, 4-5 (2000).

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requirements nor the substantive consequences of the copyright laws are likely to be apparent to the average individual consumer of copyrighted works.

More recently the authors of *The Digital Dilemma*⁸¹ concluded that both consumers and copyright owners are poorly informed about copyright law, and hold many widespread misconceptions about the nature and scope of copyrights. For example, consumers may erroneously believe that lack of a copyright notice means that a work does not have copyright protection, while rights holders may be under the incorrect impression that copyright protection accords them absolute control over every use of the works in which they own copyrights.⁸²

In addition to noting the apparent pervasiveness of significant misapprehensions about copyright law, the authors observed that even well informed individuals might find the interpretation of the sections of the Copyright Act relating most directly to the conduct of members of the general public to be complex and difficult. Moreover, dependable assistance with copyright quandaries is unlikely to be available. While companies might have the resources to comprehensively analyze and track evolving copyright legal doctrine (and even to influence its legislative direction), ordinary consumers generally do not.

It is hard to see how the legal rules of copyright can serve the roles assigned to them by doctrinal scholars or economists if individual actors don't pay these legal rules any attention. The conclusion that the *Digital Dilemma* authors reached was that "if, as a matter of legal and social policy, members of the general public are expected to comply with the requirements of intellectual property law, then it is important that the law be set forth in a clear and

⁸¹ *The Digital Dilemma*, Intellectual Property in the Information Age, by the Computer Science and Telecommunications Board and the National Research Council (National Academy Press Washington DC 2000).

⁸² *The Digital Dilemma*, Chapter 4. ("Although no rigorous study has been done, there is circumstantial evidence suggesting that many rights holders, too, are misinformed about legal behavior with respect to intellectual property, and do not understand the legal limits to their control. For example, a major academic publisher places the following legend on the page bearing the copyright notice for its publications: "No part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission.")

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straightforward manner that the general public can readily comprehend."⁸³ They call for "a greater degree of simplicity, clarity, straightforwardness, and easy comprehensibility for all aspects of copyright law that prescribe individual behavior," which might be facilitated by "the development of specific interpretive guidelines on those aspects of consumer behavior that raise questions frequently encountered in daily life in dealing with copyright protection."⁸⁴ In other words, copyright law should (but clearly does not at present) resonate like a social norm, and any given use to which copyrighted content is put should strike people as fairly obviously right or wrong.

b. Gap-causing Exaggeration About Copyright Scope

Another potential cause of copyright norm gaps is that copyright holders exaggerate the scope of their ownership rights. One group of commentators observed:

...[A] major academic publisher places the following legend on the page bearing the copyright notice for its publications: "No part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission."⁸⁵

The use of similar legends or legal notices is widespread in the publishing industry. Yet the fair use privilege in the Copyright Act clearly authorizes the reproduction of at least some limited portion of a copyrighted publication for legitimate purposes, including critical commentary, scientific study, or even parody or satire. In that respect the absolute nature of the prohibition above is an overstatement of the copyright owner's rights. Similar observations could also be made with respect to the type of notice prohibiting any form of copying that appears on videocassettes and digital video disks (the so-called "FBI notice"), in the shrink-wrap licenses that accompany mass market software, in point-and-click licenses, and even on some individual Web sites.⁸⁶

⁸³ The Digital Dilemma Chapter 4, page 3?

⁸⁴ The Digital Dilemma Chapter 4, page? However, other commentators have observed that a unitary legal construct with universally applicable precepts, or "one size fits all" copyright law may not be possible or even desirable, see e.g. Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 *Ohio St. L.J.* 569, 590-91 (2001).

⁸⁵ http://www.nap.edu/html/digital_dilemma/ch4.html

⁸⁶ http://www.nap.edu/html/digital_dilemma/ch4.html

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Such overstatements may be counterproductive in terms of encouraging respect for copyrights.

If consumers recognize them as overstatements and perceive them to be excessive, they may ignore them entirely as a result.⁸⁷ Even judges will sometimes remark on overreaching by copyright holders, as Judge Easterbrook did somewhat scathingly in one case, writing: "A definition of derivative work that makes criminals out of art collectors and tourists is jarring despite [the plaintiff's] gracious offer not to commence civil litigation."⁸⁸

The absolutist language used in copyright notices or "warnings" reflects the norm preferred by some copyright owners. This desired norm is that individuals abstain from any unauthorized copying whatsoever, which is much more restrictive of use than the actual copyright laws. Attempts at absolute copyright protection such as these are aggressively pitted against rights of fair use and access to information, and that makes it difficult to characterize any given behavior or norm as the outcome of rights or interest balancing, even if people could be assumed to know and understand copyright law, which they cannot. Individuals may, however, recognize that certain actions taken by copyright holders are driven by greed rather than law, and

⁸⁷ http://www.nap.edu/html/digital_dilemma/ch4.html ("Just as it is important for consumers to understand and obey the legal requirements affecting use of copyrighted material, it is also important that rights holders learn about fair use and other limits to their control over intellectual property and that they avoid making overstatements concerning what constitutes legal use of their material. Overstatements may well be counterproductive for rights holders if consumers recognize them as such, judge these statements to be excessive, and ignore them entirely as a result.")

⁸⁸ The case before Easterbrook was *Lee v. A.R.T. Company*, 125 F.3d 580 (7th Cir. 1997). ("If mounting [a greeting card on a tile] works a "transformation," then changing a painting's frame or a photograph's mat equally produces a derivative work. Indeed, if Lee is right about the meaning of the [of derivative works] definition's first sentence, then any alteration of a work, however slight, requires the author's permission. We asked at oral argument what would happen if a purchaser jotted a note on one of the note cards, or used it as a coaster for a drink, or cut it in half, or if a collector applied his seal (as is common in Japan); Lee's counsel replied that such changes prepare derivative works, but that as a practical matter artists would not file suit. A definition of derivative work that makes criminals out of art collectors and tourists is jarring despite Lee's gracious offer not to commence civil litigation.") It should be noted, however, that this was a Seventh Circuit case in which the plaintiff artist was simply asserting (unsuccessfully, it should be apparent) a claim that had actually prevailed twice in the Ninth Circuit. The plaintiff relied on the holdings in *Munoz v. Albuquerque A.R.T. Co.*, 38 F.3d 1218 (9th Cir. 1994), *aff'd* 829 F.Supp. 309 (D. Alaska 1993) and *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988).

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there is a possibility that when the letter-C-in-a-circle copyright notice is followed by words such as “unauthorized reproduction prohibited” individuals react to it as a contemptuous ultimatum.⁸⁹

In fairness to large institutional copyright holders, individual authors sometimes assert an equally expansive view of copyrights. Academics frequently post conference papers or works-in-progress on web pages with admonitions such as “Unauthorized reproduction prohibited,” or “No part of this paper may be reproduced or cited without the permission of the author.” Yet it seems unlikely that the author of a paper containing such a notice truly expect readers to contact her before they click on the print button that the software with which she has posted her paper so conveniently and tantalizingly features. If she is so concerned about unauthorized reproductions, she probably should not have posted the document on the Internet in the first place, especially not on an unrestricted website and in PDF format. Under the circumstances her “copyright notice” is not entitled to a great deal of respect, nor in all likelihood does she truly expect it to receive much.⁹⁰

c. Gap-Fostering Exemplar Expediency

⁸⁹ See Cass Sunstein, "Social Norms and Big Government," 15 *Quinnipiac L. Rev.* 147, 153 ((Summer 1995) (the "Ultimatum Game" demonstrates that certain economic predictions about rational self interest are incorrect; social norms influence the way people behave when they negotiate distribution of a potentially shared pool of money.) , see Bart Kosko, Commentary, 2/13/02 *Los Angeles Times*, "How Many Blonds Mess Up a Nash Equilibrium?" Accessed at <http://www.latimes.com/news/opinion/commentary/la-000011031feb13.story?coll=la-news-comment-opinions> (“Studies of ultimatums have shown that we can be so selfish that we become envious and we don't achieve a Nash equilibrium. Suppose I have \$100 and I offer you a share of it. The rules let us keep our shares if you accept my offer. But neither of us gets anything if you reject my offer. Then I should offer you as little as possible and you should accept anything I offer. Yet more than half of players reject an offer of less than \$20 even though accepting even \$1 is better than nothing.”).

⁹⁰ In contrast, many of the CDs produced by Righteous Babe Records, such as those featuring the music of Ani DiFranco, bear the somewhat cryptic legend, "unauthorized duplication, while sometimes necessary, is never as good as the real thing." See e.g. copyright notice on Ani DiFranco's "To The Teeth" CD (1999 righteous babe music/bmi). It would be interesting to know what effect if any this approach has on consumers. In a slightly different vein Pete Seeger reported in June of 1967: “When Woody Guthrie was singing hillbilly songs on a little Los Angeles radio station in the late 1930s, he used to mail out a small mimeographed songbook to listeners who wanted the words to his songs, On the bottom of one page appeared the following: "This song is Copyrighted in U.S., under Seal of Copyright # 154085, for a period of 28 years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do." Reoprted at: <http://www.geocities.com/Nashville/3448/guthrie.html>

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Copyright owners argue that unauthorized copying constitutes contempt for copyrights. Yet large content owners will themselves fail to respect copyrights when it is in their financial interest to ignore the moral or even legal precepts of copyright constructs, especially if they do not fear provoking well funded copyright infringement suits. For example, despite the pro-artist rhetoric they often employ, large copyright owners are notorious for trampling the copyrights of individual human authors, as evidenced by (to take one example) the devious machinations by which the recording industry recently tried to, and almost succeeded in, depriving songwriters of termination interests in their copyrighted works. This was almost accomplished when a corrupt Congressional aide surreptitiously placed a short but extremely substantive addition to the Copyright Act into the Satellite Home Viewing Act of 1999 after debate on this unwieldy bit of unrelated legislation had concluded. This brief insertion created a new category of “works for hire” under section 101(2) of the Copyright Act (“sound recordings”), and the R.I.A.A. (which has since hired the corrupt aide as a lobbyist) falsely represented to Congress that this was merely a “technical amendment.”⁹¹

What the amendment really did was to render music companies the “authors” as well as the owners of musical compositions (written by non-employee songwriters) as a matter of law, if the music companies had had the forethought to “incorrectly” label the songs “works for hire” in copyright assignment contracts before this surreptitious change in the law made the designation meaningful. The fact that so many copyright assignments in the music industry asserted work for hire status over independently authored songs before this change in the law was attempted suggests music companies planned to reap the bounty of this “technical amendment” well in

⁹¹ See e.g. "Courtney Love Does The Math" in Salon at <http://www.salon.com/tech/feature/2000/06/14/love/>, and Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm>.

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advance.⁹² The amendment actually went into effect for a brief period of time, but when the true importance of the insertion became apparent, the subterfuge was undone by Congress, which then specifically revised the Copyright Act to expressly state that Section 101(2) should be interpreted as if the amendment was never enacted. Had the recording companies been successful in making the change to section 101(2) permanent, human composers would have lost the ability to terminate the copyright assignments in their songs after 35 years as a result of losing statutory “author” status. This is an otherwise unwaivable right that the Copyright Act specifically provides for them.⁹³

Press reports of the incident, and media attention paid to the aghast reactions of well known musicians, helped convince Congress to undo the handiwork of the record companies as a legislative matter. It also helped build a societal awareness that copyright laws can be a tool of repression used against artists rather than to benefit them. When this sort of nefarious plotting is exposed, it begins to seem possible that musicians could actually make more money if copyrights were completely abolished, so that they could perform, sell merchandise, offer subscriptions and engage in other career related activities without having to negotiate royalties, pay intermediaries or otherwise interact with and risk exploitation by large corporations.⁹⁴ Anyone who was looking for a way to internally justify using a peer to peer file trading service to download free music certainly got plenty of material to work with from this sorry episode.

In a similarly self-serving vein, many content owners opposed certain provisions of NAFTA, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and

⁹² But see Mary LaFrance, Authorship and Termination Rights in Sound Recordings, 75 S. Cal. L. Rev. 375-418 (2002) (asserting that many musical compositions may be works for hire because they meet the definition of “collective works”).

⁹³ See sections 203 and 304(c) of the Copyright Act.

⁹⁴ See e.g. Kevin Kelly, "Where Muics Will Be Coming From," in the 3/1702 New York Times, accessed at <http://www.nytimes.com/2002/03/17/magazine/17ONLINE.html?pagewanted=print&position=top>

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the Berne Convention that imperially commanded the sudden acknowledgement of copyrights in foreign works that had previously been treated as part of the public domain.⁹⁵ While prior to these international treaties it had been technically non-infringing to make unauthorized use of certain foreign works because the works were not formally copyright protected within the borders of the United States, ignoring copyrights because they were legally unenforceable was not behavior that strengthened normative societal respect for copyrights as a moral or ethical concept.

It is also ironic that content owners opposed the same sort of pro-copyright strengthening legislation they often pursue on behalf of their own copyrighted content, demonstrating again that their view of copyright law hinges upon self interest rather than principle. Cass Sunstein once remarked on a similar phenomenon in a very different context, that of civil rights.⁹⁶ He noted that the Civil Rights Act of 1964 was actually supported by some southern restaurants that were discriminating against African Americans on the basis of race. Had the restaurants decided on their own to start serving African American patrons, they would have been in violation of a prevailing social norm of segregation. Changes in the law made this norm illegal.

The Civil Rights Act of 1964 thus gave the restaurants the ability to begin serving African Americans, thereby potentially increasing their patron pool, without risking social censure.⁹⁷ Their view of civil rights was clearly driven by concerns for profit rather than principle, and they were prepared to let the decision about whether or not to respect the rights of African Americans be dictated by the interplay between law and social norms: When it was legal to discriminate, they would discriminate if this was more profitable than opening their doors to African Americans. Once it was illegal to discriminate, no one could criticize them for conforming to the

; see also Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm>.

⁹⁵ cite industry opposition to the 1993 NAFTA Agreements that revived copyrights in certain Mexican and Canadian motion pictures, and the Uruguay Round Agreements Acts that "restored" copyrights in works that had not complied with notice and renewal formalities, codified in Section 104A of the Copyright Act.

⁹⁶ Cass Sunstein, "Social Norms and Big Government," 15 Quinnipiac L. Rev. 147, 157 ((Summer 1995).

⁹⁷ Cass Sunstein, "Social Norms and Big Government," 15 Quinnipiac L. Rev. 147, 157 ((Summer 1995).

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new legal regime, because the potential costs of not abiding by the law were large, and in at least some cases compliance with the law increased restaurant profitability by expanding customer bases.

And so it is some content industry players work both sides of the street, trying to simultaneously profit from authorized and unauthorized uses of copyrighted works. For example, again in the context of Internet music file sharing, one commentator observed: "[T]he [recording] industry is not simply fighting an unorganized group of college kids. In an illustration of Lenin's remark about capitalists selling the rope with which to hang themselves, businesspeople are lining up to profit from activities they officially decry," and listed several examples of content owners who invested heavily in file trading businesses,⁹⁸ ready to get rich off technologies like Napster if the courts decided that file trading facilitators were not liable for contributory copyright infringement.⁹⁹ When large content owners behave opportunistically rather than in a consistently copyright-respectful manner, they undermine the message that respect for copyrights is an ethical

⁹⁸ Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm>

⁹⁹cf. A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 at 81 n28 ("For example, such plaintiffs as BMG and Sony have entered into agreements with Listen.com, a site that provides links to CD-ripping applications. See Exh. A (Conroy Dep.) at 49:22-51:20, Exh. 295; Exh. E (Eisenberg Dep.) at 135:2-24. However, BMG representative Kevin Conroy stated in his deposition that BMG encourages its online partners "to provide only for authorized ripping" and that BMG has agreements with such sites "to legitimately and securely market, promote, and sell [BMG] artists' music." Id. at 43:20-24, 51:8-14.

In the case of Musicmaker.com, in which EMI owns an equity stake, consumers can *purchase* single tracks and have them burned into a custom CD. See id., Exh. B (Cottrell Dep.) at 141:10-142:17. It is not clear that Musicmaker.com promotes the use of pirated music. Similarly, Universal has entered agreements related to commercial downloading with Real Jukebox, which the first phase of the Secure Digital Music Initiative ("SDMI") did not cover. See id Exh. F (Kenswil Dep.) at 54:8-56:25; see also infra note 31 (discussing SDMI specifications). Under its agreement with Universal, RealJukebox will become SDMI-compliant, but still will be able to play unencrypted files to the extent the SDMI-specifications allow. Defendant provides no conclusive evidence that Universal has encouraged the use of Real Jukebox to play copyrighted music for which no authorization has been obtained.

Finally, Sony VAIO Music Clip appears to be a Sony product that facilitates the downloading, arrangement, storage, and playback of MP3, ATRAC3, or WAV files. However, while the VAIO Music Clip may not be able to screen out unauthorized files, one advertisement promotes the "*secure* music download capability of the software" and indicates that consumers should "*purchase* the wave of tides for major artists and record labels that are soon to come" on music websites. See id., Exh. E (Eisenberg Dep.) at 44:5-48:10, Exh. 220 (emphasis added)).

imperative, and instead informally reinforce an attitude of cynicism by consumers toward copyrights that they formally condemn.

Nor does the United States as a nation have a history of consistent respect for copyrights. When it was useful and profitable to do so, publishers in the United States "disrespected" copyrights in foreign works on a broad scale, acting as much the pirates as the unauthorized copiers they currently ask the U.S. government to target with trade sanctions.¹⁰⁰ It was only when content owners in this country widely desired international protections to protect their copyrighted works abroad that the U.S. government began advocating and facilitating reciprocity of copyright respect across national borders.¹⁰¹

d. Gap-Sparking Assertions of Copyright in Public Domain Works

Publishing entities may also lose credibility when they claim copyrights in public domain works, at least to the extent that individuals recognize that publishers are attempting to fence off portions of the literary and cultural commons. Yet, there are monetary enticements to assert nonexistent copyrights, and few if any financial or legal risks to doing so. As Paul Heald articulated:

Unfortunately, current practice seems to provide few disincentives for the impoverishment of the public domain. Why shouldn't a publisher claim rights in public domain material? Why not affix threatening language that will intimidate consumers into paying for otherwise fair uses of validly copyrighted material? The cost of affixing a copyright notice or threatening language is very low, and the rewards can be substantial. Those consumers who are intimidated will pay; those who understand that a Bach Cantata or Shakespearean play belongs to the public will not. In either event, the putative copyright holder sees only a potential gain; economics and common sense would predict that, in the absence of a significant deterring cost, spurious claims of copyright will proliferate.¹⁰²

¹⁰⁰ See e.g. Siva Vaidhyanathan, *Copyrights and Copywrongs; The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press 2001); J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854* (1974).

¹⁰¹ See e.g. Siva Vaidhyanathan, *Copyrights and Copywrongs; The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press 2001); J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854* (1974).

¹⁰² Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 *J. Intell. Prop. L.* 259, 261 (1994).

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In some circumstances provisions of the Digital Millennium Copyright Act and overreaching by content owners could even physically obstruct access to works that are non-copyrightable, or in the public domain. This can be accomplished because technological protection systems engaged in metering usage of copyrighted works can also be employed to gate keep access to any public domain work that a commercial entity converts to electronic form.¹⁰³ For example, unless a public interest entity digitalizes the complete works of William Shakespeare, libraries could find that they must obtain the works from commercial electronic publishers who charge for and monitor access to Shakespeare plays as if they were protected by copyright.

The prospect of paying copyright royalties, or “licensing fees” that have the look and feel of copyright royalties, to access public domain works might be infuriating to those who recognized what was transpiring. A person could very well feel completely justified in circumventing “copyright controls” to secure the ability to use content that is not copyrighted. Using any means necessary to access content that is illegitimately copyright protected may violate “copyright-related” laws such as the Digital Millennium Copyright Act, but it hardly seems immoral. Quite the contrary, it actually evokes the specter of well warranted civil disobedience.

e. Something for Nothing: The Gap-cultivating Impact of the Lack of Formalities and Low Threshold of Originality

Additionally, a norm gap-wrenching backlash may be created when individuals learn that copyright protections vest automatically, or gain an awareness of the low level of originality required to obtain a defensible copyright.

i. elimination of formalities

¹⁰³ See e.g. Ruth Okediji, Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace, 53 Fla. L. Rev. 107, 166 (Jan 2001).

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In 1989 the United States dispensed with the requirements that copyrighted works be registered with the U.S. Copyright Office, or contain formulaic copyright notices, to be eligible for copyright protection. This was done to bring the country into compliance with the Berne Convention, and to meet its obligations as a signatory of this multilateral copyright treaty.¹⁰⁴ However, eliminating formalities occasioned a sea shift in the way individuals must look at the universe of potentially copyrighted content. When copyright notices were required, one could assume that a work that did not bear a current copyright notice was in the public domain. Now, almost fifteen years after the copyright notice requirement was jettisoned, one must assume that almost everything is copyrighted until proven otherwise. As a consequence, copyright protections may take the form of background noise, rather than important and attention worthy constructs. Copyrights are everywhere, and therefore are nothing special.

The realization that copyright protection adheres automatically, without paperwork, consultations with attorneys or bureaucratic entanglement, may also devalue the perceived significance of copyrights. While many people may be constitutionally disposed toward enjoying free lunches, the contravening maxim that “you get what you pay for” would suggest that copyright protections which are freely and effortlessly obtainable are of little inherent worth, and therefore undeserving of much respect.

ii. low level of originality

Judicial repudiation of copyright justifications such as “industrious collection” and “sweat of the brow”¹⁰⁵ made sense from a doctrinal standpoint to those who understand the importance of divorcing determinations about the scope of copyright protections from subjective judgment calls about the quality or “protection worthiness” of a disputed work. However, replacing heuristics that evoke hard work with a requirement of a low level (or “scintilla”) of

¹⁰⁴Pursuant to The Berne Convention Implementation Act of 1988, mandatory copyright notice requirements ceased as of March 1, 1989, but incentives for the voluntary use of copyright notices were retained

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originality seems to suggest that a work will qualify for copyright protection even if few resources and very little effort has invested in it. This can create a perception that copyright owners can “work the system” and receive something valuable (a defensible, infringingable copyright), for almost nothing. If copyright owners are regarded as skilled manipulators of the copyright law, copyright law itself can appear to be somewhat of a scam, and therefore undeserving of respectful adherence.

In a related vein, content owners’ attempts to portray starving artists and musicians as the real victims of copyright infringement can be significantly undermined when lawsuits over the copyrightability of pedestrian items such as phone books or page numbers are publicized. Press reports about seemingly unmeritorious copyright suits¹⁰⁶ brought against successful authors, (for example, the widely publicized but so far stunningly unsuccessful infringement suit against Harry Potter author J.K. Rowling¹⁰⁷), or on behalf of long dead authors (for example, the Wind Done Gone suit brought by “the estate of” Gone With the Wind author Margaret Mitchell¹⁰⁸) may taint the entire concept of copyright with an aura of gamesmanship and illegitimacy.

f. Some People Are Unrepentant Copyright Infringers

Content users are decidedly not assumed to hold values that predispose them toward non-infringing use behaviors. Copyright holders seem to have little confidence that the number of consumers who have internalized copyright-respecting social norms is adequate to render their copyrights sufficiently profitable. Yet as Albert Einstein once observed, humankind would be in a poor way if ethical behavior were driven only by fear of punishment and hope of reward after

¹⁰⁵ E.g. Feist Publications, Inc. v. Rural Telephone Service Company, Inc., 499 U.S. 340 (1991).

¹⁰⁶David. D. Kirkpatrick, “Harry Potter and the Battle Over Creativity,” 4/1/01 New York Times, Section 1, page 1, column 3. http://www.cesnur.org/recens/potter_08.htm ; Julie Dunn, “Muggles From Earlier Time Haunt Hogwarts Express,” 3/18/21 New York Times at section 3 page 2 column 3 (“Legal challenges filed by the famous and the little-known alike over the originality of creative works have proliferated steadily over the last 20 years, partly because of the soaring value of intellectual property in a media-saturated culture.”).

¹⁰⁷ See e.g David. D. Kirkpatrick, “Harry Potter and the Battle Over Creativity,” 4/1/01 New York Times, Section 1, page 1, column 3. http://www.cesnur.org/recens/potter_08.htm ; Julie Dunn, “Muggles From Earlier Time Haunt Hogwarts Express,” 3/18/21 New York Times at section 3 page 2 column 3.

death.¹⁰⁹ There is in fact reason to believe that individuals will respect copyrights even without being threatened with dire consequences for not doing so. Robert Cooter claims that the extent to which an individual has internalized a social norm can be measured by how much she will pay to conform to it.¹¹⁰ In the copyright context respect for copyrights might be measured by how much a person is willing to pay for goods that embody copyrighted works; or by how many free or inexpensive unauthorized copies a person is willing to forgo; or by how much inconvenience a person is willing to bear to avoid infringing. The substantial profits often reaped by large content owners such as the music, movie and publishing industries suggests that individuals will and do respect copyrights to some degree and in some contexts.

One of the doomsday scenarios painted by a music industry research company in April of 2000 was that "within three years the industry could lose as many as one out of six CD sales to Internet piracy."¹¹¹ While one sixth of sales certainly represents a lot of revenue to lose, the implications of a prediction that five sixths (or about 83%) of presumably copyright-respectful CD purchases would still be made despite the allure of free Internet file trading can't be dismissed as meaningless. In addition, when a CD that contains songs easily available for free on the Internet sells 2.4 million copies in a week,¹¹² books that could easily be scanned and

¹⁰⁸ Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001)

¹⁰⁹ Albert Einstein, "A man's ethical behavior should be based effectually on sympathy, education, and social ties; no religious basis is necessary. Man would indeed be in a poor way if he had to be restrained by fear of punishment and hope of reward after death." See also Robert Cooter, Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, quoting Gerard Lynch ("What society wants from its members, in any case, is not an intelligent calculation of the costs and benefits of abiding by its basic norms, but more less unthinking obedience to them. To the extent people are specifically comparing the costs and benefits of breaking criminal laws, the battle is already lost; many of them must conclude, in particular situations, that the calculus favors law-breaking....For society to function, most people have to obey the law for reasons of conscience and conviction, and not out of fear of punishment.").

¹¹⁰ Robert Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1581 (November 2000).

¹¹¹ Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm> (referencing warning by the Bernstein Investment Research Group).

¹¹² See Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm> (Ascertaining the financial impact of file-swapping is difficult -- indeed, the discussion quickly verges on the theological. Because not everyone who downloads a song would otherwise have paid for the compact disc, one can't simply multiply the number of illicitly traded CDs by the

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infringingly distributed over the Internet sell millions of ink and paper copies,¹¹³ or movies draw millions of people to theaters and video rental stores despite DeCSS,¹¹⁴ it looks like copyright laws are working fairly well.¹¹⁵

That being said, however, it is clear that some cohort of people will not pay for copyrighted content if they can obtain it for free. Content owners assert that as a consequence the government should facilitate (or at least allow) copyright protections to be reconfigured to thwart copyright free riders, decreasing accessibility and restricting use of copyrighted materials for everyone else in the process.

5. Proselytizing¹¹⁶ and Coercing New Norms

Bob Hamilton once observed that “an interesting characteristic about money is that the people who have it don't like to lose it; indeed, they will take many, even extreme, steps to avoid losing money.”¹¹⁷ Large-scale content owners fear that norms of unauthorized copying and sharing will deprive them opportunities to realize profits from their copyrighted works, and have reacted accordingly. Members of the resource rich music industry, for example, have used every

average price of a CD to estimate the economic impact of unauthorized copying. So pro- and anti-sharing advocates rely on indirect data. In May, Reciprocal, a start-up in New York that hopes to make money from secure downloads, released a study showing that CD sales at stores near colleges -- thought to be hotbeds of Napster users -- had slipped slightly, whereas overall CD sales had risen. Scoffing, pro-Napster forces pointed out that this year, when MP3 is supposedly destroying the music business, the industry is selling more compact discs than ever before. Such sales increases, in the view of John Perry Barlow, an advocate of sharing and a former lyricist for the Grateful Dead, are the logical outcome of music-swapping, which exposes audiences to new music. Counterargument: it is simply the demographic boom in the number of teenagers that is propelling the rise in music sales. Counter-counterargument: this spring new records by Eminem, Britney Spears, and 'N Sync were easily available on the Internet, yet buyers mobbed stores for all three; *No Strings Attached*, by 'N Sync, sold 2.4 million copies in its first week -- more than any other album in history.”)

¹¹³ examples such as Harry Potter books, others...

¹¹⁴ See Jack Valenti/MPAA press release dated March 3, 2002 or so gloating about Hollywood's record revenues in 2001, higher than ever in human history, with theater admissions the highest since 1959 and U.S. box office receipts alone at \$8.41 billion, no less licensing fees, video and DVD sales and rentals, plus profits from foreign markets...

¹¹⁵ But see e.g. Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 Ohio St. L.J. 569, 569-72 (2001) (recounting “pirate stories”).

¹¹⁶ I borrow the term “proselytize” from Steven Hetcher, but use it in a much more sardonic manner than he has employed it. See Steven Hetcher, “Changing the Social Meaning of Privacy in Cyberspace,” 15 Harv. J. Law & Tec 149 (Fall 2001) (“The word ‘proselytize’ is appropriate because it would be reductionist to describe these entrepreneurs as merely fostering preferences for data privacy. Privacy norm proselytizers seek to arouse the moral consciousness of consumers vis-à-vis websites’ collection and use of personal data.”)

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weapon in their arsenals to dislodge the disharmonious norm of unauthorized song sharing over the Internet that has developed among a rather large section of the population. Music industry tactics run from persuasion, in which they proselytize respect for their copyrights, to coercion, a strategy that one commentator has described as "legislation, litigation and leg-breaking."¹¹⁸

a. Proselytizing

Copyright holders want obeisance by consumers to a normative interpretation of copyright laws that provides broad and powerful monopoly rights, because this will maximize control over and profitability of copyrighted works. They generally do not want to publicly acknowledge that the copyright law has goals other than maximizing the income stream of copyright owners. Instead, they castigate copiers, labeling them pirates and thieves,¹¹⁹ sometimes employing stunning hyperbole. For example, at the 2002 Grammy Awards, Michael Greene, the president of the National Academy of Recording Arts and Sciences, revealed that he had paid three college students to download as many music files as possible over the Internet to prove the scope of the music piracy problem, and claimed that they had managed to download 6,000 songs in two days.¹²⁰ The students themselves later admitted that they had spent three days on the project, half the files never completely downloaded, and 4,000 of the songs were

¹¹⁷ Robert W. Hamilton, "1998 Symposium: Constitutional Issues Involving Use of the Internet: Liability for Third-Party Content on the Internet," 8 Seton Hall Const. L.J. 733, 736 (Summer 1998).

¹¹⁸ Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm>; see also Richard Barbrook, "How the Music Industry Blew It" (reviewing John Alderman's "Sonic Book") posted 11/30/01 to Salon.com, accessed at http://www.salon.com/tech/books/2001/11/30/sonic_boom/print.html (During the late 1990s, while so many others were succumbing to dot-com hype, the music business stubbornly resisted any accommodation with the new technology. Its corporate leaders used all of their lobbying power and legal resources to attack the Net. They had the copyright laws strengthened, blocked software development and closed down Web sites. They even successfully prosecuted Napster -- one of the most popular services on the Net.)

¹¹⁹ e.g. *Metallica Sues Napster, Universities, Citing Copyright Infringement and RICO Violations*, (Apr. 13, 2000) (Searching for the band's tracks and downloading them on Napster was like walking by a Tower Records or HMV music store, seeing that the cash register was open and that no one was in the store, and helping yourself to whatever was available, according to Gayle Fine of Q Prime, Metallica's management company) at <http://www.livedaily.com/news/781.html>; also ("From a business standpoint [trading files via Napster], this is about piracy - a.k.a. taking something that doesn't belong to you; and that is morally and legally wrong. The trading of such information - whether it's music, videos, photos, or whatever - is, in effect, trafficking in stolen goods," said Metallica drummer, Lars Ulrich.)

obtained through private messaging with their friends rather than downloaded from publicly accessible websites.¹²¹ The exercise was apparently supposed to underscore the R.I.A.A.'s announcement that its data showed a ten percent decrease in music sales, purportedly due to online piracy and CD burning.¹²² Similarly, Metallica attorney Howard King rhetorically equated using Napster with thievery, stating, "At this moment, all around the world, hundreds of thousands of people are breaking into record stores and stealing CDs and tapes. Or they might as well be."¹²³ In their complaint filed against Napster and several universities, plaintiffs Metallica and Creeping Death Music accused Napster users of exhibiting "the moral fiber of common looters."¹²⁴

Robert Cooter has asserted that a person who intrinsically values obeying a social norm will pay something to do so independent of resulting advantages or disadvantages,¹²⁵ but an individual who does not intrinsically value obeying the social norm will do so only if it has instrumental value, such as generating praise from neighbors, or it facilitates the making or saving of money.¹²⁶ Copyright owners hope that if enough people internalize their preferred normative view of high barrier copyrights protection, non-permissive uses will dramatically decrease. Individuals who intrinsically value complying with this new copyright norm will "pay" to obey it by foregoing acts of unauthorized copying. Those who do not intrinsically esteem obeying the norm will still honor it if the instrumental value of doing so is high enough,

¹²⁰ Neil Strauss, "The Pop Life; Downloading Files and Storms," 3/7/02 New York Times, Section E page 3 Column 1.

¹²¹ Neil Strauss, "The Pop Life; Downloading Files and Storms," 3/7/02 New York Times, Section E page 3 Column 1.

¹²² E.g. Chris Ayres, "Fall in Sales Casts Cloud on Grammys," in the 2/26/02 London Times Business Section.

¹²³ *Two Views on the Copyright Dispute Between Metallica and Napster*, CNN.Com Law Center, (May 19, 2000) <http://www.cnn.com/LAW/columns/dual.metallica.05.19/> (last visited October 12, 2000).

¹²⁴ *Metallica Files Suit Against Napster, University of Southern California, Indiana University*, (Apr. 13, 2000) at <http://www.metallica.com/news/2000/000413a.html>; *Metallica Takes on Napster*, (Apr. 14, 2000) at <http://www.thestandard.com/article/display/0,1151,14119,00.html> (citing ZDNet's report about Metallica's press release).

¹²⁵ Robert Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1583 (November 2000).

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and if the likely consequences of making an unauthorized copy are confiscation of the work and legal censure, it probably will be. Whether the threat of peer censure would provide an effective deterrent is decidedly less certain.

Content owners would prefer people to respect copyrights as matters of conscience and conviction, rather than because they fear punishment, because infringing acts may be hard or expensive to detect. In addition, content owners don't want to alienate their customer base by using resource intensive legal means to pursue small scale copying by individuals if they can avoid it.¹²⁷ Copyright owners have therefore been attempting to shift the social meaning of unauthorized access and copying from morally neutral to morally reprehensible, using lobbying, the legal system, and publicity and "education" campaigns to influence public opinion away from any perception that unauthorized uses of copyrighted works could be socially legitimate or worthwhile.¹²⁸

In recent infringement actions aimed at file sharing technologies content owners have been wildly successful at painting copying technologies as "contributory infringers"¹²⁹ yet there is little indication that these actions are increasing overall societal respect for copyrights.¹³⁰ The

¹²⁶ Robert Cooter, "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1584 (November 2000).

¹²⁷ See e.g., Metallica News FAQ: "We are going after Napster, the main artery here. All the people doing illegal things here, whether with good or bad intentions, we are not going after individual fans. Metallica has always felt fans are family." at <http://www.metallica.com/news/2000/napfaq.html>, (last visited October 12, 2000). But see *RIAA Assists in Student's Arrest*, (Sept. 18, 2000) (Where an Oklahoma State University student had his personal computer and a CD recorder seized after university officials were notified by the RIAA that he may have downloaded as many as 1,000 Internet music files. The unnamed student had not been arrested, and there was no evidence that he had been selling the files or profiting in any way from the downloads.) at <http://www.wired.com/news/print/0,1294,38863,00.html>.; Cf Metallica/RIAA exhibits listing user names and info about Napster users.

¹²⁸ E.g. The F.B.I. Justice Department and Information Technology Association of America, a trade group, are engaged in initiatives to educate children about "cyberethics," and apparently equate making unauthorized copies of MP3 files with hacking and other cybercrimes. See ASSOCIATED PRESS, *F.B.I. Calls For Cyber Ethics Education*, (last visited Oct. 10, 2000) available at <http://www.nytimes.com/aponline/technology/AP-Ethics-in-Cyberspace.html>

¹²⁹ See e.g. Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm> (the music industry has induced the legislature to revamp unfavorable laws, and some of the music industry lawsuits have been successful)

¹³⁰ See e.g. Joseph P. Liu, *Owning Digital Copies: Copyright Law And The Incidents of Copy Ownership*, 42 Wm and Mary L. Rev. 1245, 1365 (April 2001)("If the concern is the increased potential for piracy presented by digital

development likely most noticeable to average content consumers is that the courts are responding to copyright owners' concerns by legally disabling innovative technologies and making them unavailable to everyone,¹³¹ copyright infringer and copyright-respecter alike. The outcomes of these court cases is undoubtedly signaling something to individual content consumers, but whether the message is effectuating the copyright use norm shifts that copyright owners desire is unclear.

b. Coercion

Many copyright holders have adopted a curious strategy of castigating their potential customers for unauthorized copying, but stopping short of actually suing them.¹³² The prevailing assumption seems to be that no one would voluntarily choose to pay for copyrighted content, so everyone must be coerced into doing so. According to Robert Cooter:

Economics models of law typically accept the “bad man” approach and add an element to it: rationality. A bad man who is rational decides whether or not to obey the law by calculating his own benefits and costs, including the risk of punishment. The rational bad man breaks the law whenever the gain to him exceeds the risk of punishment.¹³³

Large-scale content owners seem to hold the view that most consumers are “bad but rational men” who will infringe copyrights at every opportunity unless they are dissuaded from doing so by the fear of punishment.¹³⁴ There certainly seems to be empirical evidence that some acts of unauthorized copying will not be easily dissuaded, but whether this makes the copiers “bad men”

copying, then surely increasing the already underenforced substantive rights will have little impact on reducing piracy. Rather, it will only have the impact of making infringing much activity that was previously not infringing, thereby leading to increasing disrespect for existing copyright laws.”)

¹³¹ E.g. DeCSS, Napster, Scour, MP3.com, Kazaa?

¹³² See e.g., Metallica News FAQ: “We are going after Napster, the main artery here. All the people doing illegal things here, whether with good or bad intentions, we are not going after individual fans. Metallica has always felt fans are family.” at <http://www.metallica.com/news/2000/napfaq.html>, (last visited October 12, 2000). But see *RIAA Assists in Student's Arrest*, (Sept. 18, 2000) (Where an Oklahoma State University student had his personal computer and a CD recorder seized after university officials were notified by the RIAA that he may have downloaded as many as 1,000 Internet music files. The unnamed student had not been arrested, and there was no evidence that he had been selling the files or profiting in any way from the downloads.) at <http://www.wired.com/news/print/0,1294,38863,00.html>.

¹³³ Robert Cooter, “Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1591 (November 2000).

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depends on one's perspective. Content owners would certainly like unauthorized copiers to believe themselves bad, but they appear to realize that achieving this objective alone will not be enough to realize "copyright absolutism" among consumers.

The music recording industry has tried to thwart the unauthorized sharing of digital music with every means at its disposal, yet has apparently accomplished little in the way of engendering reverence for copyrights among certain song-trading sectors of the populace, because a substantial portion is still engaging in peer-to-peer music file trading.¹³⁵ Ostensibly fearing the copyright evil that consumers may do, they and other content owners have convinced Congress to make circumventing "copy control" devices illegal, and to make the criminal penalties for some acts of copyright infringement greater than those for armed robbery.¹³⁶ They purport to believe that committing substantial acts copyright infringement is so inherently logical, reasonable and attractive that, even with the obvious self-help option of implementing technological barriers to unauthorized copying, the legal strictures against performing such activities need to be rigorous and the consequences for flouting them severe.

c. Potential Effects of Norm Shifting

Attempts by content owners to proselytize and coerce adherence to copyright holder friendly norms represent the convergence of two important phenomena: First, content owners are

¹³⁴ Cite scumbag quote from Buffalo article, Ohio state???

¹³⁵ See, e.g., Larry Lessig, Napster affidavit paragraph 66: "Gnutella is a simple substitute for Napster. It facilitates a better peer-to-peer searching capability and is operated in a far more decentralized manner. Because of this architecture, there would be no way, under the present architecture of the net, for a court to stop the deployment of Gnutella without essentially shutting down a substantial portion of the Internet. Gnutella is simply an application that runs on the net; there is no central server for this application; links are made in a chain that itself is not consistent or easily tracked." Lessig affidavit at <http://dl.napster.com/lessig.pdf>. Other possible substitutes for Napster include Hotline, iMesh and Scour. See e.g., Chad Kempfert, "Metallica Sues Napster, Fans Left Dumbstruck at Millionaire Move, ALTERNATIVE MUSIC, (April 4, 2000) at <http://altmusic.about.com/musicperform/altmusic/library/weekly/aa041400a.htm>. (last visited Oct 12, 2000). Still others include AIM and ICQ. See Jon Katz, *Metallica's 'Justice' And Napster*, SLASHDOT (April 28, 2000), at <http://slashdot.org/features/00/04/16/2139241.shtml> (last visited Oct. 12, 2000). Mojo Nation is another alternative. See e.g., Damien Cave, *The Mojo Solution*, SALON (Oct 9, 2000) at http://www.salon.com/tech/view/2000/10/09/mojo_nation/print.html.

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pushing for greater respect for copyright laws, based on the premise that greater respect for copyrights is necessary given the “dangers” posed by new technologies, particularly the Internet. They want internalized respect for copyrights to spread among the populace, and the closure of norm gaps, and hope to achieve these goals by convincing consumers that norm adherence is socially responsible and morally correct. Second, however, is the fact that content owners are simultaneously using certain features of digital formats to strengthen their ability to control distribution of works, and to fundamentally change nature and scope of unauthorized use and access privileges accorded by longstanding precepts of copyright law as applied to analog works. Real space formats allow unfettered non-permissive use and access through libraries, personal sharing, first sale doctrine, fair use, and limitations on scope of copyrights imposed by the idea/expression dichotomy. Digital formats, however, raise the possibility of tracking, controlling and profiting from every use of a work, and narrowing the scope of (or even eliminating) unauthorized uses.¹³⁷

Only the first goal, encouraging respect for copyrights, is legitimate and deserving of assistance, though only to the extent that the new social norm recognizes appropriate limits on the scope of copyrights. The second objective is unequivocally improper, as curtailing unauthorized but fair uses would be detrimental to society and contrary to the very goals of the copyright laws.¹³⁸ Codifying real space norms such as fair use, and thereby imperializing and importing them into the sphere of digital formats, can advance the potentially beneficial aspects of the first goal of copyright owners while thwarting the counterproductive second one.

¹³⁶ Civil damages are available under § 1203 of the DMCA; the criminal provision, § 1204, permits fines of up to \$ 500,000 and prison terms of up to 5 years for the first offense, and up to \$ 1 million and 10 years for any subsequent offense –see Fred Yen???

¹³⁷ See e.g. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Van. J. Transnat'l L.* 613, 615 (May 1996).

¹³⁸ See e.g. Brennan dissent in *Harper & Row*

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Copyright holders would have individuals obey a social norm in which only authorized and permissive uses are made of copyrighted content. Conforming to any social norm may impose costs on individuals such as financial expenditures, inconvenience, and lost opportunities, but coterminously convey the benefits of group approval and a good reputation.¹³⁹ If respecting absolutist copyrights became a widespread social norm, exercising fair use rights could be seen as a deviation warranting sanction. This would serve the short-term control and profit maximizing goals of content owners, but undermine the goals of information dispersal and access to ideas that fair use is intended to realize.

To illustrate, copyright holders are limited to statutory damages for acts of infringement committed by educators who believed in good faith they were exercising fair use rights under Section 504(c)(2) of the copyright act. Educators can therefore make unauthorized uses of copyrighted works knowing that as long as they behave reasonably, the penalty for exceeding fair use will be modest. Social norms that discouraged any unauthorized uses of copyrighted works would add censure and other informal sanctions to these penalties, adding to the costs of exceeding fair use, and exacerbating the risks of exercising fair use rights at all.¹⁴⁰

Moreover, if the “public interest” justification for unauthorized uses of copyrighted materials is consistently and visibly invoked exclusively by “evil” infringement defendants, the concept of fair use may be tainted and ignored as the last refuge of scoundrels. Exercising fair use privileges could become something one felt it necessary to make excuses or apologize for.

B. "Use Norms" in the Correct Normative Framework: Copyright Infringements are Injuries Rather Than Thefts

¹³⁹ Robert Cooter, “Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1577, 1584 (November 2000).

¹⁴⁰ See David Nimmer, Fair Use handout from Duke conference.

The trend toward “proPERTIZATION” of copyrights had been well chronicled by legal scholars and others.¹⁴¹ In some respects and contexts, treating copyrighted works like chattels, if not parcels of land, has become almost a norm, but one that is challenged by a divergence of opinion as to how allegations of infringement ought to be characterized and disposed of. An act of copyright infringement is, at its essential level, most accurately described as a tort. Copyrights come under the rubric of “intellectual property,” and many commentators rhetorically equate unauthorized uses of copyrighted works with property takings and theft,¹⁴² but infringing acts actually inflict injuries that are closer to trespass or conversion than property theft, because nothing tangible is taken or withheld from a copyright owner.¹⁴³ Rather, the value of the copyrighted work is diminished (and a copyright holder is consequently injured) only to the extent that the copyright owner’s right to control and exploit the work is compromised by acts that exceed fair use and reach the level of copyright infringement.¹⁴⁴

Divining the extent of injury to a copyright occasioned by an act of infringement such as the making of three unauthorized copies may be difficult and speculative, but is a more doctrinally coherent approach than automatically concluding that the existence of three unauthorized copies means the work has been stolen three times. Have the three unauthorized copies been sold, and therefore substituted for three sales of authorized copies? Or, have they been made and retained by the owner of an authorized copy? Were the copies made by a so-called pirate, who was hoping to sell them illicitly and reap an undeserved profit? Or were they made by a public school that was unable to purchase “authorized” copies due to budgetary

¹⁴¹ Radin, Boyle, Aoki, Lemley etc...

¹⁴² String cite...

¹⁴³ fn about trespass to chattels jurisprudence and commentary, SH’s fn about cyberpromotions, plus Cubby, idea is stop gap until legislation or may evolve like body of tort law?

¹⁴⁴ But see Lawrence Lessig, Intellectual Property and Code, 11 St. John’s J. Legal Comment. 635, 638 (1996) (“while we protect real property to protect the owner from harm, we protect intellectual property to provide the owner sufficient incentive to produce such property.”)

constraints, or because the copied work is out of print? Was the unauthorized use unusual in nature, or a type of use that is commonly made, and therefore a norm?

A torts based inquiry into the extent and reasons for the alleged injury wrought by the unauthorized copying or use is more likely to lead to a just outcome and fair award of damages, if any, to the complaining copyright holder. Copyright owners would usually prefer that all unauthorized copies be treated as similarly situated thefts, but a factual and situational inquiry is more appropriate, though it will not necessarily be more protective of the right to engage in unauthorized fair use copying.

1. The Role of Custom

In the context of ordinary negligence, Steven Hetcher analyzed the role that social norms and customs play in tort law, and asserted: “When people injure one another while conforming to social customs, it is the duty of tort law to determine which of these injuries merits legal redress.”¹⁴⁵ Hetcher observed:

In negligence litigation, injurers attempt to establish their conformity to custom as evidence of due care while victims attempt to establish the injurer’s failure to conform as evidence of negligence. When conformity is used defensively, the injurer in effect asks: “How could I have done wrong, as I was simply doing what others do in similar situations? How could all the conformers to this widespread social custom be negligent?” When the rule of custom is used offensively, the victim in effect complains: “Surely the injurer was negligent as she failed to exhibit the degree of caution that is so obviously required that is has become customary.”¹⁴⁶

This analysis is adaptable to copyright use cases, where it is the duty of copyright law to determine which unauthorized uses of copyrighted works constitute fair use, and which merit legal redress because a use has infringed a copyright. Fair use is by definition a defense to a claim of copyright infringement, and a defendant claiming fair use might assert that a particular type of unauthorized use was customary.

¹⁴⁵ Steven Hetcher, “Creating Safe Social Norms in a Dangerous World,” 73 S. Cal. L. Rev. 1, 4 (November 1999).

¹⁴⁶ Steven Hetcher, “Creating Safe Social Norms in a Dangerous World,” 73 S. Cal. L. Rev. 1, 5 (November 1999).

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Custom appeared to play a significant part in several important copyright decisions by the Supreme Court, including the majority opinion in the Sony¹⁴⁷ case. In Sony¹⁴⁸, by the time the dispute was litigated up to the Supreme Court, the ownership of videocassette tape recorders (VCRs or VTRs) was widespread, and a large segment of the populace had grown accustomed to using them to tape and “time shift” television programs. The text of the majority opinion makes explicit and extensive reference to the fact that “Petitioner Sony manufacture[d] *millions of Betamax video tape recorders* and market[ed] these devices through numerous retail establishments,” referenced “*millions of owners of VTR's* who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood,” and stated: “One may search the Copyright Act in vain for any sign that the elected representatives of *the millions of people who watch television every day* have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.”

Copyright holders are likely to use custom offensively when it is advantageous to them, such as when the defendant has been engaging in copying activities for which others customarily obtain permission and/or pay royalties.¹⁴⁹ However, “market effect” can be invoked to overshadow or supplant custom to defeat fair use defenses raised by accused infringers.¹⁵⁰ For example, in the *Texaco v. American Geophysical* case,¹⁵¹ a court found that the longstanding practice by researchers of photocopying articles of interest out of circulating scientific journals was not fair use, and was therefore copyright infringing. Unauthorized photocopying, though customary, was held to harm the nascent market for photocopy royalties. The complaining copyright owners convinced the *Texaco* court to embrace and judicially endorse a new norm that

¹⁴⁷ Re Sony cite *Fast Forward*.

¹⁴⁸ *Sony v. Universal*, 464 U.S. 417 (1984).

¹⁴⁹ give examples

¹⁵⁰ E.g. *Kinkos*, *Texaco*, *Harper & Row*

imposed on research institutions a duty to either pay photocopy royalties to publishers, or to obtain photocopy licenses from the Copyright Clearance Center.¹⁵²

2. The Impact of Strict Liability

Copyright infringement is a strict liability tort, which, as a doctrinal matter, explicitly takes account of the accidental or intentional nature of the infringing acts only in the calculation of statutory damages awards.¹⁵³ Such strict liability provides copyright owners with a broad scope of protection against direct infringement. If liability for infringement were limited to intentional conduct on the part of an alleged infringer, this would result in a significant narrowing of the tort compared to strict liability.¹⁵⁴ An intermediate scope of protection for copyrighted works would result if infringement liability were premised upon a finding of negligent conduct by the entity accused of infringement.¹⁵⁵ Strict liability eliminates the need for plaintiffs to muster certain types of evidentiary proof.

In some copyright disputes, however, establishing liability for direct infringement will generally be facilitated by, and may even require, proof of something very much resembling negligence or even intentional conduct. Mounting a successful copyright infringement claim requires, at a minimum, establishing that infringing unauthorized copying has occurred. Copyright owners can enjoy the benefits of strict liability when an infringer's motives appear

¹⁵¹ cite to case

¹⁵² cite...

¹⁵³ See 17 U.S.C section 504(c). Copyright owners who can prove that infringement was willful can boost statutory damages awards substantially (from between \$500 and \$20,000 to as much as \$100,000). “Willfulness” in this context is generally defines as knowing infringement, something more than a mere intent to infringe. See Nimmer on Copyright Section 14.04[B][3] (1999). Willful infringers can also be subject to criminal penalties under section 506(a)(1) of the Copyright Act and 18 U.S.C. section 2319, even if the infringing acts are committed without a profit motive on the infringer’s part

¹⁵⁴ By contrast, the doctrine of contributory infringement has a “knowledge” requirement. Contributory infringement empowers copyright owners to bring infringement actions against entities that (for example) distribute technologies that enable the copying of copyrighted works. It requires copyright owners to prove that defendants have “knowledge” that the accused technology is being used extensively by others to commit commercially significant acts of direct copyright infringement. See e.g., Netcom case.

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pure,¹⁵⁶ and simultaneously reap the advantages of painting unauthorized copiers as bad actors where factual circumstances allow. Consider the scathing words of a judge who decided that a photocopy shop that was making "multiple copies for classroom use"¹⁵⁷ of educational materials (compiled and chosen by University of Michigan faculty members) and selling them to students was a willful copyrights infringer. Articulating a view of copyrights as chattels she wrote:

[T]he defendants have continued for an extensive period of time to take and use the property of others for their own personal gain. They excuse all of this by further suggesting that they do not agree with the law and asserting that they interpret the law differently than appellate courts that have addressed copyright infringement, and legal scholars who have counseled them against their practice. They would argue that their efforts to determine the law for themselves would excuse their conduct as it might be deemed willful.

This court is compelled to see this practice for what it is. The defendant is taking the property of another without right or permission, using that property for personal gain. There simply is no excuse for this conduct. How often this court hears as an explanation for illegal conduct a statement or argument that "the law is wrong, so I just chose not to be bound by it." There are procedures to change the law; it is not to be violated.¹⁵⁸

The defendant photocopy shop was clearly making unauthorized photocopies intentionally, but was doing so believing this to be an exercise of copyright fair use. The legal dispute concerned whether or not this photocopying could be a fair use of the copyrighted materials at issue, given the doctrinal conflict between the profit-making nature of the photocopying, and the nonprofit educational purpose to which the photocopies were put by the end users, who were students. The defendant faced precedent in the form of a district court opinion from another circuit in which the judge ruled against a copy shop in similar circumstances.¹⁵⁹ However, the defendant also reasonably, if not successfully, argued that because Section 107 of the Copyright Act specifically

¹⁵⁶ *Bright Tunes Music Corp. v. Harrisongs Music LTD.*, 420 F. Supp. 177, ??? (1976)

¹⁵⁷ An illustrative example of fair use in Section 107 of the Copyright Act.

¹⁵⁸ *Princeton Univ. Press v. Michigan Document Servs.*, 855 F. Supp. 905, 907-08 (E.D. Mich. 1994), *aff'd in part and vacated in part*, 99 F.3d 1381 (6th Cir. 1996).

¹⁵⁹ *Kinkos*

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sets out “teaching (including multiple copies for classroom use)” as an illustrative purpose for which fair use could be made of copyrighted works, making course packs was fair use. Despite the plain words of the statute, the copyright owners were able to call forth the coercive power of the state with a vengeance by convincingly painting the defendants’ behavior as intentional, premeditated theft of another’s property.

In spite of the vitriolic tone of her words, and the apparent certainty by this district judge that the defendant’s conduct was “inexcusable” and “illegal,” an appellate court later tacitly disavowed this qualitative assessment of the defendant’s actions by overruling the district court’s holding that the defendant’s activities rose to the level of willful copyright infringement. In addition, the appellate court required the district court judge to modify an overbroad injunction that barred from the defendant doing any unauthorized copying of the plaintiff’s copyrighted works altogether, even if the copying fell within the tiny realm of paradigmatic and virtually unequivocal fair use such as making a personal copy for scholarly purposes.¹⁶⁰ While the flawed nature of the injunction implies a lack of comprehension of the nuances of copyright law by the judge, it also suggests her perception that the defendant was intentionally engaging in something illicit and destructive that needed to be unambiguously halted. Most pertinently for the purposes of this article, despite the strict liability framework, the behavior and motivations of an accused copyrights infringer were clearly important factors in the liability inquiry when a fair use defense was raised. Other copy shops in the region were paying photocopy royalties to publishers when this suit was brought,¹⁶¹ and the defendant was punished harshly for deviating from this norm.

C. How a Copyright Norm Can Become Law: The “Teacher Exception” to the Work For Hire Doctrine

¹⁶⁰ MDS cite, plus one copy for personal use fn

¹⁶¹ MDS cite.

Norms in the guise of past practices have already found their way into copyrights jurisprudence. For example, prominent “law and economics” scholar¹⁶² and former law professor Judge Richard Posner perceived a significant “teacher exception” to copyright law’s work for hire doctrine that protects professors from being treated like ordinary employees. The work for hire doctrine is set out in sections 101 and 201(b) of the Copyright Act, and designates an employer (rather than the actual human creator) the author of any copyrightable work created by an employee within the scope of his or her employment. Application of the “work for hire” doctrine in an academic context would give universities and colleges the ability to claim both authorship and ownership of the copyrights in creative works prepared by faculty members within the scope of their employment. As a general matter academia has never worked this way, but this case certainly represented an attempted move in that direction.

There is a complete dearth of textual support for the teacher exception divined by Posner in either the Copyright Act or its legislative history.¹⁶³ In fact, Posner overtly conceded that “to a literalist of statutory interpretation, the conclusion that the [1976 Copyright] Act abolished the [teacher] exception may seem inescapable.”¹⁶⁴ Nevertheless, Posner determined that universities should not be deemed the authors of the copyrighted works created by the professors they employ because of the “havoc that [a contrary] conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish” the teacher exception.¹⁶⁵ In other words, applying the work for hire doctrine to faculty members would be contrary to the norms of academia. His analysis suggests a belief that these

¹⁶² See e.g. Larissa MacFarquhar, “The Bench Burner” in the 12/10/01 New Yorker 78 at 87.

¹⁶³ See e.g. Weinstein v. Illinois, 811 F.2d 1091, 1094 (7th Cir. 1987) (“The copyright law gives an employer the full rights in an employee’s “work for hire” 17 U.S.C. 201 (b), unless a contract provides otherwise. The statute is general enough to make every academic article a “work for hire” and therefore vest exclusive control in universities rather than scholars. See DuBoff, *An Academic’s Copyright: Publish and Perish*, 32 J. Copyright Society 17 (1984)”.

¹⁶⁴ Hays v. Sony Corp. of Am., 847 F.2d 412, 415 (7th Cir. 1988)

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norms are widespread and entrenched, and that to disregard these norms by issuing a ruling that contravened them would be highly disruptive and counterproductive. He observed that authority supporting the notion that scholarly writing by teachers is presumptively not work made for hire was scanty “not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings.”¹⁶⁶

In describing the history of the teacher exception, Posner wrote:

Although college and university teachers do academic writing as a part of their employment responsibilities and use their employer’s paper, copier, secretarial staff and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. There was good reason for the assumption. A college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise...¹⁶⁷

Posner concluded: “The reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were.”¹⁶⁸

Another former law professor identified with the law and economics viewpoint, Judge Roger Easterbrook had reached a analogous conclusion in a similar case a year earlier, basing his ruling on a combination of rules (in the form of a university copyrights policy), and the norm of allowing academics to be deemed authors for copyright purposes, which he believed the rules

¹⁶⁵ Hays v. Sony Corp. of Am., 847 F.2d 412, 416 (7th Cir. 1988)

¹⁶⁶ Hays v. Sony Corp. of Am., 847 F.2d 412, 414 (7th Cir. 1988)

¹⁶⁷ Hays v. Sony Corp. of Am., 847 F.2d 412, 414-15 (7th Cir. 1988)

¹⁶⁸ Hays v. Sony Corp. of Am., 847 F.2d 412, 415 (7th Cir. 1988). Later in the decision Posner, a former law professor who wrote prolifically, humorously observed: “At argument Sony tied to distinguish between the [word processing manual at issue] and what college and university teachers write on the ground that the manual is ‘boring,’ insignificant, and in short unworthy of legal protection. In making this argument Sony’s counsel either betrayed a lack of familiarity with academic writing or was exhibiting an exaggerated deference for members of this panel.” Hays at 418. Judge Posner also issued a ruling in a trademark case that also deferred to societal norms. In *Illinois High School Assn. V. GTE Vantage*, 99 F.3d 244 (7th Cir. 1996) Posner held that where the public appropriated the trademarked term “March Madness” from a high school basketball tournament and began using it to refer to the NCAA college basketball tournament, the trademark became susceptible to “dual use.” In reaching this decision, Posner judicially created a wholly new category of trademark for the purpose of keeping trademark law from “interfering” with widespread public usage of the expression. See e.g. Merges, Mennell & Lemley, *Intellectual Property in the New Technological Age*, 691 (2d ed. Aspen 2000).

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left intact.¹⁶⁹ Easterbrook observed that allowing academics whom created copyrightable works during the course of their employment to own the copyrights to these works “has been the academic tradition since copyright law began.”¹⁷⁰ Like Posner, Easterbrook clearly found the importance of tradition in the intersection between academic writing and the copyright law dispositive.¹⁷¹ The teacher exception example thus serves as “precedent”¹⁷² for approaching copyright law through established real life behaviors and practices rather than strictly through statutory interpretation.

One wonders how these jurists might react to the wholesale downgrading of traditional access levels to information as copyright and digitalization curtail the distributive abilities of entities like libraries. Loss of customary access is arguably more chaotic, disruptive and unsettling than academic copyright ownership issues, in part because a major alteration in the fundamental terrain of fair use (to the extent there is such a thing) impacts a much larger cohort of people, though academics are clearly among this group. Given the opportunity, would Posner and Easterbrook act to preserve the copyright status quo for library patrons, as they did for academics? The next section of this Article is geared toward persuading the reader that this would be a very good idea.

¹⁶⁹ Weinstein v. Illinois, 811 F.2d 1091, 1094 (7th Cir. 1987).

¹⁷⁰ Weinstein v. Illinois, 811 F.2d 1091, 1094 (7th Cir. 1987)(“ A university “requires” all of its scholars to write. Its demands -- especially the demands of departments deciding whether to award tenure -- will be “the motivating factor in the preparation of” many a scholarly work. When Dean Manasse told Weinstein to publish or perish, he was not simultaneously claiming for the University a copyright on the ground that the work had become a “requirement or duty” within the meaning of paragraph (3) [of the University’s copyrights policy]. The University concedes in this court that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof. This has been the academic tradition since copyright law began, see M. Nimmer, *Copyright* § 5.03[B][1][b] (1978 ed.), a tradition the University’s policy purports to retain. The tradition covers scholarly articles and other intellectual property. When Saul Bellow, a professor at the University of Chicago, writes a novel, he may keep the royalties.”)

¹⁷¹ Ironically, in a more recent case involving the decidedly less traditional ??? Vanderhurst v. Colorado Mountain College Dist., 16 F. Supp. 2d 1297 (Dist. Colo. 1998) (holding that professor’s creation of a teaching outline, even though prepared on his own time, connected directly with the work which he was employed to do and was fairly and reasonably incidental to his employment, and therefore based on Section 101(1) of the Copyright Act and the holding in CCNV v. Reid was a work made for hire).

¹⁷²But see Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Penn. L. Rev. 1697, 1700 (1996) (norms are not identical to common law doctrines because while judges may be self-conscious about making their decisions consistent with prior decisions, norm-producers are more likely to be swayed by their sense of justice).

III. THE NORMS OF LIBRARY USE IN THE CURRENT LEGAL ENVIRONMENT

Recall Ellickson's hypothesis that members of close-knit groups tend to govern their interactions by developing informal norms that maximized the objective welfare of group members, but that legal rules would become more important when the social distance between disputant increases, when the magnitude of the dispute increases, and when the legal system allows disputants to externalize costs to third parties.¹⁷³ Whether or not libraries and copyright holders ever constitute close-knit groups is a complicated question. For some types of works, libraries stand squarely in the way of profit maximization by copyright holders. Because some fraction of the library patrons who check out a book, movie or computer game would have rented or purchased the work had the item not been made accessible through a library, libraries negatively impact copyright owners' revenue streams.

With some works, the purchases made by the libraries themselves to stock their collections benefit publishers financially, but unless they pay premium prices, sales to libraries probably generate royalties that are inadequate to compensate for the "lost sales" they cause. Though libraries are likely to purchase multiple copies of works for which high patron demand is expected or encountered, the royalties still may not be proportionate to a works' popularity.

For other works, such as reference books, libraries may be publishers' best customers, and publishers that target library markets with particular information products would no doubt like to increase the consumption of these works and updates to these works by libraries. Given the consolidation among publishing entities that has occurred recently,¹⁷⁴ some companies happily market works to libraries from some subsidiaries while simultaneously cursing the very existence of libraries from other corporate divisions.

¹⁷³ Supra p. ____.

¹⁷⁴ Cite re: consolidation among publishing companies.

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Assuming for the sake of argument that copyright owners and content-consuming libraries form something resembling a close knit community, one possible explanation for the increasing importance of copyright law to large scale content owners, as evidenced by the explosive rates of copyright infringement litigation and the increased congressional lobbying efforts by corporate copyright holders, is that relatively recent technological innovations that enable high quality, low cost copying of copyrightable works triggered or exacerbated the factors identified by Ellickson as increasing the importance of legal rules. Digital copying technologies may have increased the social distance between copyright owners and content-consuming libraries by pitting them against each other in high stakes and/or antagonistic licensing negotiations. As discussed below, when libraries must license information products, they lose the autonomy over licensed portions of their collections that the first sale doctrine provides with respect to works that they can purchase outright. Libraries may not realize any concomitant gains, and resent the limitations that licensing regimes unilaterally impose.

The magnitude of any given copyright dispute is certainly increased when large numbers of infringing copies can be rapidly and inexpensively made. Additionally, certain copyright law precepts allow copyright owners to externalize costs to third parties such as the court system, customs agents and federal marshals, and entities marketing copying technologies. With respect to libraries, restrictive licenses externalize some of the consequences of access compression to library patrons.

In the ink and paper context the norms of library use are arguably self-enforcing. Libraries purchase copyrighted works in quantities correlated with expected demand, and make them available to patrons who may or may not have purchased copies of the works of their own if the library did not have the work in its collection. Every instance in which a given book is checked out does not necessarily represent a lost sale any more than every child enrolled in

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public school represents "lost tuition" to private educational institutions. In the case of some works, such as inexpensive paperback copies of works of fiction, library copies very likely supplant some purchases library patrons might have otherwise made. However, even if copies of these works were purchased by individuals rather than borrowed from libraries, evidence suggests the privately purchased books would still be shared informally.¹⁷⁵ In other cases readers would simply forgo exposure to the works rather than buy them.

Libraries pay hundreds of millions of dollars to publishers to provide patrons with access to books and other objects embodying copyrighted works.¹⁷⁶ Because patrons can borrow these books to use as their own for a reasonable length of time, they are intuitively less likely to make infringing copies of the works. Though libraries may very well cost publishers sales, it doesn't necessarily follow that libraries foster or enable copyright infringements that wouldn't otherwise occur. Libraries may actually reduce incentives for infringing copying, since they facilitate access to authorized copies of works.

If copyrighted works are lost or damaged, a library may procure replacement copies if the copyright owner continues to make the work available for purchase. If a given work is no longer in print, the library may resort to purchasing a used copy of the work, or to photocopying copies that remain available in its collection. If libraries exceed the scope of copying authorized by section 108 of the Copyright Act, they may be vulnerable to censure by the owner of the affected copyright, but if the copyright owners reacts with excessive harshness the library may be reluctant to purchase other works from that entity. Libraries and at least some publishers are locked into long-term mutually dependent relationships with each other. However, it is apparent

¹⁷⁵ Cite re: book sharing, e.g. Charles C. Mann, "The Heavenly Jukebox" in the September 2000 Atlantic Monthly, accessed at <http://www.theatlantic.com/issues/2000/09/mann.htm> ("editors often guess that four or five people read every "hard" copy of most popular books and magazines...").

¹⁷⁶ For example, the Association of Research Libraries 122 members spend \$900 million a year on books and journals. See David D. Kirkpatrick, "As Publishers Perish, Libraries Feel the Pain" in the 11/3/2000 New York Times, accessed at <http://www.nytimes.com/2000/11/03/business/03PUBL.html>

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that publishers have been deeply dissatisfied with the extensive use that libraries and libraries patrons could make of a copyrighted works in ink and paper formats after simply remitting the initial purchase price. Digitalization has given publishers an opportunity to restructure their relationships with libraries, and to force abandonment of all pre-existing norms in the new distribution mediums.

One academic librarian recently published an interesting article in which she explicated the values conflicts between librarians and copyright owners,¹⁷⁷ observing at the outset that "[w]hile these conflicts have existed for centuries, they are escalating in the rapidly expanding digital environment, and the debate between the two groups is becoming increasingly acrimonious."¹⁷⁸ While there may be equal amounts of acrimony on both sides of the debate, the power imbalance between the two groups is substantial. A set of norms pertaining to library usage of copyrighted written materials in analog formats evolved that displeased publishers in several respects. As a result, copyright owners challenged these norms whenever new copying technologies emerged, such as when photocopying technologies made copying paper onto paper cheap and efficient, but failed to significantly alter either the law or the norms. They did not go so far as to begin publishing books comprised of ink and paper that could not be photocopied, perhaps because this was cost-prohibitive, or because it would have alienated consumers. Digital technologies, however, present economically efficient opportunities for control of content that photocopiers, microfiche and similar copying mechanisms simply do not.

Copyright use issues that have arisen around "distance education" provide illustrative examples of how educational use norms have been challenged by publishers. Educators, educational institutions, students and librarians all have normative expectations pertaining to

¹⁷⁷ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115 (Fall 2000).

¹⁷⁸ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 115 (Fall 2000).

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distance learning.¹⁷⁹ All of these stakeholders anticipated from the outset that they would be able to make real-space-equivalent uses of copyrighted works in distance learning courses, even though such equivalents necessarily required transmitting copies of the works over the Internet.¹⁸⁰ The example of the intuitively real-space rooted student expectations articulated by Gasaway is particularly instructive:

Students in distance learning courses expect that they will not be treated differently than students who take the same course in a traditional classroom. They believe that their learning experiences will not suffer because of restrictions on the types of materials that are performed or displayed in the course, restrictions that do not apply to the traditional classroom. They expect that the school will provide course materials for them just as it does for local students through course packs, access to web pages, and through other materials. They also assume that access to these materials will not be more expensive than it is for on-campus students. Students expect that the library in the educational institution will provide copies of books, articles, and other materials needed for their research and study for the course. They also expect the library to provide access to electronic journals, which are available to other students enrolled in the school.¹⁸¹

Hoever, it has become apparent that these user expectations contrast dramatically with copyright holders' expectations, which include the conviction that schools offering online courses should obtain licenses for providing digital access to textual materials, should restrict access to course materials to enrolled students, and should "implement technological controls to prevent downstream copying."¹⁸² Copyright holders have also assumed that they are free to offer licenses

¹⁷⁹ Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 *Ohio State L. J.* 783, 797 (2001) ("Library staff anticipate that they will be able to meet the needs of distance learners by providing copies of materials under sections 108(d) and (e) of the Copyright Act. They expect that they can provide copies to these students obtained for them via interlibrary loan. Libraries expect that they can create electronic reserve systems that will be available to all students, including distance learners. They assume that they will be able to negotiate licenses for digital materials for students, faculty, and staff on campus as well as for enrolled distance learning students who are located off-campus. Libraries also expect that they will be able to implement authentication technology that will not require all users to have the same ".edu" address but rather will authenticate them as having access under the license. They believe that license fees will be reasonable in comparison to license fees for printed works and that license terms will not be inordinately restrictive. Libraries expect that publishers will respond quickly to their requests and will respect the time-sensitive nature of these requests. They expect that the Copyright Clearance Center will cover an increasingly larger number of publishers and types of materials for digital copying.")

¹⁸⁰ Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 *Ohio State L. J.* 783, 795-97 (2001)

¹⁸¹ Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 *Ohio State L. J.* 783, 797 (2001).

¹⁸² Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 *Ohio State L. J.* 783, 798 (2001).

on a "take it or leave it" basis¹⁸³ or to decline to license a particular work at all,¹⁸⁴ even if that means that distance learning students are completely denied access to certain materials.¹⁸⁵

Thus the expectation by several groups of copyright users that real space usage norms would move seamlessly into cyberspace proved unfounded. Instead copyright owners used the control mechanisms enabled by digital technologies to unilaterally alter the rules of use and access.

A. E-Book Borrowing in Cyberspace and in Person: "Library Use"

New technologies can facilitate unprecedented distribution of new creative works and access to information. However, trends in the development and application of copyright and "copyright-related" laws are bolstering business practices by content owners that may undermine or virtually incapacitate the ability of nonprofit libraries to maintain the level of access to electronic copyrighted content that is provided by traditional paper-and-print books and periodicals. The goal of this section of the article is to articulate the necessity, importance and rectitude of establishing for individual library patrons the electronic equivalent of "real space access" as the minimum standard of free, unfettered and unmonitored entrée to information contained in digital form within the collections of nonprofit libraries, whether accessed in person or via the Internet, herein designated "Library Use."¹⁸⁶

Library Use, as proposed here, would be an explicit constraint on copyright exploitation giving library patrons the right to access and use the digital works owned by libraries, with no more constraints than have historically been placed upon ink-and-paper publications. Library

¹⁸³ Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 Ohio State L. J. 783, 817 & 818 (2001).

¹⁸⁴ Laura Gasaway has observed that "there may be little motivation for certain copyright owners to license their works for distance learning because 'it may not be a remunerative market.'" Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 Ohio State L. J. 783, 813 (2001), quoting U.S. Copyright Office, *Report on Copyright and Digital Distance Education* (1999) at 165.

¹⁸⁵ For a discussion ofSee Tom Bell, "Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works," 69 U. Cin. L. Rev. 741, 798-800 (2001)

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Use will not enlarge or restrict the doctrine of fair use, nor affect the legality of excessive or extra-library copying. It will simply allow access to the works in the first place, to the extent rising prices allow libraries to maintain and add to their holdings, electronic or otherwise.¹⁸⁷

The statutorily constructed right to Library Use proposed is directly intended to counter access restrictions imposed by content owners, both those implemented to control use of copyrighted works in electronic formats generally, and those specifically aimed at curbing the ability of nonprofit library patrons to access and use copyrighted information. These restrictions are intended to reconfigure the norms of information access available through libraries. To prevent narrowing the portals of access to informational works that libraries provide, either Congress or the courts must step in to preserve pre-existing library use norms associated with ink and paper.

Congress is better situated than the courts to address norm preservation in an immediate and consistent manner. The exemplar Posner “teacher exception” pronouncement¹⁸⁸ demonstrates that courts can preserve copyright norms based on past practices if they are so inclined. However, that judgment was not rendered in the context of an orchestrated attempt to

¹⁸⁶ Establishing a statutory right of “Library Use” was first proposed in Ann Bartow, “Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access through Changing Technologies,” 62 Ohio State Law Journal 821 (2001).

¹⁸⁷ See e.g. Peter Givler, Executive Director of the Association of American University Presses, “Scholarly Book, the Coin of the Real of Knowledge,” Chronicle of Higher Education, Point of View, November 12, 1999, accessed at <http://www.chronicle.com/weekly/v46/i12/12a07601.htm> (“Research libraries have watched their purchasing budgets dwindle, while the portion they earmark for scholarly books has gone down as journal prices have risen.... Locked in a vicious spiral, publishers attempt to recover costs from dwindling markets by charging more, as the price of scholarly books balloon past the reach of all but the most determined buyers.”); see also “The Cost of Publishing an Electronic Journal: A General Model and a Case Study,” D-Lib Magazine (November 1998), accessed on 10/28/99 at <http://www.dlib.org/dlib/november98/11roes.html> (“In their excellent review of the development of scholarly publishing in the United States, Tenopir and King present evidence showing that the average institutional price of a scholarly journal subscription has increased from \$39 in 1975 to \$284 in 1995, a factor of 7.3 in just twenty years. Based on these figures, Tenopir and King conclude that: “It is clear that traditional scholarly publishing is in serious economic difficulty.” General inflation and increase in size (more pages per issue, more issues per volume, more volumes per year) of the journals, account for only 52 percent of the price increase. Tenopir and King explain the remaining 48 percent by pointing to the dramatic decrease in personal subscriptions, which started in the late seventies. Publishers have apparently addressed this fall in revenue by increasing institutional subscription rates, thereby causing a vicious circle of cancellations and further increases in institutional rates.”).

¹⁸⁸ Supra p. ____

challenge and alter a preexisting norm by well-funded norm opponents. Nor would courts ordinarily have had the first hand experience with the customs at issue that Posner had with academia.¹⁸⁹

Real space library use norms are functionally under attack by license-based restrictions imposed as conditions for access to information products. Even if libraries or library patrons are willing and able to litigate access compression issues, content owners are likely to be vastly better resourced, and to the extent that they are defending their licensing practices, will benefit from “freedom to contract” jurisprudence that appears far clearer, better established, more consistent and easier to apply than the complex vagaries of copyright’s fair use doctrine.¹⁹⁰ Even if fair use was held to trump content owner imposed licensing terms, it would take a while for a

¹⁸⁹ But see Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 *Vanderbilt L. Rev.* 2063, 2080 (“Increasing excludability enhances the welfare of owners of information goods, and these owners lobby for expanding rights. Those whose welfare is adversely affected are usually too diffuse to represent the full measure of the social loss, thereby presenting legislatures with a skewed picture of the social effects of perfecting the excludability of information goods. Perhaps, then, it is up to publicly spirited legislators, but even more so to judges, to serve as counterweight to these political imbalances, to review very carefully, and with a skeptical eye, proposals for further enclosure of the public domain.”).

¹⁹⁰ cites??? But see e.g. Clayton P. Gillette, *Lock-In Effects In Law and Norms*, 78 *B.U.L. Rev.* 813, 228-29 (“A legal entrepreneur who wanted to modify an existing rule to make it more pro-consumer, on the other hand, would tend to proceed through the judicial process, even if the initial rule was promulgated by the legislature. By proceeding through the courts, any single consumer (or attorney) could mount a challenge without incurring the significant costs necessary to lobby the legislature. Although class action litigation may require coalitions among and significant investment by attorneys, in all but the most complex cases those costs are likely to be less than the costs related to organizing interest groups, drafting legislation, and approaching legislatures. In fact, even in the most complex cases, the organizational costs of litigation may still be less than the costs of pursuing the same result through legislation. Plaintiffs’ tort lawyers, for example, may join forces in litigation to share expertise and realize economies - but they have less capacity to lobby legislators, with whom they have less contact. Further, the need for greater numbers in order to lobby effectively for legislative change would reduce the lawyers’ capacity to monitor and prevent shirking by coalition members. Individuals who have difficulty coalescing into groups because potential members are geographically diffuse or have insufficient individual stakes might find it costly to approach legislators relative to courts. Thus, we should not be surprised to find that tobacco reform and civil rights and anti-death-penalty movements take the form of litigation campaigns rather than legislative campaigns. The result is that whether lock-in occurs more readily in courts or in legislatures will depend to a significant extent on which forum is more amenable to the legal entrepreneurs who seek to modify the status quo. Entrepreneurs who face low organizational costs and little opposition from other organized groups or who are repeat players in the market for legal rules and thus more able to amortize investments in relationships with rulemakers can be expected to address the legislature both to obtain their initial objectives and to modify existing rules. If these entrepreneurs would be the predominant beneficiaries of legal change, we could expect to see more lock-in with respect to common law than statutory law. If, on the other hand, legal entrepreneurs tend to be poorly funded and face organizational barriers, we can expect them to seek their reforms through the courts and, as a consequence, we could expect to see relatively more lock-in with respect to statutory law.”)

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consistent body of like decisions to emerge across jurisdictions. An imperial defense of real space copyright use norms through legislation is therefore preferable.¹⁹¹

Structural interventions by the government that impose real space access norms on cyberspace are justifiable as a general matter because they will improve the quantity and diversity of information that is available to all citizens, facilitating the prime directive of copyright law. Copyright protections (indeed copyrights themselves) depend for their very existence on government action, primarily through extensive legislative and judicial apparatus. Congress has been willing to pass laws that protect copyrights, and needs to legislate to protect rights to access and make fair use of copyrighted works as well. As Diane Zimmerman has observed, “[T]he advent of law-backed self-help to assert and enforce copyright owners’ interests also demands that lawmakers engage in an affirmative rebalancing of interests as between users and owners to assure that crucial social policy objectives are not lost in the shuffle.”¹⁹²

Except where sexual content¹⁹³ or copyrights are involved, federal officials have generally preferred a "hands-off" approach to the Internet.¹⁹⁴ Consider the rationalizations

¹⁹¹ See e.g. Clayton P. Gillette, Lock-In Effects In Law and Norms, 78 B.U.L. Rev. 813, 831-32 (“A judge who shares the interests of a group that wishes to maintain the status quo can do little more than render decisions that maintain the existing rule. The zero-sum nature of litigation and the inability to decide issues not presented to them provide courts little opportunity to trade away social gains in favor of preventing those losses that would be imposed on the groups that prefer to lock in the existing regulation. Legislators have more flexibility in effecting tradeoffs. Legislators need not deal solely with discrete, individual decisions; instead, they can buy out those who lose in one piece of legislation by granting them an offsetting benefit in some other legislation. In this manner, legislators can more easily avoid lock-in at a suboptimal point because they can simultaneously vote in a manner that facilitates a socially optimal solution while granting those who oppose the measure an offsetting benefit in some unrelated matter.”)

¹⁹² Diane Leenheer Zimmerman, “Adrift in the Digital Millenium Copyright Act: The Sequel,” 26 Dayton L. Rev. 279, 284 (Winter 2001).

¹⁹³ Though reluctant to (for example) tax the Internet (see e.g. Buff cites, Declan McCullagh, “Wrong Time for Net Tax?” posted to Wired.com on 3/15/2001, accessed at

<http://www.wired.com/news/print/0,1294,42442,00.html> Federal officials are much more enthusiastically “hands on” about sex on the Internet - CDA, COPA, porn... Cyberspace Law authority Robert W. Hamilton has humorously (and yet with startling accuracy) observed:

I have two syllogisms that produce rules for me, the rules that I use to analyze any legal question involving the Internet. The first one starts from a proposition that's really beyond genuine dispute: all lawyers are inherently evil. It therefore follows, it seems to me, that if all lawyers are inherently evil, what they practice must be inherently evil as well; i.e., that the law is inherently evil. And, as we all know, money is the root of all evil. The logical

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Congress used to justify granting ISPs immunity under the Communications Decency Act, finding that the Internet and interactive computer services “have flourished, to the benefit of all Americans, with a minimum of government regulation,”¹⁹⁵ and further stating that it is “the policy of the United States...to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁹⁶ However, though reluctant to tax e-commerce¹⁹⁷ or to consider legislation pertaining to online data privacy,¹⁹⁸ Congress has been perfectly willing to interfere with the otherwise ostensibly laissez faire commercial environment in cyberspace in the context of copyrights, as evidenced by passage of the Digital Millennium Copyright Act.

In fact, Congress has a tradition of reacting to technological changes by adding to or changing the Copyright Act.¹⁹⁹ Many of the amendments to the Act have been largely aimed at protecting certain categories of copyrightable content from the potential risks of excessive unauthorized copying posed by emerging technologies. For example, the first sale doctrine in section 109 of the Copyright Act was explicitly circumscribed by an amendment that made it a

conclusion: money is the root of all law. So analytical rule number one is: follow the money. If you follow the money, you will find the answer to your question on virtually any legal issue.

The second syllogism that produces my two rules of analysis is derived from the quotation that I believe is attributable to George Gilder: Back in the early days on the Internet law lecture circuit (say, three or four years ago), the popular quip we heard was: "Soon, all law will be Internet law." In fact, we heard a variant of that quip from Mr. Shapiro this morning, in which he repudiated the notion of some distinction between cyberspace and real space and instead suggested that soon it will all be considered the same space. So the first premise is: "All law will be Internet law." To this premise I add what I believe is equally indisputable: "Soon, all Internet law will be pornography law." It therefore follows, then, that soon, all law will be pornography law. Thus, my two analytical rules for all Internet law questions are: (I) follow the money, and (ii) figure out what pornography law has to say about the issue, and you'll get your answer.

Robert W. Hamilton, "1998 Symposium: Constitutional Issues Involving Use of the Internet: Liability for Third-Party Content on the Internet," 8 Seton Hall Const. L.J. 733 (Summer 1998).

¹⁹⁴ See e.g. Neil Weinstock Netanel, Book Review: "Cyberspace 2.0," 79 Tex. L. Rev. 447 (December 2000) at 448, and see *infra*...

¹⁹⁵ See 47 U.S.C. section 230(a)(4).

¹⁹⁶ 47 U.S.C. 230(b)(2).

¹⁹⁷ Cite to e.g. Internet Tax Relief Act

¹⁹⁸ e.g. Arney letter, <http://www.freedom.gov/library/technology/memo/privacy3.asp>
see also <http://www.ecommercetimes.com/perl/story/8871.html%20>

copyright infringement to engage in the “rental, lease or lending” of copies of computer software and sound recordings embodied in phonorecords for “direct or indirect commercial advantage.”²⁰⁰ This was intended to protect certain content owners²⁰¹ from having their wares leased and copied outside the scope of their control and profit streams. Yet even this content owner protective amendment to the copyright law sought to preserve for libraries the benefits of the first sale doctrine, at least as applied to sound recording bearing phonorecords: Section 109 (b)(1)(A) of the Copyright Act reads in pertinent part, “Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.”

Ruth Okediji has persuasively argued that legislative intervention with respect to fair use in cyberspace can be problematic, because rules that emerge can be complex or difficult to follow.²⁰² She also warned that legislating exemptions for specific uses must be accompanied by room for evolution of the Internet, as even the framework and design elements currently integral to the functioning of cyberspace are not necessarily immutable.²⁰³ Both libraries and copyright holders have incentives to misunderstand or willfully misconstrue copyright law to further their own ends,²⁰⁴ and they can be expected to pursue self-serving agendas in way that could distort or complicate any statutory framework.

¹⁹⁹ See e.g. Hearings on S. 1284 and H.R. 2411 before the Subcomm. On Courts and Intellectual Property of the Senate and House Comm. On the Judiciary (1995) (statement of Bruce Lehman, [then]Assistant Secretary of Commerce).

²⁰⁰ Title 17 Section 109 (b)(1)(A)

²⁰¹ Other content owners whose works are not covered by this statutory provision (such as motion picture producers) had to find their own paths within constraints of the first sale doctrine to maximize the profitability and minimize the infringement of their copyrighted works. It is important to note that most in fact did; the lack of statutory protection may have resulted in changed business method models, but it did not discernibly impact artistic creativity in a negative manner.

²⁰² Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 Fla. L. Rev. 107, 173-74 (Jan. 2001).

²⁰³ Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 Fla. L. Rev. 107, 173-74 (Jan. 2001).

²⁰⁴ See *infra/supra*, see also Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 115 & 160-61 (Fall 2000) (observing that

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Richard Pildes has made a similar point more generally, asserting that laws can act destructively with social norms if lawmakers fail to appreciate the complexity of the ways in which given norms are created, enforced and altered.²⁰⁵ Certainly, the codification of copyright use norms will need to be finely calibrated, yet it is hard to believe these laws could put copyright users at more of a disadvantage than typical copyright licenses do. As Mark Lemley has noted:

[I]ntellectual property rules may not always be pretty, or easy to determine, and they certainly aren't perfect descriptions of an optimal incentive structure. But they are at least an effort to arrive at the right balance of incentives - an effort that would never even be made were we to leave social ordering entirely in the hands of private parties.²⁰⁶

Library Use will have the most dramatic and unequivocal impact if it is straightforwardly defined by making explicit, unambiguous and detailed reference to minimum standards of access derived from traditional real space rights and privileges. Content owners could be required to concede to library patrons the electronic equivalent of checking out books, with the imbedded ability to read the works multiple times over a period of several weeks, and to print out portions of the work or even the work in its entirety just as a book could be photocopied. This guaranteed minimum would preserve the ability of library patrons to use electronic books essentially as they had used ink-and-paper books, but would deny them most of the advantages of digitalization, with the exception of remote access.

Alternatively, the access standard promulgated by library use could be elevated to allow patrons to download electronic content, electronically "cut and paste" portions of digital works,

both librarians and copyright holders often misunderstand copyright law and sometimes engage in fairly gross overstatement).

²⁰⁵ Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. Pa. L. Rev. 2055, 2073 (May 1996)

²⁰⁶ Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing* 87 Calif. L. Rev. 111, 169-71 (January 1999); see also Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 Vanderbilt L. Rev. 2063, 2079 ("There is...no general theoretical reason to think that private ordering of information transactions will systematically enhance aggregate social welfare, relative to public ordering

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and otherwise share in the benefits of digital media. It could also imbue libraries with the authority to digitalize pre-existing analog works to make them susceptible to remote access via the Internet. Simplicity, clarity, straightforwardness, and easy comprehensibility should be the guiding principles, whatever the particulars of Library Use are ultimately chosen to be. This movement toward transparency and specificity must, however, preserve a sufficient flexibility and adaptability in the law so it can accommodate the future evolution of technologies and consequent use behaviors.

1. Imposing Norm-based Limits on Libraries as Well as Publishers

Library Use could be constructed to place limitations on libraries and patrons as well as copyright owners. For their part libraries might be compelled to limit perusal of information units to one user at a time, again using past practices involving books as norm models, although why it would ultimately make a difference to the content copyright owner if two patrons access an electronic document sequentially rather than simultaneously is unclear. If libraries limit themselves to granting book-like access, patrons and libraries both will lose some of the advantages of electronic mediums. Others may be maintained, such as the amount of physical space required, maintenance, searchability, preservability, and ease of acquisition.²⁰⁷

2. The WTO/GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

There are international considerations, as the United States will need to remain in compliance with the Berne Convention, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which largely incorporated the principles of the Berne

of such transactions. There are, on the other hand, many reasons to think that increasing the excludability of information goods will impose significant costs on public discourse and on personal autonomy.”)

²⁰⁷ See e.g. Kent Milunovich, *Issues in Law Library Acquisitions: An Analysis*, 92 *Law Libr. J.* 203, 205 (Spring 2000) (“Technology provides a potent tool in matters related to data handling: storage, access, searching, relating, and retrieval. As such, it enhances the library’s role as an information center and as a research support resource.”).

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Convention.²⁰⁸ Article 13 of the TRIPS agreement obligates member states of the World Trade Organization not to adopt exceptions or limitations except "in certain special cases that do not conflict with a normal exploitation of the work or otherwise unreasonably prejudice the interests of the rights holders." At a macro level, simply codifying real space library usage and access norms and importing them into the digital environment would not appear to be a new exception or limitation. However, to the extent that other signatory nations hold the expectation that digital works will be accorded higher levels of copyright protection than works in analog form, adhering to TRIPS may pose difficulties. Marci Hamilton has asserted that TRIPS was outdated at its inception because it did not address the issues posed by online distribution of intellectual property,²⁰⁹ and that the task of constructing an appropriate free use zone in an online world still lies ahead of national and international policymakers.²¹⁰ Both Congress and the U.S. courts must be cognizant of TRIPS obligations when drafting and interpreting statutory Library Use,²¹¹ but should not be dissuaded by them.

B. Why a Statutory Right of “Library Use” is Necessary

1. To Preserve the Right to Share

Copyright law has never given copyright owners control over all uses of their works. Rather, it gives copyright owners exclusive rights and expressly subjects those rights to a host of

²⁰⁸ E.g. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Van. J. Transnat'l L.* 613, 625 (May 1996).

²⁰⁹ Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Van. J. Transnat'l L.* 613, 614-15 (May 1996) (“Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.”).

²¹⁰ Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Van. J. Transnat'l L.* 613, 625 (May 1996).

²¹¹ http://www.nap.edu/html/digital_dilemma/ch4.html (“The U.S. Congress will need to keep TRIPS obligations in mind when it contemplates adopting new exceptions and limitations to copyright law, including those that might apply to digital works. Judicial interpretations of exceptions and limitations will also need to be consistent with TRIPS obligations.”)

exceptions.²¹² The Digital Dilemma authors articulated seven categories into which exceptions and limitations to copyright owners' rights seem generally to fall²¹³:

- Those that are based on fundamental human rights, such as free speech and privacy interests²¹⁴
- Those that are based on public interest grounds, such insuring access to information for nonprofit education purposes, and in libraries²¹⁵
- Those that arise from competition policy, such as compulsory licensing and findings of fair use for reverse engineering for compatibility purposes²¹⁶
- Those that promote flexible adaptation of the law to new circumstances, such as the development of technologies that can copy, but also have substantial non-infringing uses²¹⁷

²¹² See 17 U.S.C. §§ 106-122, 1008.

²¹³ http://www.nap.edu/html/digital_dilemma/ch4.html

²¹⁴ http://www.nap.edu/html/digital_dilemma/ch4.html ("A number of fundamental human rights might provide a basis for a limited exception to copyright owner rights, including freedom of speech, freedom of the press, freedom of expression, freedom of information, democratic debate, and privacy or personal autonomy interests. A literary critic for a print magazine, for example, can republish a portion of another author's work in order to develop her critique of that author's work. A reporter for a print newspaper can publish some portions of a politician's speech in order to show the errors it contains. Copyright laws in some countries have specific "rights of fair quotation" to provide for legitimate copying for purposes of criticism and news reporting. In the United States, these concerns are generally dealt with through the fair use doctrine. Given the robustness of criticism, news reporting, and public debate on the Internet, it would seem that fair quotation/fair use rules would likely have some application in the digital world, just as they do in the print world.")

²¹⁵ http://www.nap.edu/html/digital_dilemma/ch4.html ("Public interest exceptions to copyright vary to some degree from country to country. Among those that could arise under the laws of the United States and some other nations are those that permit performance of copyrighted works in the course of face-to-face instruction in nonprofit educational settings; those that enable libraries and archives to make copies for preservation, replacement, and other legitimate purposes; and those that enable the creation of derivative works for the blind. It is worth noting that the Digital Millennium Copyright Act seeks to maintain an appropriate balance between the rights of rights holders and the needs of others and contains a provision to enable libraries and archives to make digital, as well as print and facsimile, copies for these purposes. It also mandated a study to help Congress consider what copyright rules might be appropriate to promote distance learning. Fair use may sometimes be invoked on public interest grounds to justify some copying of copyrighted articles in legal proceedings (e.g., as evidence relevant to a contested issue of fact) or to satisfy some administrative regulatory requirements (e.g., to demonstrate the efficacy of drugs).")

²¹⁶ http://www.nap.edu/html/digital_dilemma/ch4.html ("Competition policy concerns underlie some exceptions to and limitations on copyright owners' rights. Two examples of competition policy-based limitations in U.S. law are rules that impose compulsory licenses on owners of musical copyrights to enable further recordings of those musical works and on owners of rights in broadcast signals for passive retransmissions of the broadcasted material by cable systems. The U.S. fair use defense is sometimes employed to promote competition policies, as in the *Sega v. Accolade* case, which upheld the legality of unauthorized decompilation of computer programs for the legitimate purpose of developing a compatible but noninfringing program. As the *Sega* case demonstrates, competition policy issues may arise at times when information is in digital form.")

²¹⁷ http://www.nap.edu/html/digital_dilemma/ch4.html ("In times of rapid technological change, it may be difficult for legislatures to foresee what new technologies will arise, how they will be used, and what copyright rules ought to apply. Courts in the United States have often employed the fair use doctrine as a flexible mechanism for balancing the interests of rights holders and of other parties in situations in which the legislature has not indicated its intent. These include not only the *Sony v. Universal City Studios* decision about home taping of television programs for time-shifting purposes, but also a number of cases involving digital information. These include the *Galoob v.*

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- Those that arise from perceived market failures, such as when the transaction costs of negotiating a license far outweigh the benefits derivable from the transaction²¹⁸
- Those that are the harvest reaped from successful lobbying endeavors; and
- Those that cover situations in which uses or copying of protected works are *de minimis*, incidental to otherwise legitimate activities, or implicitly lawful given the totality of circumstances.²¹⁹

The copyright law allows unauthorized copies, downloads, uploads, transmissions or distributions that might be fair use under §107 of the Copyright Act, lawful noncommercial consumer copies under §1008, and private performances and transmissions over which the statute gives the copyright owner no control. Most pertinently here, section 108 explicitly permits photocopies of articles and other short works for library users, whether the user is on location or has made a request through another library. As Laura Gasaway explained:

Section 108 contains three subsections dealing with the reproduction and distribution of copies to library patrons. Section 108(d) states that the rights of reproduction and distribution apply when the user requests no more than one article from a periodical issue or other collective work, or a "small part of any other copyrighted work." For example, when a patron asks the library to provide

Nintendo case, which upheld Galoob's right to distribute a "game genie" that enabled users to make some temporary alterations to the play of certain Nintendo games, and the *Religious Technology Center v. Netcom* case in which automatic posting of user-initiated Internet messages by an online service provider was found to be fair use.")

²¹⁸ http://www.nap.edu/html/digital_dilemma/ch4.html ("Exceptions and limitations may arise from a perceived possible market failure. One argument for fair use may be that a market cannot effectively be formed when the transaction costs of negotiating a license far outweigh the benefits derivable from the transaction (whether they be licensing revenues or some other benefit, such as enhanced reputation or goodwill). To the extent that a fair use defense arises, at least in part, from market failure considerations, the scope of the fair use may be affected by changed circumstances that enable new markets to be formed effectively. As noted above, this view is expressed in the *Intellectual Property and the National Information Infrastructure* (IITF, 1995) white paper, specifically in relation to the digital environment. To some degree, the exception aimed at promoting publication of works for visually impaired persons reflects market failure, as well as public interest, considerations.")

²¹⁹ http://www.nap.edu/html/digital_dilemma/ch4.html ("Finally, some exceptions and limitations to copyright owners' rights would seem to be the result of successful lobbying or of a legislative perception of the *de minimis* or incidental character of a use. In Italy, for example, military bands are exempt from having to do rights clearances for music they perform in public. In the United States, a number of exceptions, such as those creating special copyright privileges for veterans' groups, are the result of successful lobbying. Whether they can be justified on *de minimis* grounds or are pure pork barrel politics is perhaps debatable. Better examples of *de minimis* or incidental uses for which special copyright exceptions have been created are those in the Digital Millennium Copyright Act, which provides some "safe harbor" rules for certain copies in the digital environment, such as those made in the course of a digital transmission from one site to another where the transmitting intermediary (e.g., a telephone company) is merely a conduit for the transmission and not an active agent in it. It is conceivable that other such exceptions will need to be devised for incidental digital copying in the future, or that fair use law will be used to exempt incidental or *de minimis* copying.")

a copy of an article, the library may supply the request if three conditions are met: (1) the copy becomes the property of the user, (2) the library has no notice that the copy will be used for other than fair use purposes, and (3) the library places the register's warning on copy order forms and prominently displays the same warning at the place where orders are made. ...[If a patron] identifies him or herself as a student, the library usually presumes that the use is for a course or for other research. All the statute requires is that the library have no actual notice that the copy will be used for other than private study, scholarship, or research.²²⁰

As a practical matter, the norms of library use of bound books and periodicals favor the access rights of library patrons over profit maximizing by copyright owners. Communities act collectively to found and maintain nonprofit public libraries as a venue through which purchased or donated copies of copyrighted works can be shared among community members. Similarly, educational organizations develop and sustain libraries for the benefit of their institutional communities, largely students and faculty members, and also sometimes allow their libraries to be utilized by outsiders as well. Libraries insure that individuals can have access to large numbers of books and periodicals without purchasing or subscribing to them.

Because activities over digital networks can be tracked and recorded, library activities involving the accessing and copying of copyright-protected works that were essentially unmonitorable in the offline world become ascertainable and quantifiable when conducted online. Moreover, the nature of digital technology means that many activities analogous to non-infringing acts in the offline world become putatively technical infringements if conducted over the Internet, because some degree of content copying is a functional requirement of using a computer.²²¹ In real space, libraries can provide access to a book by acquiring only one copy, and extensive sharing of the book can be done through serial loans, without copying that copy. In the digital world, however, even routine access to information requires "making a copy," both

²²⁰ Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 *Ohio State L. J.* 783, 793 (2001).

²²¹ See e.g. the Pro CD analysis re: RAM copies, etc. and e.g. Needham J. Boddie, II, Thomas C. McThenia, Jr., Fred B. Amos, II and Douglas Kim, *A Review of Copyright and the Internet*, 20 *Campbell L. Rev.* 193 (Spring 1998) ("The end result of virtually every transmittal of a work across the Internet will involve the exclusive right to copy. Printing to paper, copying to disk, and loading into memory all amount to reproduction.")

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as a technological issue, and as a legal matter.²²² "Copying" is a touchstone of copyright infringement even if the supposed copies are intangible and fleeting, such as in the random access memory (RAM) of a computer. As a result, functionally identical uses of books may be legally disparate: serially loaning an ink-and-paper book to twelve eager readers is acceptable but serially loaning an electronic book online to even half that number is potentially a copyright infringement, because the library has enabled six "unauthorized copies" of the work to be made, even if the work was never saved to the readers' hard drives or printed by patrons.

Traditionally, loaning a book, compact disc or videocassette to a library patron infringed no rights under copyright. The right to share or dispose of a purchased copy of a copyrighted work fell within the first sale doctrine.²²³ In cyberspace, however, a library cannot "share" material over the Internet without reproducing and transmitting it. It is therefore necessary as well as expedient to make multiple copies of copyrighted digital works to facilitate any sort of sharing. This fast, facile, and inexpensive copying enables (if a library were so inclined) broad sharing with many people simultaneously, on a scale not possible with a real space book, compact disc, or videocassette, and such "sharing" at some point admittedly begins to look less like acts of altruism and more like incidences of copyright infringement, especially to copyright holders. To prevent wide spread sharing, content owners are attempting to use contracts, courts and laws to render it legally and technologically impossible for libraries to share even one legitimate, authorized copy of a work: Though the Internet makes sharing information faster and easier than ever, some content owners would have all digital sharing unauthorized by them rendered copyright-infringing,²²⁴ which is neither possible nor generally even attempted in real

²²² Courts have decided that unfixed, ephemeral RAM use of a digital work is copying E.g. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

²²³ See 17 U.S.C. § 109. In 1984, Congress enacted the Record Rental Amendment of 1984, Pub L No 98-450, 98 Stat 1727 (1984), codified as amended at 17 USCA §§ 109, 115. As amended, the copyright law prohibits commercial record rental, but places no restrictions on resale, loan or gift.

²²⁴ E.g. the Diamond Rio, Napster, DeCSS, MP3. Scour, MP3Board, and similar copyright infringement litigation.

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space, in part because preventing sharing of analog works would run contrary to longstanding conventions of everyday use. Content owners are thus leveraging new technologies to change the norms of sharing and other uses of copyrighted material well beyond the context of libraries. Jane Ginsburg explained the new options available to copyright owners by contrasting Napster and VCRs as follows:

There is an important difference between the Napster technology and the Sony videotape recorder. Videotape recorders are a free-standing technology; as the District Court in Napster recognized, once a machine was sold, its producer could no longer follow up how consumers employed it. As a result, the determination of contributory infringement entailed an all-or-nothing outcome: if the manufacturers were held liable, then no machine could be distributed, despite its capacity for non-infringing uses; if no liability, then the machine can be distributed, despite its capacity for infringing uses. Splitting the difference by limiting distribution of the machine to a class of non-infringers was not a possibility. Whether as a matter of judicial political instinct, or of technology policy considerations, when the choice is all or nothing, those who end up with nothing are not likely to be the producers and consumers of a vastly popular new device that is susceptible of legitimate applications. With Napster, by contrast, the difference could be split; the online technology makes possible the confinement of the service to a class of non-infringers. The user class will be restricted to non-infringers because, with the implementation of notice and take down, only authorized files will remain available for "sharing."²²⁵

Libraries, meanwhile, are veritable cultural icons of sharing, providing access to works that are copyright protected as well as works that are in the "public domain," and in so doing, facilitating a significant amount of public domain treatment of copyrighted works. Sharing copyrighted works with the populace is the mission of nonprofit libraries, and has long been part of the culture of information distribution, but is jeopardized by restrictions on sharing.

Patron access is also affected by the ability of libraries to share with each other. Books and journals are expensive, which is one of the reasons patrons seek access to them in libraries in

²²⁵ But see Jane C. Ginsburg, Copyright Use and Excuse on the Internet, 24 Colum.-VLA J.L. & Arts 1, 37 (Fall 2000)

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the first place.²²⁶ Since 1986, the average journal price has tripled, forcing libraries to drastically cut the number of books they buy and serials they subscribe to.²²⁷ Major commercial academic publishers in particular tend to increase their prices every year and charge almost six times as much per page as nonprofit publishers.²²⁸ Patrons can only be assured of access to a broad range of books and journals if their “home libraries” can assist them by supplementing their collections by borrowing works they lack from peer institutions.

a. Sharing and the Shadow of Napster

To the extent that content sharing is demonized, and library access is viewed as indistinguishable from “common” sharing, library content users risk being analogized to Napster users, who in turn have been accused in legal documents of exhibiting “the moral fiber of common looters.”²²⁹ When it was launched, Napster did not charge for its services.²³⁰ Napster users didn't make any more money when they made a song available to other Napster users than a nonprofit library would have, and in fact Napster users who downloaded songs could have, at least theoretically (though with less convenience) have obtained the songs from libraries that maintained music collections.

Libraries start to look even more like Napster when library collections are accessed remotely. Library patrons who access digitalized works from home necessarily make copies of

²²⁶ See e.g. Larry Keller, “Looking It Up,” posted to CNN.com on 11/28/00, accessed at <http://www.cnn.com/2000/CAREER/trends/11/28/librarians/index.html> (“One incentive for Internet users to tap into their local library: cost. Large library systems...subscribe to online journals and data bases that charge fees.”).

²²⁷ See e.g. David D. Kirkpatrick, “As Publishers Perish, Libraries Feel the Pain” in the 11/3/2000 New York Times, accessed at <http://www.nytimes.com/2000/11/03/business/03PUBL.html> (Members of the Association of Research Libraries report increasing their spending on collections by 130% over the past 15 years, cutting their number of journal subscriptions by 6% and the number of books they buy by 26%.

²²⁸ Kendra Mayfield, “Publish, Perish or Pay Up?” posted to Wired News on 3/15/01, accessed at <http://www.wired.com/news/print/0,1294,42377,00.html>

²²⁹ *Metallica v. Napster, Inc.* Complaint, Case No. 00-03914 (filed 4/13/00 in Central District of California), Introduction, para 3. See also Metallica Press Release dated 4/13/00, accessed 10/13/00 at <http://www.metallica.com/news/2000/000413a.html>; see also “Metallica takes on Napster,” posted 4/14/2000 to The Standard.com, accessed 10/12/2000 at <http://www.thestandard.com/article/display/0,1151,14119,00.html> (citing ZDNet’s report about Metallica’s press release);

²³⁰ cite

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the work, either ephemeral²³¹ or permanent.²³² If libraries made optimal benefit of the advantageous properties of digital formats, many patrons could access (and therefore "copy") the same copyrighted works within a very short time span, again much as multiple Napster users could access a single electronic copy of a song quickly and efficiently.

While it might seem unlikely that content owners will begin the wholesale litigation campaign against libraries they crippled Napster with, the more that electronic library access begins to resemble peer-to-peer file sharing, the more hostility content owners will begin to express toward libraries. Recently, for example, Patricia Schroeder, a former Congressional Representative, stated that her employing organization, the Association of American Publishers (AAP) has "very serious issues[s] with librarians" because a library that buys electronic journals may give it to other libraries.²³³ As a result, according to Schroeder, the AAP is looking for ways to charge library patrons for information.²³⁴ Similarly, Bruce Lehman, former Assistant Secretary of Commerce and Commissioner of Patents and Trademarks and author of the Digital Millennium Copyright Act, was quoted as stating: "The law just never said that information should be free, it just said that information (should) be available on a vast scale for a reasonable fee – hence the library system."²³⁵

Napster effectively made a wide selection of music available to millions of individuals without cost, offering unique selection and control options that ordinary radio broadcasts had never made possible. Content owners such as those represented by Schroeder, however, seek to impose charges on library patrons for access to information that has traditionally been available for free. This would represent a significant norm shift with serious repercussions for libraries.

²³¹ define / RAM

²³² explain/define

²³³ Linton Weeks, "New Chapter; The Former Congresswoman is Battling for America's Publishers," in the 2/7/01 Washington Post, Style section p. C01.

²³⁴ Id.

²³⁵ Brad King, "Copyright: Your Right or Theirs?" posted 1/19/01 to Wired, accessed at <http://www.wired.com/news/print/0,1294,41199,00.html>

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According to Laura Gasaway, librarians are resisting this, as they emphatically want information to be free to library patrons after libraries have paid for access, as it has always been. She observed:

What librarians staunchly advocate is that individual users should not have to pay for information obtained from their public libraries. Libraries should be able to negotiate licenses to provide access for users in their companies, academic institutions, and public libraries. They fear the threat that information will become pay-per-view and that the library will no longer be able to negotiate appropriate terms and fees to make a database available to its users. So, statements such as "information wants to be free" may simply mean free to the individual, not free to the library. If database proprietors charge too much for the license fee, then the library will not be able to purchase access for its users. This will mean that patrons with economic means will be able to afford individual access to the data while the masses will not. The idea of "information have-nots" provides a direct clash with the core values of librarians. Librarians deeply believe that information should be available to everyone who chooses to come to the library to use it, and that access by individuals should not be determined by their ability to pay. This likely originates with the idea of free public libraries and universal service.²³⁶

If libraries are forced to operate under Napster-like restrictions²³⁷ patron access to information may deteriorate well below "pre-Internet" levels, losing rather than gaining from technological innovations in information distribution. For example, libraries generally oppose "pay-per-view" access schemes because it is too hard to predict or estimate demand for a given resource accurately enough for a realistic budgeting process.²³⁸ As a result, works available only on that basis may not be accessible through libraries. With respect to other works in electronic

²³⁶ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 134 (Fall 2000).

²³⁷ cite – explain scope of injunction – This point has not escaped the American Library Association, which filed an amicus brief in the Napster case, arguing that a ruling adverse to Napster could have chilling consequences for entities such as libraries and search engines that catalog information for others to use. See Lisa Bowman, "Filter This! Librarians to Sue Over New Law," posted 1/18/01 to ZDNet News, accessed at <http://www.zdnet.com/zdnn/stories/news/0.4586.2675701.00.html> , text of ALA brief accessible at ???

Napster/ALA site?

²³⁸ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 134 (Fall 2000) ("Libraries must have a "sum certain" in the budget - they tried in the early 1970s simply to allow access and pay for "hits" in a database, but many libraries had to abandon this practice or even curtail it in the middle of a fiscal year when the charges reached the amount budgeted to cover use of that database. Negotiating for a year's access, not on a per search basis, but on a flat rate permits the library greater flexibility even if it then has to narrow access to everything in the database as a way to reduce its costs.")

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format, content owners may permit libraries to allow extended access, but probably only to the extent that it doesn't involve any printing or other copying. Content owners empirically oppose patron copying of electronic works and even attempt to restrict archival copying by libraries, rigidly limiting them to what is permitted by statute.²³⁹

Before widespread, inexpensive photocopying technology emerged, researchers and scholars had to laboriously hand copy excerpts and quotations out of texts.²⁴⁰ Researchers and scholars of the future may face the same fate if content owners make information products unprintable as a technological matter, by using distribution software that disables print capabilities; as a legal matter, by pursuing or at least threatening to pursue vicarious or contributory copyright infringement actions against libraries; or as a matter of contract, forbidding libraries (and in turn, patrons) from acquiring or accessing information unless they agree that there will be little or no downloading or printing of content, under penalty of loss of access or breach of contract suits.

Libraries are the ultimate sharers - a fixed geographic or cyber location to which an individual can go to access a wide range of copyrighted materials. As the authors of one copyright law textbook noted:

Once [a] manuscript has been commercialized or otherwise disclosed to the public...library patrons can read the work, libraries can lend it, critics or scholars can quote from it, teachers can photocopy it for classroom use or read it, students and actual or potential competitors can analyze it – all without obtaining permission or paying license fees, thanks to traditional limiting doctrines such as “first sale” and “fair use.” Such a published work is not in the “public domain,” in the technical sense of that term, but it is available to the public as part of the general “informational commons” – the existence of which has been regarded as crucial to the “Progress of Science and useful Arts.”²⁴¹

²³⁹ e.g. Section 108 of Copyright Act – See Kenneth Crewes excellent article – Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair Use Guidelines,” 62 Ohio St. L.J. 599 (2001)

²⁴⁰ see judge discussing in Mich. Doc Svcs dissent?

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As generous and inveterate sharers of content, libraries are thorns in the sides of content owners, who believe or at least purport to fear that access to an electronic work in a library somehow has a more deleterious effect on profits than ink-and-paper library availability does. In short, content owners assert that library patrons are pirates-in-waiting. Jack Valenti of the Motion Picture Association of America expressed his purported fear of libraries as follows:

[S]ome libraries and some universities want to be given a pass-key to unlock the shielding technology for what they describe as “fair use.” That is, all libraries and their employees would have unlimited entry into copyrighted encrypted movies, with the additional power to copy at will. To allow this unlimited pass-key entry would entice massive piracy. It would vanquish the technological guardians which preserve copyright integrity. Everyone knows this.²⁴²

Yet the public has long had the ability to copy audiovisual works at will by using videocassette recorders. The assumption that new and emerging digital technologies would encourage library patrons who have checked out “authorized” copies of movies to make more unauthorized copies than they have before is unsupported and illogical. Certainly higher quality copies can be made more quickly, but if a library patron has had a week or more in which to view the library’s authorized copy, how often would she truly bother making a copy for herself? And if she is running a massive piracy-based business out of her home, would she really endure the inevitable waiting list for library copies of recently released movies rather than simply buying an authorized copy of the movie she intended to pirate? One could see how the fact that libraries can loan patrons videocassettes of movies without charging rental fees or remitting royalties must be galling to the movie trade, but that is what the Copyright Act provides. The movie industry has apparently invested a lot of resources into making sure that unlike

²⁴¹ Craig Joyce, William Patry, Marshall Leaffer and Peter Jaszi, *Copyright Law (Fifth Edition)* (Lexis Publishing 2000) at 57.

²⁴² Remarks of Jack Valenti, President & CEO, Motion Picture Association, Before Summer Internet World '98, Chicago, Illinois, “Protecting America’s most prized Export in the Digital World,” accessed at http://www.mpaa.org/jack/98/98_7_16b.htm

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videocassettes, digital copies of motion pictures cannot be treated like books.²⁴³ More disturbingly, publishers are attempting to insure that electronic versions of literary works cannot be treated like books either.

Trepidation that the unauthorized dissemination of digitalized versions of creative works made possible by the Internet will decimate marketplace for authorized ink-and-paper or electronic books appears overstated to date. Even the average person has ability and equipment to scan analog books into digital form and distribute them widely over the Internet. Yet there is no evidence happening to any significant degree, and millions and millions of books are still being sold. Americans are probably not the copyright-infringing scumbags that content owners self-interestedly make us out to be.²⁴⁴ In cyberspace as in real space, most of us are mostly law abiding most of the time.²⁴⁵ Moreover, as long as library collections remain legal, available, and comprehensive, they actually reduce incentives for individuals to invest time and energy in obtaining counterfeit copies of copyrighted works, or to gain unauthorized access to any copies.

Now that cyberspace is the repository of all manner of art, literature, history and scholarship, the real space attributes of public and private, academic libraries matter little, but the access to information libraries provide is as critical as ever. While emerging data technology has

²⁴³ videocassette cases!!!! Does Blockbuster pay royalties?

²⁴⁴ See e.g. Janelle Brown, "Ethical Music Piracy" posted to Salon on 10/5/2000, accessed at <http://www.salon.com/tech/log/2000/10/05/fairtunes/print.html>, see also Janelle Brown, "The Jukebox Manifesto," posted to Salon on 11/13/00, accessed at <http://www.salon.com/tech/feature/2000/11/13/jukebox/print.html> (quoting Rob Reid, CEO of Listen.com for the proposition that "If people can pirate for free, but it's hard to find things and it's hard to get good quality, most people who have more money and less time than they used to have will feel fine paying \$10 [for an industry-approved service] and getting a better experience." But see Jack Valenti, June 15, 2000 VALENTI URGED CONGRESS TO SUPPORT COPYRIGHT PROTECTION IN INTERNET AGE, accessed at http://www.mpaa.org/jack/2000/00_06_15.htm (the Internet is invested with thievery).

²⁴⁵ My focus is on U.S. residents since these are the folks that U.S. courts can realistically exercise jurisdiction over. I certainly don't mean to suggest other nations have either greater or lesser concentrations of scumbags within their borders. But see Jack Valenti, President of the MPAA, - If You Can't Protect What You Own--You Don't Own Anything; Comments by Jack Valenti President & Chief Executive Officer Motion Picture Association of America before the House Subcommittee on Courts & Intellectual Property on WIPO Copyright Treaties Implementation Act and the Online Copyright Liability Limitation Act, accessed at http://www.mpaa.org/jack/97/97_9_16b.htm ("In China, in Russia, in Italy, in scores of other countries, video pirates steal more than \$2 billion of our intellectual property each year....Russia...is literally infested with pirates...")

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greatly enhanced the speed and efficiency with which information can be distributed, access information through nonprofit libraries has not only not been enhanced, but in some contexts has actually been reduced as new technologies, copyright law and licensing regimes give content owners the ability to control and restrict paradigmatic library-to-patron sharing of information. Thus, digitalization undermines the ability of nonprofit libraries to maintain the level of access provided by traditional paper-and-print books and periodicals. This trend will continue as digitalization becomes the preferred method of preserving the contents of modern paper-and-print books, which are subject to physical deterioration over time, and have a useful life of about fifty years. This means that actual books last a far shorter time period than the copyrights in the works these books contain, and they will not even last that long if expansively used, misused or stored under improper conditions.²⁴⁶

A library ordinarily provides access to a work in its collections to everyone in its constituent community regardless of whether there are alternative means of access to the work. Additionally, a library may sometimes serve as an "intermediary," demonstrating its faith in the value (or at least "worthwhileness") of a book or journal with its decision to add the work to its collection. As Lawrence Lessig observed in another context:

Historically, libraries have always had to choose what materials to bring into a library. That choice has been influenced in part by the interests of the community served, in part by budget constraints, and in part, no doubt by the values of the person making the selection.²⁴⁷

While libraries are subject to market forces to an extent, and are intuitively more likely to stock works that patron demand than those that will be of little interest, they offer an alternative to the more strictly market driven "gate-keeping" intermediation of bookstores and video rental

²⁴⁶ Harry S. Martin III, *From Ownership to Access: Standards of Quality for the Law Library of Tomorrow*, 82 *Law Libr. J.* 129, 130 (Winter 1990) (most of the books in the large research libraries of this country are physically dying because they were printed on highly acidic paper and stored in less-than-ideal physical environments for the bulk of their shelf lives.)

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establishments, and are more likely to provide patrons with access to works undiscovered by or unimportant to the mainstream.

Current copyright laws make it possible for libraries to provide any works they desire as long as the work can be procured in ink-and-paper format,²⁴⁸ yet the same is not true for electronic content.²⁴⁹ Libraries licensing digital content must comply with any use restrictions contained in the license, and are vulnerable to any decision made by publishers to remove the work from the library's online collection if the publisher has reserved that right. Some libraries have already experienced the consequences of ceding this power to publishers in the context of digital journals: When companies supplying the libraries with e-periodicals decided to drop titles from their databases, libraries were left completely without access to journals for which they had been paying if they did not have analog ink-and-paper backups (for which they had been required to remit extra compensation).²⁵⁰

Library Use in the digital context should be coterminous with accessibility, usability, and core library values such as patron privacy in real space.²⁵¹ Digital rights management systems

²⁴⁷ Lawrence Lessig, "What Things Regulate Speech: CDA 2.0 vs. Filtering" Draft 3.01: May 12, 1998 at 36.

²⁴⁸ Needham J. Boddie, II, Thomas C. McThenia, Jr., Fred B. Amos, II and Douglas Kim, A Review of Copyright and the Internet, 20 Campbell L. Rev. 193 (Spring 1998)(under the first sale doctrine, "a library which has acquired ownership of a copy of a book is entitled to lend it under any conditions it chooses to impose without violating the copyright owner's distribution rights.")

²⁴⁹ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 134 (Fall 2000) (the intermediary role of librarians is one of information filtering rather than censoring, and is threatened by "pay-per-view" models of electronic information distribution).

²⁵⁰ Goldie Blumenstyk, "Companies Find Academic Libraries a Key Target and a Tough Sell," in the 5/18/01 Chronicle of Higher Education (Information Technology section), accessed at <http://chronicle.com/free/v47/i36/36a03701.htm>

²⁵¹ Per Cohen Right to Read Anonymously article, most states have laws re: library patron privacy: (Effect on libraries/patron privacy of The USA Patriot Act??? E.g. generally Susan Herman, Jurist Forum, accessed 4/4/02 at <http://jurist.law.pitt.edu/forum/forumnew40.htm>).

(Below is **COPIED DIRECTLY FROM COHEN RIGHT TO READ ARTICLE – verify, credit etc**) nearly all states have enacted legislation to protect the identities of library patrons:

See Ala. Code <sect> 41-8-10 (1975); Alaska Stat. <sect> 09.25.140 (1994); Ariz. Rev. Stat. Ann. <sect> 41-1354 (1992); Ark. Code Ann. <sect><sect> 13-2-2703 to -2704; Cal. Gov't Code <sect> 6254(j) (West 1995); Colo. Rev. Stat. <sect> 24-90-119 (1973); Conn. Gen. Stat. Ann. <sect> 11-25 (West 1986); D.C. Code Ann. <sect> 37-106.2

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that rely on tracking programs to discern authorized access from non-permissive use create databases of file names and IP addresses that can be sent to an accused infringer's Internet Service Provider.²⁵² Disreputable content owners could track and collate information about how even "authorized" patrons use their information products without the knowledge and consent of patrons and despite any contrary representations they have made to the library itself, if the content owners are confident that libraries are unlikely to have the ability, resources or technological proficiency to ascertain their treachery.

Content owners may also use "push" technology to try to steer patrons to certain works and away from others for monetary gain. To the extent these technologies are less than transparent, content owners can at least attempt to surreptitiously shape the scholarly investigation agendas and research outcomes of library patrons. This will diminish the chance

(1981); Del. Code Ann. tit. 29, <sect> 10002(12) (1991); Fla. Stat. Ann. <sect> 257.261 (West 1991); Ga. Code Ann. <sect> 24-9-46 (Harrison 1994); Ill. Ann. Stat. ch. 81, para. 1201 (Smith-Hurd 1993); Ind. Code Ann. <sect> 5-14-3-4(16) (Burns 1994); Iowa Code Ann. <sect> 22.7(13) (West 1995) (amended 1996); Kan. Stat. Ann. <sect> 45-221(23) (Supp. 1995); Me. Rev. Stat. Ann. tit. 27, <sect> 121 (West 1988); Md. Code Ann. State Gov't <sect> 10-616(e) (1993); Mich. Comp. Laws Ann. <sect><sect> 397.601-605 (1982) (amended 1996); Minn. Stat. Ann. <sect> 13.40 (West 1988) (amended 1996); Miss. Code Ann. <sect> 39-3-365 (1992); Mo. Ann. Stat. <sect><sect> 182.815, -.817 (Vernon's 1986) Mont. Code Ann. <sect> 22-1-1101 to -1103 (1995); Neb. Rev. Stat. <sect> 84-712.05(10) (1994) (amended 1995); Nev. Rev. Stat. <sect> 239.013 (Michie 1996); N.H. Rev. Stat. Ann. <sect> 201-D:11; N.J. Stat. Ann. <sect> 18A:73-43.2 (West 1989); N.M. Stat. Ann. <sect> 18-9-4 to -5 (Michie 1978); N.Y. Civ. Prac. Law <sect> 4509 (McKinney 1992); N.C. Gen. Stat. <sect> 125-19 (Michie 1985); N.D. Cent. Code <sect> 40-38-12 (Supp. 1995); Okla. Stat. Ann. tit. 51, <sect> 24A.11 (West 1988); id. tit. 65, <sect> 1-105 (1995); 24 Pa. Cons. Stat. Ann. <sect> 4428 (1992); R.I. Gen. Laws <sect> 38-2-2(21) (1956); S.C. Code Ann. <sect> 60-4-10 (Law. Co-Op. 1985); S.D. Codified Laws Ann. <sect> 14-2-51 (1991); Tenn. Code Ann. <sect><sect> 10-8-101, -102 (1988); Vt. Stat. Ann. tit. 1, <sect> 317(b)(19) (1995); Va. Code Ann. <sect> 2.1342(B)(8) (Michie Supp. 1994); Wash. Rev. Code Ann. <sect> 42.17.310(1) (West Supp. 1996); W. Va. Code <sect> 10-1-22 (1995); Wis. Stat. Ann. <sect> 43.30 (West Supp. 1995); Wyo. Stat. <sect> 164-203(d)(ix) (1977).

In addition, although the NII Privacy Report expressly recognizes that "individuals should have the opportunity to remain anonymous, when appropriate," the examples it provides suggest a definition of "appropriate" that is narrow and highly deferential to the perceived needs of private copyright owners. "Browsing a public electronic library" would be included. NII Privacy Report, supra note 45, at III.B., <para> 31.
**** end of copy from Cohen article...

See also Policy on Confidentiality of Library RecordsSource: Handbook of Organization 1990/91, American Library Association, Chicago, IL, 1990, page 256, accessible at <http://www.cni.org/docs/infopols/ALA.html#pcpr>

²⁵² See e.g. Brad King, "Digital Rights Gain a Foothold," posted 5/30/01 to Wired News, accessed at <http://www.wired.com/news/print/0,1294,44153.00.html>

that individuals will serendipitously encounter works that unexpectedly interest them or challenge their preconceived notions about a topic.

2. Avoiding the Pitfalls of “Fair Use”

Fair use is, as explained above,²⁵³ a limitation on the exclusive rights of copyright owners, codified at Section 107 of the Copyright Act of 1976. All library users, particularly researchers, educators, and scholars, are at least somewhat protected from use restrictions imposed by publishers through the doctrine of fair use, limited and uncertain though it may be. However, law professor and librarian Kenneth Crews has trenchantly observed: “Fair use is both a privilege, and a source of confusion. Nearly everyone will disagree on what is ‘fair,’ and no one has a definitive, legally binding ‘answer.’”²⁵⁴ This sort of sinister ambiguity creates incentives to avoid litigation by erring on the side of denying access in any questionable situation. This is bad for patrons, and contrary to the mission of a library.

The Digital Millennium Copyright Act (DMCA) particularly impedes the public's ability to exercise the right of fair use with respect to digital works.²⁵⁵ The DMCA makes it illegal to manufacture or distribute devices designed to bypass technology that “protects” copyrighted material. It also makes it illegal to use these devices, even where the user is an individual seeking to make a back-up copy of a digital work for herself, the type of copying that is almost universally viewed as allowable under copyright law.²⁵⁶ As a result, while making the copies does not violate the Copyright Act, breaking through the copy-protection measures to make perfectly legal copies

²⁵³ *supra*...

²⁵⁴ Kenneth Crews, *Copyright Law, Libraries, and Universities: Overview, Recent Developments, and Future Issues*, presented October 1992 to the Association of Research Libraries, accessed at <http://palimpsest.stanford.edu/bytopic/intprop/crews.html> see also Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair Use Guidelines,” 62 *Ohio St. L.J.* 599, 658 (2001)

²⁵⁵ The Librarian of Congress and Copyright Office were given the opportunity by Congress to issue rules governing the access provisions of the DMCA that established an enhanced right of copyrighted works fair use access to copyrighted works. They chose not to do so. See e.g. *Wired* article re Rules released 10/28/00, see also American Library Association Washington Office Newslines, Vol. 9, No. 85, October 26,2000 “New Digital Copyright Rules Bad for the American Public,” accessed at <http://www.ala.org/washoff/alawon/alwn9085.html>

²⁵⁶ Cite

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violates the DMCA.²⁵⁷ Moreover, individuals can legally copy portions of a work for purposes of parody, scholarship, news reporting or criticism when they are engaging in fair use of copyrighted works, but circumventing copy prohibition technologies to exercise this right is illegal under the DMCA, as are software tools that make such circumvention possible. As Diane Zimmerman has written, it is a statute with a sense of humor,²⁵⁸ albeit a very cynical and malevolently droll one.

The DMCA, like the Copyright Act, does provide exemptions for libraries.²⁵⁹ For example, libraries may circumvent copyright protection measures if the reason they do so is to make a determination about whether to acquire a particular work.²⁶⁰ In addition, a library may make three non-permissive copies of a work, and the statute specifically permits copies to be in digital format. However, these exemptions also contain some alarming restrictions. For example, the statute says that if a copy that is reproduced is in digital format, the digital copy may not be "made available to the public in that format outside the premises of the library" Laura Gasaway has explained that prior to this amendment, a library could treat the reproduction just as it did the original work, lending the reproduction to library patrons for home use, and providing it to others through interlibrary loans. The new restriction, however, seems to say that if the work is preserved in digital format, it cannot be used outside the library building.²⁶¹

²⁵⁷ See e.g. Any Harmon, "Software Double Bind," in the 8/13/01 New York Times, accessed at <http://www.nytimes.com/2001/08/13/technology/ebusiness/13NECO.html?pagewanted=print>

²⁵⁸ Diane Leenheer Zimmerman, "Adrift in the Digital Millenium Copyright Act: The Sequel," 26 Dayton L. Rev. 279 (Winter 2001).

²⁵⁹ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 161 (Fall 2000) ("An unusual part of the DMCA is found in section 1204, which states that nonprofit libraries, archives, and educational institutions are exempted from the criminal provisions for anti-circumvention or removal of copyright management information. Subsection (b) states that neither the large fines nor federal prison terms will be assessed against libraries. Note that the library will not go to jail - the statute does not say "librarians" but "libraries.")

²⁶⁰ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 161 (Fall 2000).

²⁶¹ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 138-39 (Fall 2000). ("While these three changes broaden the preservation exemptions for libraries, each subsection also contains a new limitation. If the copy that is reproduced is in digital format, the digital copy may not be "made available to the public in that

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Because of the new restrictions it imposed, librarians publicly (and vehemently) expressed concern that the DMCA negatively impacted libraries' abilities to make interlibrary loans, provide off-site access to digital materials, and to use donated digital copies of works. The Copyright Office's response was the discouraging statement that it hoped and expected that "the marketplace will respond to the various concerns of customers in the library community."²⁶² Imposition on digital content providers of real space access obligations for libraries is therefore unlikely to be attained by bare persuasion or lobbying by librarians, especially after the Copyright Office deemed the librarians' arguments that relied on analogies to the physical world "flawed and unconvincing."²⁶³

3. Giving Libraries the Scope of Immunity Accorded Commercial Internet

Service Providers

Internet Service Providers (ISPs) recognized early on that fair use was an uncertain and doctrinally complex defense to assert, should any infringing materials be introduced into cyberspace through the portals and speech platforms they provided. They realized that relying on a fair use defense could easily bankrupt them, because even if they won a copyright

format outside the premises of the library ... " This may narrow the library's rights even though a library now may make a digital copy for on-premises use. However, the library could also then make a printed copy from that digital copy and loan the printed one since it is allowed to make up to three copies of a work. Prior to the amendment, a library that reproduced a work under these subsections could treat the reproduction just as it did the original work. It could lend the reproduction to users, provide it through interlibrary loan, and the like. This new restriction may mean that if the work is preserved in digital format, it cannot be used outside the library buildings, and this is much more restrictive. Surely what Congress must have meant was that if the reproduction was digital and was available on the library's network, then it could be used only within the premises and not on a campus network or the World Wide Web. In using the term "digital copy" Congress may actually have narrowed the exemption for works that were originally in digital format. For example, if the original work was a CD-ROM, which now is lost and is not available at a fair price, a library may create another CD, which also happens to be a digital copy. But the language of the statute says that digital copies cannot be used outside the premises even if the original was a digital copy that could have been outside the premises of the library. This is more restrictive than the previous version of the statute, and likely is not what Congress meant to accomplish by the amendment.²⁶¹

²⁶² Cite study, also e.g. Reuters, No Need to Alter the DMCA – Yet, posted 8/30/01 to Wired.com, accessed at <http://www.wired.com/news/print/0,1294,46440,00.html>

²⁶³ Cite study, also e.g. Reuters, No Need to Alter the DMCA – Yet, posted 8/30/01 to Wired.com, accessed at <http://www.wired.com/news/print/0,1294,46440,00.html>

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infringement suit, the litigation preceding what might ultimately prove a pyrrhic victory would be lengthy, disruptive, and hideously expensive.

With plenty of lobbying money at their disposal, commercial ISPs such as AOL were able to convince Congress to build ISP immunity into Section 230 of the Communications Decency Act.²⁶⁴ Later, they persuaded Congress that ISPs should be provided with immunity to copyright infringement suits in the Digital Millennium Copyright Act. ISPs can take advantage of this immunity as long as they agreed to take certain actions against service users accused of infringement pursuant to the Act's "take down" provisions. This frees ISPs²⁶⁵ from burdensome monitoring of its customers, and the conflicts and responsibilities that could arise out of such monitoring. The specific mechanics of the Act encourage and reward risk averse "take down now, ask questions later" behavior by ISPs, and this raises serious freedom of expression concerns that need to be addressed.²⁶⁶ However, at least this immunity admirably insures that, for ISPs, copyright issues can be consistently and predictably dispatched without an inordinate use of resources.

Libraries would benefit from a similar reduction in the risks and uncertainties that copyright issues currently pose. Rather than a doctrinal test that isolates "factors for consideration" in establishing the parameters of electronic works exploitation in library contexts, an approach that has failed so miserably in the context of fair use, straightforward codification of a right to use digital documents as if they were constructed of ink and paper would promote uniformity and stability. This would statutorily import behaviors and practices into the digital

²⁶⁴ Under Section 230 of the Communications Decency Act, even when an ISP has notice of a defamatory third party posting it is entitled to immunity, as section 230 expressly bars "any actions." See e.g. *Jane Doe v. America Online*, Supreme Court of Florida, decided 3/8/01.

²⁶⁵ It should be noted that ISP immunity in this context specifically applies to computer services offered by libraries. See 47 U.S.C. section 230(3)(2).

²⁶⁶ cite

realm, allowing libraries to continue to rely on established norms regardless of the format in which a work is embodied.²⁶⁷

Ironically, when libraries provide patrons with access to the Internet they actually qualify for ISP immunity, which gives libraries qualified protection from copyright suits that could arise if patrons post copyrighted materials using library computers²⁶⁸. It is when patrons access and use digitalized materials from library collections that libraries remain exceedingly vulnerable to accusations of copyright infringement, even though providing access to information is arguably a more critical function of libraries than facilitating patron communications over the Internet. Libraries need statutory protection from copyright suits through a limited immunity framework so that they can provide access to information without undue fear of litigation, and are not burdened with extensive patron monitoring responsibilities.

4. Preventing Replacement by For-Profit “E-Libraries”

For profit electronic library services generate an estimated \$250 million annually, and one industry estimate suggests this figure will triple over the next three years.²⁶⁹ Online library services are spending years and hundreds of millions of dollars to build digitalized collections of books, postulating that consumers (largely students at present) will pay for Internet-enabled access to books, journals and reference materials, despite the fact that most of the same information can be obtained from a nonprofit library free of charge.²⁷⁰ Publishers will favor for-profit libraries because they will create a new revenue stream, as if they did not obtain permission from (and remit royalties to) copyright holders, for profit electronic libraries would

²⁶⁷ Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair Use Guidelines,” 62 Ohio St. L.J. 599, 658 (2001) (The CONTU Guidelines have great authority and legal credibility and together with Section 108 manifest the importance Congress places on interlibrary services and conservation of collections.)

²⁶⁸ Check, also look into filtering issues, sexual harassment?

²⁶⁹ Kendra Mayfield, “The Quest for E-Knowledge,” posted to Wired News on 2/5/01, accessed at <http://www.wired.com/news/print/0,1294,41543,00.html> (quoting E. Yegin Chen, director and senior analyst of Eduventures.com).

²⁷⁰ Kendra Mayfield, “The Quest for E-Knowledge,” posted to Wired News on 2/2/01, accessed at <http://www.wired.com/news/print/0,1294,41543,00.html>

doubtlessly be sued with at least as much energy and passion as Napster was. Ultimately, these so called “e-libraries” will have incentives to endorse and support any actions content owners take to limit patron access to information in traditional libraries, as constraining the electronic access that nonprofit libraries can provide will enhance the demand for for-profit online library services.

Some courts²⁷¹ and copyright scholars²⁷² have advocated a "market failure" theory of fair use, which configures the scope of fair use for any given copyrighted work in inverse proportion to the ease with which the work (or rights to use the work) can be licensed or purchased in an open market. This view of the fair use doctrine suggests that in the absence of a new statutory right of access such as Library Use, the existence of affordable for-profit e-libraries undermines the doctrinal justifications for according nonprofit libraries and their patrons broad fair use privileges.

Though the acquisition decisions of nonprofit libraries are undoubtedly determined by patron demand to some degree, the collections of for-profit libraries are likely to be much more "market driven." For profit e-libraries will have much stronger incentives than non-profit libraries to stock only popular, mainstream works likely to be attractive to large numbers of users. If they become the primary venue through which content is accessed by patrons, access to less conventional content will begin eroding, and works targeted at narrow, specialized audiences will become less profitable, and therefore less "incentivized."

Some for profit entities are beginning to provide electronic books to academic, public and corporate libraries, rather than directly to individuals. A patron of a subscribing library is typically allowed to “check out” an electronic book for 48 hours via the World Wide Web as long as her library has bought that particular e-book, and no one covered under the same library

²⁷¹ e.g. Texaco, MDS

²⁷² e.g. Wendy Jo Gordon, maybe Jane Ginsburg...

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subscription is using it contemporaneously²⁷³: While remote access may be convenient to the user, the e-book is likely to be configured so that the text cannot be saved to the user's own computer,²⁷⁴ so the ways in which she can make use of the work are very constrained.

Electronic books obtained from for-profit library intermediaries generally do not save libraries money or solve storage or shelving issues. This is because libraries will, whenever possible, purchase the work in print as well as electronic form. This ensures that the work will still be available to patrons if it is removed from the online collection by the e-book company, or the publisher, or if the e-book company discontinues its relationship with the library, or goes out of business.²⁷⁵ Sometimes, however, an e-version of a work is all that is made available.

Anyone who doubts that for-profit libraries can displace or reconfigure nonprofit ones should consider the effect that legal data bases such as Lexis and Westlaw have had on the ink and paper collections of law libraries. As one librarian observed:

Facing shrinking or static budgets, law school libraries have indeed cancelled or stopped acquiring materials that are duplicated on legal research databases. This practice is so prevalent that law libraries are even considering selective cancellations of Shepard's citators because shepardizing is so readily available on Lexis and Westlaw. Resistance to what is perceived as unnecessary duplication of information is so rampant that a new law school seeking accreditation is suing the American Bar Association for, among other things, insisting that material on the databases also be maintained in hard copy...[L]ibraries increasingly rely on Lexis, Westlaw, and other databases as the sole sources for certain materials.²⁷⁶

Patrons that do not have Lexis, Westlaw or other necessary passwords conferring authorization to use these databases are excluded from the informational resources they provide, unable to use

²⁷³ But see M.J. Rose, "The Library That Keeps On Giving," posted to Wired News on 8/21/01, accessed at <http://www.wired.com/news/print/0,1294,46160,00.html> (The California State University System used its size – 23 campuses and 370,000 students - to persuade NetLibrary to allow Cal State system libraries to lend e-books to an unrestricted number of borrowers at one time, representing a significant change in how subscription models generally work.)

²⁷⁴ Goldie Blumenstyk, "Companies Find Academic Libraries a Key Target and a Tough Sell," in the 5/18/01 Chronicle of Higher Education (Information Technology section), accessed at <http://chronicle.com/free/v47/i36/36a03701.htm>

²⁷⁵ See Goldie Blumenstyk, "Companies Find Academic Libraries a Key Target and a Tough Sell," in the 5/18/01 Chronicle of Higher Education (Information Technology section), accessed at <http://chronicle.com/free/v47/i36/36a03701.htm>

them even to discover what information they are being denied.²⁷⁷ Those of us with ready and unlimited access to well-resourced libraries and expensive online legal databases are the lucky few. Most people working in the legal field or in areas heavily impacted by law, such as police officers, public sector workers, and even judges and their clerks, face space, budgetary, and geographic constraints that impede their ability to perform broad based legal research.²⁷⁸

In addition to online databases, law libraries are increasingly dependent on full-text resources available through the Internet, and document-on-demand services that may be the only sources of certain materials.²⁷⁹ Ultimately, access to all legal information could require royalty payments. Peter Martin has explained that in 1997 Microsoft began an ongoing initiative to set up electronic filing systems in courts, and to link law firms to courts, and to each other. While this may improve communications in the legal field, he expressed fear that if courts and agencies do not insist that the standards for data interchange are open and non-proprietary, Microsoft and its allies will gain control over the flow of data into and out of the government. Ultimately, he warned, this "would give Microsoft a monopoly position over the tools of communication that it could use to get both the public and lawyers to pay for again and again, either directly or indirectly."²⁸⁰

²⁷⁶ Gail M. Daly, "Bibliographic Access to Legal Research Databases Reconsidered," 87 Law Libr. J. 192, 199 (Winter 1995).

²⁷⁷ See Gail M. Daly, "Bibliographic Access to Legal Research Databases Reconsidered," 87 Law Libr. J. 192, 201 (Winter 1995).

²⁷⁸ See e.g. Peter W. Martin, "The Internet: "Full and Unfettered Access" to Lawsome Implications," 26 N. Ky. L. Rev. 181, 194 (Summer 1999).

²⁷⁹ Gail M. Daly, "Bibliographic Access to Legal Research Databases Reconsidered," 87 Law Libr. J. 192, 199 (Winter 1995).

²⁸⁰ Peter W. Martin, "The Internet: "Full and Unfettered Access" to Lawsome Implications," 26 N. Ky. L. Rev. 181, 204-05 (Summer 1999). ("In December of 1997, Microsoft announced a strategic alliance with several other vendors to "promote an electronic legal and justice system that will digitally link law firms to courts, as well as law firms to each other." The press release spoke of setting "up electronic filing systems in courts through the United States" and offering law firms of all sizes a document management system that "will integrate with the [court] systems" thereby realizing the full potential of "electronic filing." Nevertheless, it is current and past corporate practice, and not paranoia, that suggests a contrasting vision. The Internet browser competition and the constant addition of hitherto discrete applications to Windows "operating system" provide inescapable evidence of Microsoft's willingness to give away technology products and services in order to secure market dominance. With billions of dollars in reserve Microsoft should have no trouble dominating the market for electronic legal data interchange--that is, the means of

5. Preventing the Complete Evisceration of the First Sale Doctrine

The first sale doctrine is set out in Section 109 of the Copyright Act. It guarantees purchasers of “hard copies” of copyrighted works such as books, the right to sell or “otherwise dispose of” that copy of a work that has been straightforwardly purchased, regardless of whether the purchasers are individuals or libraries. As a general matter, depending on how one looks at it, first sale doctrine either reflects or legitimizes traditional “book behaviors.” People who buy books can re-read them, loan them to others, trade them, give them away or even rent them out without violating the copyright laws. First sale doctrine is a bedrock principle upon which nonprofit libraries are built.²⁸¹

First sale doctrine mandates that, for copyright owners, profiting from a physical article embodying a copyrighted work is one time only proposition. Copyright owners are precluded from regulating or restricting distribution of a book or periodical after it is sold. Therefore, among the other functions it serves, Section 109 enables students to sell textbooks back to bookstores, and bookstores to resell the textbooks to other students, without transmitting additional royalties to entities that own the copyrights in the texts.

First sale doctrine is the statutory foundation of many copyright use norms. Before it was codified, copyright owners tried to coerce and proselytize alternative use norms more favorable to themselves. According to Pamela Samuelson:

communication between lawyers, courts and other public bodies, and ordinary citizens. The scenario is straightforward. Imagine the Microsoft alliance offering a free or chillingly inexpensive, fully functional and secure “legal data interchange” and “electronic filing” system to courts and public agencies at all levels of government, few of whom are prepared to be technology leaders, yet all of whom feel resource constraints. Integrated smoothly with Microsoft Word, Internet Explorer, or the ubiquitous Windows operating system, and supported with ample training, this would be a package that courts and agencies moving into the digital environment might be hard pressed to refuse. However, if they accept such an offer without insisting that the resulting standard for data interchange be an open, non-proprietary one, they will have given the alliance control over the flow of law data both into and out of government. That decision would give Microsoft a monopoly position over tools of the communication that it could use to get both the public and lawyers to pay for again and again, either directly or indirectly.”).

²⁸¹ Individuals are, by statute, restricted in what they may do with computer software, and audio and visual recordings. See 17 U.S.C. 109 (b).

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Book publishers and sound recording companies once tried to restrict what purchasers of their products could do with them by "licenses", but fortunately the courts didn't let them get away with it. (Take a look at an old Victrola recording jacket and you all see that it purports to license use of the recording to one Victrola machine and to deny authority to retransfer one's copy of the recording.) One important case was *Bobbs-Merrill v. Straus*. Bobbs-Merrill sued Straus because he sold copies of Bobbs-Merrill books in violation of a license restriction that conditioned the right to retransfer copies of the books on an agreement to charge at least \$1 per copy. The U.S. Supreme Court treated the license restriction as ineffective as a matter of copyright policy. The Bobbs-Merrill decision contributed to the emergence of the "first sale" or "exhaustion of rights" doctrine in copyright law, under which publishers lose authority to control redistributions of copies of their works when, in commercial reality, the transaction is a sale. In the aftermath of this and similar cases, publishers and sound recording companies abandoned these overly restrictive practices.²⁸²

Having failed to convince the courts that the first sale doctrine would summarily bankrupt them, they turned to business solutions. For example, publishers blunt the effect of the first sale doctrine by issuing revised editions of textbooks, which renders used copies of "old" editions less attractive and shrinks the market for used texts,²⁸³ but they can't do so without giving the world an updated and at least hypothetically improved information product.

Among its other advantages for libraries, the first sale doctrine helps prevent price discrimination, because it allows those who buy a work at a low price to resell it to an entity that otherwise may have been targeted for a high price. In other words, publishers can't effectively tack a surcharge onto books they sell to libraries, even though those copies are likely to be read by more people than copies sold to individuals, because libraries can "arbitrage" books from those who are able to purchase them at lower prices.. When the first sale doctrine is circumvented through contract provisions governing licensing, reselling can be prevented (since there was never a "first sale" to engage the eponymous doctrine) and libraries become vulnerable

²⁸² Pamela Sameulson, "Legally Speaking: Does Information Really Want To Be Licensed?" accessed at http://sims.berkeley.edu/~pam/papers/acm_2B.html (get cite to version published in September 1998 issue of Communications of the ACM)

²⁸³ See e.g. Ann Bartow, Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely, 60 U. Pitt. L. Rev. 149, 214 (Fall 1998).

to price discrimination.²⁸⁴ In addition, certain kinds of multiple uses can be prevented, and contract terms can be automatically enforced, with technology that meters digital access, or by the use of computer discs that self-destruct after a certain amount of time, number of users, or attempts to print.²⁸⁵

a. Licensing Alters Library Functionality

As described above, Section 108 of the Copyright Act places "library oriented" limits on a copyright owner's exclusive rights, enabling libraries (and archives) to make limited numbers of copies of copyrighted works to replace, preserve or supplement market-acquired copies in a library or archival collection.²⁸⁶ However, Section 108(f)(4) expressly states that nothing in Section 108 "in any way affects . . . any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections."

²⁸⁴ See Michael J. Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, 45 Buffalo L. Rev. 845 (Fall 1997); James Boyle, Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property, 53 Vanderbilt L. Rev. 2007 (2000).

²⁸⁵ See e.g. Andy Patrizio, "DVDs That Self-Destruct," Wired News (posted 1/20/00) accessed at <http://www.wired.com/news/print/0,1294,33781,00.html>; Peter Wayner, "To Cover Electronic Tracks, E-mail That Self-Destructs," New York Times, October 12, 1999, accessed 10/13/99 at <http://www.nytimes.com/library/tech/99/10/cyber/articles/13mail.html> ("Several companies are exploring ways to control the copying and dissemination of electronic documents with their own versions of self-destructing e-mail. They aim to make it possible to send a message or document that will become unreadable after a predetermined period so that companies and individuals can keep their information on a short leash."); Bob Tedeschi, Publishers Seek to Conquer Readers' Sales Resistance, New York Times, October 4, 1999, accessed 10/4/99 at <http://www.nytimes.com/library/tech/99/10/cyber/commerce/04commerce.html> ("Technologies developed by companies like SoftLock, Authentica and Fatbrain allow publishers to sell information online to one user, and have that information encrypted on the hard drive of the user's computer. Software that the user downloads with the document controls the information, so it cannot be digitally reproduced, forwarded via e-mail or even, in some cases, printed.").

²⁸⁶ More specifically, "Section 108 permits a library, under certain circumstances, to make a single copy of a periodical article or small excerpt of a larger work (such as a book chapter) upon request of the library's patron or in response to a request from another library on behalf of that library's patron. This right is subject to two conditions. Subsection (g) (1) of section 108 prohibits a library from engaging in related or concerted copying or distribution of either single or multiple copies of the same material on one occasion or over a period of time. Subsection (g) (2) prohibits a library from engaging in the systematic reproduction of a single or multiple copies of articles or short excerpts. Libraries may, however, participate in interlibrary arrangements that do not have as their purpose or effect the receipt of copies in such aggregate quantities as to substitute for a subscription to or purchase of a work. Section 108, therefore, allows isolated and unrelated copying and distribution of single copies of the same or different materials on separate occasions, but interlibrary lending that is systematic may be viewed as substituting for a subscription or the purchase of the work." James S. Heller, The Impact of Recent Litigation on Interlibrary Loan and Document Delivery, 88 Law Libr. J. 158. 160 (Spring 1996).

This legislative loophole makes libraries vulnerable to private ordering through contract that can hamper a library's ability to provide patron access. Specifically, content owners can refuse to sell digital books or periodicals to libraries, instead requiring them to "license" copyrighted works, often on nonnegotiable terms.²⁸⁷ As Anne Klinefelter has observed: "Licensing avoids the first sale doctrine by characterizing the exchange as a purchase of rights to use the electronic product in certain ways rather than as a sale of a copy. The language of the copyright law provides first sale rights only to an owner of a copy. So, if there is no sale, there is no owner; and if there is no owner, there are no first sale rights."²⁸⁸ Though courts have equivocated about the enforceability of some shrink-wrap and click-wrap licenses and license terms, the trend seems to be toward enforcing them.²⁸⁹ Moreover, states that adopt some permutation of the Uniform Computer Information Transaction Act (U.C.I.T.A.) are codifying the legality and enforceability of non-negotiated licenses for information products. As one commentator noted " [UCITA], currently under discussion for passage in the individual states, if passed, likely will make the licensing issue even more difficult for libraries as the ability to negotiate may be subsumed into standard licensing terms for many products."²⁹⁰

To the extent any negotiation with copyright owners is possible, large, well-funded libraries or library systems will have huge advantages over smaller libraries or those with fewer financial resources. For example, one electronic book provider concentrated its initial sales efforts on the 10 largest library consortia because these entities spend \$600 million on books

²⁸⁷ Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 *Legal Reference Services Quarterly* 175, 178-79 (The Haworth Press 2001) ("The point of licensing is to allow software providers to sell copies of their information products without the attachment of the first sale doctrine").

²⁸⁸ Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 *Legal Reference Services Quarterly* 175, 178-79 (The Haworth Press 2001)

²⁸⁹ String cite of cases in which courts skeptical/accepting of shrink wrap, click wraps, with parentheticals

²⁹⁰ Gasaway or Klinefelter?

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annually.²⁹¹ This enabled the libraries with the richest collections to get information-wealthier still, while smaller, poorer libraries fell further behind. Libraries with the sparsest resources are likely to serve communities that have the fewest alternative information sources available to them. If libraries are to fulfill the mission of delivering information access to those who do not have the means to purchase such access independently, at a minimum lesser-funded libraries need to be able to license information on terms that are at least equivalent to those available to wealthier institutions.

United States Register of Copyrights Marybeth Peters²⁹² has asserted that the government is considering ways to adapt the first sale doctrine to the digital age, such as by insuring that content is destroyed on a hard drive when a secondary sale of the content is made.²⁹³ However, it is difficult to believe that content owners would voluntarily forgo the advantages of a licensing format, and return to selling works outright, simply because the government helps them eliminate unauthorized copies of digital works.

Substitution of "freedom of contract" for the first sale doctrine will work exclusively to the advantage of content owners, as libraries usually have inferior bargaining power and generally will be presented with standard license agreements on a take-it-or-leave it basis.²⁹⁴ When libraries submit to restrictive licensing regimes, they do so with the highest motives (providing patrons entrée to the licensed information), but simultaneously become complicit in access compression by tolerating limitations on otherwise legitimate uses of the licensed works.

²⁹¹ Vincent Kiernan, "An Ambitious Plan to Sell Electronic Books," in the April 16, 1999 issue of the Chronicle of Higher Education, accessed at <http://chronicle.com/weekly/v45/i32/32a02901.htm>

²⁹² Bio at <http://www.loc.gov/copyright/docs/mbpbio.html>

²⁹³ Brad King, "Why You Can't Sell What You Buy," posted to Wired.com on 1/16/01, accessed at <http://www.wired.com/news/print/0,1294,41184,00.html>

²⁹⁴ But see M.J. Rose, "The Library That Keeps On Giving," posted to Wired News on 8/21/01, accessed at <http://www.wired.com/news/print/0,1294,46160,00.html> (The California State University System used its size – 23 campuses and 370,000 students, to persuade NetLibrary to allow Cal State system libraries to lend e-books to an unrestricted number of borrowers at one time, representing a significant change in how subscription models generally work.)

Licensing reconfigures digital information as a service rather than a product, and renders it potentially subject to use restrictions, or even termination, over which a library has little if any control. As copyright owners write contracts granting themselves greater rights than the copyright laws provide, and libraries fewer privileges, copying-related activities such as archiving and preservation can be limited or prohibited²⁹⁵ through a judicious combination of contract terms and technology. This undermines an important traditional role of libraries.²⁹⁶ Pure duplication, as an end in and of itself, is the type of copying least likely to be found fair use, under Section 107 of the Copyright Act,²⁹⁷ which is in fact the rationale behind giving libraries an explicit right to do some unauthorized copying in Section 108. Licensing regimes that require libraries to forgo Section 108 rights make it difficult for libraries to perpetuate the longstanding and beneficial norm of archival preservation.²⁹⁸

Additionally, libraries have long relied on older technologies like microfiche and microfilm to retain archival copies of certain types of copyrighted works such as newspapers and periodicals, and usually make them available to researchers on an unrestricted basis. Future access to such works may be compromised if archival copies are seen as revenue-producing

²⁹⁵ Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 *California Law Review* 111, 128-29 (January 1999) (some contracts provide that the licensee may not make any copies of the licensed work, whether or not the copying would be fair use).

²⁹⁶ Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 *Legal Reference Services Quarterly* 175, 179 (The Haworth Press 2001) ("[The] archiving function has been an important traditional role of libraries.")

²⁹⁷ Duplicative copying less likely to be fair than transformative copying, but see Sony.

²⁹⁸ Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 *Columbia – V.L.A. Journal of Law & the Arts* 115, 142 (Fall 2000), citing *Digital Dilemma* at 9-10, 206-10 ("Libraries view as one of their missions the preservation of the world's knowledge and cultural artifacts. The library exemption as amended deals fairly well with preserving materials that were not originally in digital format. Preserving electronic information is more problematic, however, and many digital works simply are not being preserved either by the publisher or by third parties such as libraries. Even when a library signs a license agreement that gives users access to a work, the library may not have the right to preserve it in any way. There is great concern about the impact of this on the cultural record and on what records will be available to researchers in the future.")²⁹⁸

commodities to be stored, retrieved and distributed only under the aegis of "digital asset management," and accessible only on a pay-per-view basis.²⁹⁹

Licenses could also force librarians into becoming gatekeepers of copyrights. As a condition of acquiring copyrighted works, libraries could be compelled to police how patrons get access to digital publications based on who patrons are, the reasons patrons desire access, the ways patrons expect to use the publication, or the nature of the publications at issue. One privilege that library patrons have long enjoyed, access to photocopiers, could be functionally taken away from them in the digital environment.

Before the advent of photocopiers, "it was a customary fact of copyright life that individuals could make entire handwritten copies of copyrighted materials for their own use and that secretaries could make typed copies for the use of their employers."³⁰⁰ With the advent of photocopiers, making copies of library holdings became faster and easier, to the consternation of copyright owners. Libraries, however, have never been required to monitor patron use of photocopiers, and as long as library photocopiers carry appropriate notices, libraries are immune from liability as contributory infringers³⁰¹ regardless of how egregiously patrons may exceed the bounds of fair use. Making copies of portions of copyrighted works will continue to be important to patrons accessing digital works. However, unless Library Use prevents it, publishers can contract around the fair use doctrine, forbidding even modest copying, and requiring librarians to be their enforcers. If copyrights owners are so panicked about possible acts of infringement, and so determined to reap a profit from every use of a work, library users could be put in the position of hand copying excerpts from a computer screen. This relegates patrons to a "pre-photocopying"

²⁹⁹ See e.g. Susan Stellin, "CNN Video Archives to Become Digital Database," in the April 23, 2001 New York Times, accessible at <http://www.nytimes.com/2001/04/23/technology/23SEAR.html>

³⁰⁰ Laurie C. Tepper, Copyright Law and Library Photocopying: A Historical Survey, 84 Law Libr. J. 341, 350 (Spring 1992).

³⁰¹ See 17 U.S.C. Section 108(f)(1).

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level of access of usability, which will arguably slow scholarly output and discourage research. However, hand-copying still enables, however onerously and inefficiently, circumvention of copy controls, a fact content owners highlight to rebut claims they prevent fair use of their works.

Libraries could also be contractually compelled to collect and monitor data about the use of library assets on behalf of copyright owners, or to allow content owners to collect data and monitor usage directly. Content owners can assert a right to perform this monitoring to track whether use of the copyrighted work is allowed under the terms and conditions of the pertinent license. This would compromise patron privacy, and thereby eviscerate a core library value.³⁰² Contract provisions pertaining to use monitoring can be enforced by virtue of technologies with the ironic moniker “trusted systems.” Such technologies would enable a content owner real space control over how often a work was accessed, whether the user had the ability to cut parts of the text and paste them into other texts, and how many times a work could be printed (if at all).³⁰³

The Librarian of Congress and the Copyright Office were given the opportunity by Congress to issue rules governing the access provisions of the DMCA that established an enhanced right of fair use access to copyrighted works via unauthorized (but legal) circumvention of “trusted system” type technologies. They chose not to do so,³⁰⁴ and monitored access may be on its way to becoming a norm. Already “[t]he licenses for some electronics products ask for individual accounts that can provide tracking of each participating patron's research habits.”³⁰⁵ For example, when law libraries assign passwords as a condition of access to electronic databases,

³⁰² See e.g. American Library Association Core Values Task Force Draft Statement (11/21/99) accessed 1/25/00 at <http://www.wva.com/~dsager/draft.htm> (“Core Values of Librarianship” include the connection of people to ideas; unfettered access to ideas; learning in all of its contexts; freedom for all people to form, to hold, and to express their own beliefs; respect for the individual person; preservation of the human record; interdependence among information professionals and agencies; and professionalism in service to these values. An explication of “respect for the individual person” is as follows: “We honor each request without bias and we meet it with the fullness of tools at our command. We respect the individual's need for privacy and for confidentiality in their search or their study.”

³⁰³ See e.g. Mark Stefik, “Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing,” 12 Berkeley Tech. L.J. 137 (1997).

³⁰⁴ Get cite describing rules issued on 10/28/00 by Librarian of Congress and Copyright Office.

unless a library negotiates to protect the privacy of its patrons, the research patterns of individuals associated with each password can be collected and studied by these database publishers in a personally identifiable manner.³⁰⁶

Even more alarmingly, content owners could try to use licensing frameworks to regulate qualitative usage of works by placing terms in licensing agreements that prohibit public criticism or comment about the underlying work. While some courts may be reluctant to uphold such terms because they are in conflict with the First Amendment, if nonprofit libraries do not have the resources to challenge outrageous license terms, they become de facto enforceable and could eventually constitute new and arguably undemocratic norms.

Finally, licensing works is more expensive and time consuming for libraries, meaning that ultimately libraries have fewer acquisition resources available, and can make fewer works accessible to patrons.³⁰⁷ Library staff members have to review individual licenses, perform any monitoring required by the license, and develop and manage institutional mechanisms for license administration and compliance.³⁰⁸ This is labor and resource intensive, and potentially diverts time and energy away from other worthy projects.

b. Licensing Substitutes Breach of Contract for Torts-based Liability

Analysis

As discussed above, a copyright infringement suit is an action in tort. As such, common practice plays a role, admittedly only obliquely at times, in judicial application of the fair use defense. For example, the Supreme Court's ruling in the Sony Betamax case rested in part on the

³⁰⁵ Anne Klinefelter, Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services, 19 Legal Reference Services Quarterly 175, 187 (The Haworth Press 2001)

³⁰⁶ Anne Klinefelter, Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services, 19 Legal Reference Services Quarterly 175, 187 (The Haworth Press 2001) .

³⁰⁷ Anne Klinefelter, Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services, 19 Legal Reference Services Quarterly 175, 176 (The Haworth Press 2001) ("[T]he licensing process can become quite burdensome and can involve entities normally outside of the print material purchasing process...Librarians have no choice but to redirect staff energies to licensing because what happens at the contract level affects almost all library support efforts and services to patrons.")

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fact that "free television" was a longstanding norm.³⁰⁹ In other situations, however, new norms that threatened the profit streams of were judicially squelched. In the Kinko's case an emerging norm of selling fair use "course packs" to students was stopped in its tracks, based on the perception that course packs prepared by photocopy shops were dislodging norms of textbook purchasing. By the time the same issue arose in the Michigan Document Services case, a new social norm was in place, one of photocopy shops in the course pack business obtaining permissions and paying photocopy royalties to publishers.

When works are licensed rather than sold, while "practice in the industry" may have some vague applicability in the context of gleaning the meaning of contractual terms, for all practical purposes, longstanding norms of library usage will have no role or meaning whatsoever. Licenses that preclude any copying whatsoever of the licensed work come directly into conflict with the public policy goals of Section 108 of the Copyright Act. They are also inconsistent with the right to make Section 107 fair use of the copyrighted work, as Sections 108 and 107 are intentionally designed to make certain nonconsensual uses non-infringing, and therefore beyond the control of the copyright holder. If publishers can "contract around" library exceptions and fair use, the normative aspirations of the copyright law are frustrated.³¹⁰ If libraries can be denied affordable access,³¹¹ or access at any price, the objective of the copyright laws are undermined even more dramatically. Mark Lemley has observed:

³⁰⁸ E.g.

³⁰⁹ cite to Sony

³¹⁰ ³¹⁰ Mark A. Lemley SYMPOSIUM: Beyond Preemption: The Law and Policy of Intellectual Property Licensing 87 Calif. L. Rev. 111, 169-71 (January 1999)(To be sure, not everyone is happy with the idea that public policy overrides contract. Judge Easterbrook has suggested that it should do so only rarely, and advocates of a strong form of private ordering often suggest that "the market" will do a better job of determining public policy than "the law." Robert Gomulkiewicz derides this effort to balance between policy and freedom of contract as "over-regulating" by the government.)

³¹¹ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 134 (Fall 2000) ("Libraries must have a "sum certain" in the budget - they tried in the early 1970s simply to allow access and pay for "hits" in a database, but many libraries had to abandon this practice or even curtail it in the middle of a fiscal year when the charges reached the amount budgeted to cover use of that database. Negotiating for a year's access, not on a per search basis, but on a flat rate

Intellectual property is a prime example of an area in which we cannot simply rely on "the agreement of the parties" to choose our public policy. This is true partially because intellectual property licenses are notoriously fallible as indicators of the "intent" of the parties; as we proceed to remove all trace of assent from the notion of contract, the philosophical basis for private ordering disappears as well. But the problem is more fundamental than this. Intellectual property is a deliberate, government-sponsored departure from the principles of free competition, designed to subsidize creators and therefore to induce more creation. This departure from the competitive model affects third parties who are not participants in the contract.³¹²

The externalities Lemley refers to will clearly impact upon students, scholars, researchers and library patrons generally if the licensing of copyrighted informational products is allowed to evolve unfettered into a full blown social norm.

6. Select Paradigmatic Examples of the Need For Library Use

a. Indexes, and Codes and Laws

i. Indexes

In analog real space, indexes and abstracts have traditionally been published by neutral third parties, and were therefore outside the control of those who owned the copyrights in the underlying indexed and abstracted works.³¹³ Libraries have to purchase these copyrighted indexes, and presumably seek out the best ones available, regardless of who publishes them. Neutral third party index compilers do not have monetary incentives to direct index users to any particular works. Quite the contrary: efforts to produce a high quality index would logically focus on thoroughness, accuracy and objectivity. However, the norm of neutral, independent indexes is being obliterated by the confluence of copyright law and digitalization. Publishers are adopting a system of digital object identifiers (DOIs) to attach to digital content so that it can be

permits the library greater flexibility even if it then has to narrow access to everything in the database as a way to reduce its costs.")

³¹² Mark A. Lemley SYMPOSIUM: Beyond Preemption: The Law and Policy of Intellectual Property Licensing 87 Calif. L. Rev. 111, 169-71 (January 1999).

³¹³ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 123 and 156-58 (Fall 2000).

abstracted and indexed with links to the full text of a given work.³¹⁴ This gives publishers control over access to the indexes in addition to control over access to the digital works themselves.

This means that not even the indexes would be available to potential users of the works absent licensing arrangements.³¹⁵ Publishers increasingly control information about the existence of works and any summaries of them.³¹⁶ As a result, "scholars will not be able even to determine whether a particular paper or article exists unless they have a license to use the publishers'

³¹⁴ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 156-57 (Fall 2000) ("The Association of American Publishers created a committee in 1994 to design a system that would protect copyright while enabling electronic transactions. The result was a study that recommended guidelines on an industry-wide standard identifier, which would assist in controlling electronic transactions and other operations. The goal was to design a system of persistent identifiers that would be interoperable between publishers and their clients and which would serve as the basis of a rights and permissions management system for publishers. The committee recognized problems with Internet addresses and uniform resource locators (URLs), which are not object identifiers but denote only the location of objects. There are significant problems with URLs; for example, URLs disappear, and they do not specify content but simply location on a server, which can change. Publishers propose that the "digital object identifier" (DOI) replace the URL for digital works. The goal of DOIs is to create identifiers that would stay with the object throughout its life regardless of whether the publisher sells the copyright in the work, merges with another publisher or goes out of business. Further, the DOI would stay the same regardless of the work's location on the web. The DOI consists of two parts: a prefix that contains directory information and the registration number. The DOI both specifies the location of the publisher's website where the material resides and identifies the material to the public. An example of a typical DOI is 10.1000/123456789. The portion before the slash is the prefix, which is administered by the DOI Foundation, a not-for-profit organization. Publishers purchase these prefixes. The part after the slash, the suffix, is a unique character string that identifies the specific digital object. The number is currently limited to 128 characters with at least 40 character substitutions (letters, symbols, numbers) allowed for each place in the DOI code. They are basically dumb numbers with any necessary intelligence carried in the metadata. The DOI Foundation manages the registration system. Publishers purchase each unique prefix from the Foundation for \$ 1000, and eventually there will also be an annual fee for each DOI a publisher registers on the DOI server. The fee will support maintenance of the DOI server. DOIs can be used not only for textual digital objects but also for music, video, and the like. The annual cost will increase as publishers move from using DOIs to identify large works, such as books, to using DOIs to identify increasingly smaller works, such as individual images in a collection, encyclopedia entries, etc.")

³¹⁵ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 123 (Fall 2000)("Today, publishers are adopting new digital object identifiers (DOIs) to attach to digital information and to link it through indexing. The DOI index would be linked to the full-text of the work. In theory, this sounds great, since the DOI will stay with the object regardless of whether the publisher sells the digital work, etc., but some concerns about DOIs exist. With DOIs content providers would not only control the indexing, but also access to the indexing and through the index access to the digital object itself. All of this would be available to users only through licensing arrangements. Publishers state that this would be a great boon to researchers, but this is true only if researchers have access to that publisher's digital materials or to a consortium of publishers' systems that are licensed. If a scholar wants to cite an article using a DOI, it would become an inaccessible reference to anyone who does not have access to one of the publishers' systems in the consortium. No longer would neutral third parties provide the indexing and abstracting services one can use to determine the existence of a work even if the library does not subscribe to the journal or proceeding in which the work appears.")

³¹⁶ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 158 (Fall 2000).

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system or access through a library license that provides access."³¹⁷ Thus, the new norm that publishers are imposing requires libraries or library patrons to remunerate publishers for entrée to the indexes and summaries of works they own the copyrights in, creating control mechanisms and profit streams for publishers that would be unavailable absent digitalization. A related, consequential new norm involves the mindset with which researchers must approach "non-neutral" abstracts and indexes. If abstracts and indexes are written and compiled by publishers who have financial stakes in which works a user chooses to access in full text form, the scholar must approach these research tools fully cognizant of these publishers' directive agendas, and somehow attempt to ignore or control for them.

ii. Codes and Laws

When governments enact laws that have been written and copyrighted by private entities, the private entities generally claim ownership in the copyright to the laws they have authored.³¹⁸ For example, the copyright in California's Building Code is owned by a private company that does not allow California to post the Code on the state's Web site, where most of California's laws are available to the public. Instead, one must either purchase a copy of the Building Code, the only complete version of which is in print and costs \$738,³¹⁹ or seek out a copy available for public viewing at a library.³²⁰

Meanwhile, the legal system depends upon assumed knowledge of the law, and legal notice. Those governed by the law are presumed to know it, and lack of awareness of the law, or the inability to afford access to the written law, is not a defense for failure

³¹⁷ Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 158 (Fall 2000).

³¹⁸ Kathryn Balint, "Public laws owned by the public? Think again, copyright rulings show" in the May 13, 2001 Union Tribune, accessed at http://www.signonsandiego.com/news/uniontrib/sun/news/news_1n13own.html (discussing controversy in Southern Building Code Congress International v. Veeck)

³¹⁹ Kathryn Balint, "Public laws owned by the public? Think again, copyright rulings show" in the May 13, 2001 Union Tribune, accessed at http://www.signonsandiego.com/news/uniontrib/sun/news/news_1n13own.html

³²⁰ Kathryn Balint, "Public laws owned by the public? Think again, copyright rulings show" in the May 13, 2001 Union Tribune, accessed at http://www.signonsandiego.com/news/uniontrib/sun/news/news_1n13own.html

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to obey or conform to it.³²¹ When the operative philosophy is “ignorance of the law is no excuse,” citizens ought to have free and unfettered access to the laws that bind them, and libraries' efforts to provide it should be encouraged and supported.

b. Preserving Reserves

Maintaining a reserve collection of materials that are in high demand is a practice academic libraries have been engaging in since the early 1900s.³²² Reserves offer faculty members the ability to assign supplemental readings without requiring students to purchase additional books or expensive course-packs.³²³ Students benefit from these savings, and from having reserve collections that are easily and broadly accessible. To simultaneously provide broad access and perhaps mitigate demand for personal copies, however, libraries generally will have to make some copies of the reserve works, to meet student demand and to prevent (or at least reduce) damage to original if it is in bound form.

If a student feels confident that she can expediently read a reserve copy of the material assigned for a class in the library, she is unlikely to make a personal copy of the work. However, accessing traditional “analog” ink and paper reserves requires students to be physically present in a library, and may entail a wait for materials to become available. Often, reserve works can only be checked out for short (two to four hour) intervals.³²⁴ These inconveniences are exacerbated when large numbers of students put off reserve reading until the last minute, either attempting to read assigned materials immediately before class, or shortly before an examination.

³²¹ See Peter W. Martin, “The Internet: “Full and Unfettered Access” to Lawsome Implications,” 26 N. Ky. L. Rev. 181, 200 (Summer 1999).

³²² Steven J. Melamut, “Pursuing Fair Use, Law Libraries and Electronic Reserves,” 92 Law Libr. J. 157, 158 (2000), citing Scott Seaman, “Copyright and Fair Use in an Electronic Reserves System,” 7 J. Interlibrary Loan, Document Delivery and Info. Supply 19, 19 (1996).

³²³ See e.g. Steven J. Melamut, “Pursuing Fair Use, Law Libraries and Electronic Reserves,” 92 Law Libr. J. 157, 158 (2000)

³²⁴ Steven J. Melamut, “Pursuing Fair Use, Law Libraries and Electronic Reserves,” 92 Law Libr. J. 157, 158 (2000).

Electronic reserves offer numerous advantages: Digital works can be read by a large number of people simultaneously; they can be accessed from anywhere if available through the Internet; and extensive usage does not damage or degrade the works. The materials may be searchable, better organized, and more easily edited. Use of the works may be tracked so that faculty members can see how many students access given materials and with what frequency (though presumably this would be aggregate rather than personally identifiable data, as library circulation records are generally confidential³²⁵). It is also faster, cheaper and easier for students to make personal copies of reserve works by downloading and printing than by photocopier.

At present serious copyright questions are raised if a library converts print works into electronic form for the purposes of developing and maintaining electronic reserve collections. For works that are already digital in nature, in addition to copyright concerns, the terms of any licensing agreement between the library and/or academic institution and the publisher will be implicated as well.³²⁶ Some publishers will refuse to license their works for electronic reserve purposes altogether.³²⁷

None of the Section 108 library exceptions apply to reserve copying, so the copyright issues are evaluated in the context of section 107 fair uses. However, publishers have argued that digital versions of a work distributed under the guise of “library lending” compete so directly with “original copies” that there can be no fair use of them. Attempts to work out a compromise between libraries and publishing companies on the issue of electronic reserves have so far failed.³²⁸

³²⁵ cite

³²⁶ E.g. Steven J. Melamut, “Pursuing Fair Use, Law Libraries and Electronic Reserves,” 92 Law Libr. J. 157, 162 (2000).

³²⁷ Laura N. Gasaway, Impasse: Distance Learning and Copyright, 62 Ohio State L. J. 783, 819 (2001) (some publishers refuse to license their copyrighted works for electronic reserves)

³²⁸ Steven J. Melamut, “Pursuing Fair Use, Law Libraries and Electronic Reserves,” 92 Law Libr. J. 157, 185-86 (2000): “Beginning with a public hearing in November 1993, the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force sought to have copyright stakeholders negotiate guidelines for the fair use of electronic materials in nonprofit educational contexts. Before the first meeting of the Conference on Fair Use

c. Enabling Remote Access Libraries

Evidence suggests that people will continue to venture out to real space libraries even if remote access to electronic collections is available.³²⁹ According to one academic librarian:

There are more public libraries in the United States than McDonald's restaurants. Americans make 3.5 billion visits to school, public and college or university libraries every year – three times more than visits to the movies. Children and young adults go to school libraries 1.7 billion times during the school year – two times more visits than to state and national parks.³³⁰

Libraries often function as community centers, and the increasing use of computers as a communication tool may make the real space meeting places that libraries provide more important than ever. However, anyone who has geographic or temporal impediments to visiting real space libraries would benefit from being able to access library collections through cyberspace, and many other people would simply value the convenience.

At present, however, libraries are unable to serve patrons via the Internet as they do in person, and copyright laws pose some of the barriers that will prevent them from doing so in the

(CONFU), which it had convened, the working group released the preliminary draft of its report (popularly known as the *Green Paper*) on July 7, 1994. In it, the working group expressed the belief that it would be difficult and inappropriate to apply the specific language prepared for print media to digital works and online services. The *Green Paper* appeared to be calling for a reexamination of fair use, and many parties rejected it as overreaching its mandate. At the first CONFU meeting in September 1994, working groups were established on Intellectual Property Rights in the Electronic Environment, Distance Learning, Multimedia, Electronic Reserves, Interlibrary Loan, and Image Collections.

The Electronic Reserves group included representatives of copyright holders, educational institutions, and the library community. The committee discussed the issues of fair use involved in digital reserves in nonprofit educational institutions: storage, access, display, and downloading. The negotiations reached an impasse in the fall of 1995. Some members of the committee continued to work, however, preparing a draft proposal entitled "Fair Use Guidelines for Electronic Reserve Systems" in March 1996. Finally, in November 1996, "at the plenary session of the Conference on Fair Use, participants concluded that there was insufficient support for the March 5, 1996 draft. CONFU participants agreed that the March draft would not be submitted for consideration as a proposal for CONFU fair use guidelines or included in the final CONFU report."

³²⁹ Dean E. Murphy, "Moving beyond 'Shh' (and Books) at Libraries," in the 3/7/01 NYT, accessed at <http://www.nytimes.com/2001/03/07/nyregion/07LIBR.html> (North Shore Library System near Chicago seeing resurgence in library usage, despite prevalence of home computers; more than 500,000 people participated in 30,000 programs at Libraries in Queens, NY last year)

³³⁰ Wayne Weigand, "Librarians Ignore the Value of Stories," in the 10/27/2000 issue of the Chronicle of Higher Education. See also Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 Columbia – V.L.A. Journal of Law & the Arts 115, 126 (Fall 2000) ("In mid-1998, a Gallup poll showed that 67% of Americans visited a public library within the last year, 54% checked out a book, and 21% checked out other materials, like a CD or a video.") citing Wayne A. Weigand, *The Structure of Librarianship: Essay on an Information Profession*, Samuel Lazerow Memorial Lecture at Florida State University (November 23, 1998).

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future. The Library of Congress has so far put five million historical items online as part of its American Memory Project, carefully choosing mostly works that were not copyrighted, or in which the copyright has expired, though some copyrighted works (those for which permission to digitize could be obtained from copyright owners) were also included.³³¹ Given the lengthy duration of copyrights, one can expect routine time lags of 100 years or more before modern creative and informational works can become part of the online "American Memory." Despite being curtailed by copyright considerations, however, the American Memory website has been enormously popular, receiving (as of January 2001) 18 million page views per month, while the website of the Library of Congress receives 80 million page views each month.³³²

Similarly, the School of Information at the University of Michigan hosts the Internet Public Library, described as "the first public library on the Internet,"³³³ but its collections are limited to "any online text that resembles a traditional non-online text, and is available in its entirety for free,"³³⁴ and there exclude anything covered by copyright for which free permission cannot be obtained, which rules out almost everything published after 1923, and even works not covered by copyrights which have not been converted from print to digital form.³³⁵

Meanwhile, the National Science Foundation, in conjunction with teams of computer scientists and librarian from several major research universities, is constructing a National Science Digital Library to enable users to browse digital resources from libraries around the

³³¹ Kendra Mayfield, "Library of Congress Goes Digital," posted to Wired.com on 1/19/01, accessed at <http://www.wired.com/news/print/0,1294,41166,00.html>

³³² Kendra Mayfield, "Library of Congress Goes Digital," posted to Wired.com on 1/19/01, accessed at <http://www.wired.com/news/print/0,1294,41166,00.html>

³³³ See American Bar Association website "Reference Materials Online," accessed at http://www.abanet.org/lpm/bodies/bparticle11754_body.htm

³³⁴ See The Internet Public Library, Online Texts Help & Frequently Asked Questions, accessed at <http://www.ipl.org/reading/books/help.html>

³³⁵ See The Internet Public Library, Online Texts Help & Frequently Asked Questions, accessed at <http://www.ipl.org/reading/books/help.html>

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country.³³⁶ It is intended to be “one library with many portals” that enables searches through numerous digital library collections in science, mathematics, engineering and technology education from a centralized site.³³⁷ However, copyright concerns are greatly complicating this undertaking, which would benefit greatly from an appropriate Library Use doctrine and the lowered transaction costs that the associative clear rules would make possible. Unless the legal regime governing rights in digital works is reconfigured to support online library lending as an expressly chosen social priority, remote access libraries will never reach their full potential.

Conclusion

The fundamental notion that has been proposed here is that iterated widespread past practices keyed to particular uses of works available in ink-and-paper form could provide a sound basis for normative paradigms for the fair use, and (more specifically) Library Use of digital materials in analogous electronic contexts. These real space use norms could be easily adapted to digital formats, and codified with a high degree of specificity to insure permanent, consistent and predictable levels of access to electronic materials.

Copyright law has long been driven by pragmatism rather than morality. When large content owners or government representatives hypocritically pretend otherwise, they only undermine their own self-serving attempts to foster "copyright respect" as an ethical imperative. A copyrights-respectful social norm will not be "enforced" unless there is a general consensus about the norm among copyright consumers.³³⁸ Codifying a normative framework for copyright use behavior by individuals could reduce uncertainty and lead to enhanced compliance with

³³⁶ Katie Dean, “This Library’s “Born Digital,” posted 6/18/01 to Wired News, accessed at <http://www.wired.com/news/print/0,1294,44554,00.html>

³³⁷ Katie Dean, “This Library’s “Born Digital,” posted 6/18/01 to Wired News, accessed at <http://www.wired.com/news/print/0,1294,44554,00.html>

³³⁸ See e.g. Dennis Chong, "Law, Economics & Norms: Values Versus Interests in the Explanation of Social Conflict," 144 U. Pa. L. Rev. 2079, 2079 (May 1996).

copyright laws, but only if the copyright laws on which it is premised reasonably comport with ordinary understandings and widespread norms of copyright use.

Because copyright owners can exert more control over copyrighted works in digital formats, requiring them to provide ink and paper levels of access would somewhat diminish their ability to maximally control and exploit their copyrights. The idea of codifying real space copyright use norms cannot be implemented unless these norms can be distilled from consistent and widespread past practices such that they are virtually undeniable and irrefutable, because they flow from constructions of fair use and related doctrines that copyright holders will find objectionable, and indeed have battled vigorously to narrow or eliminate. The fairness and legitimacy of these norms as they are reconfigured into laws is imperative to their acceptance and ultimate success in achieving the objectives of preserving access.

Providing the end users of creative works with some consistency of access could also lead to emergence of more societal respect for copyrights, which would be very beneficial to content owners in the long term. If the norms of real space, experiential access are preserved and respected in the electronic environment, social norms of making authorized rentals or purchases may be imported into the digital world as well, as certain precepts of copyright law attain enhanced legitimacy and adherence. A shared acceptance of the lines between fair use and infringement could emerge between copyright owners and copyright consumers.

It is important to note that making it easier to comply with the law does not guarantee improved compliance.³³⁹ However, if the expressive powers of copyrights law can be improved, the response may be that blatantly infringing copyright use behaviors are reduced without the need for increased attempts at legal coercion. Individuals may very well live up or down to the copyright laws' perceived expectations of them.

³³⁹ http://www.nap.edu/html/digital_dilemma/ch4.html

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Finally, whether the approach suggested by this article or another is attempted, action needs to be taken quickly. The closer that large content owners come to obtaining the holy grail of absolute power over their copyrighted content, the less willing they will be to relinquish any semblance of control. Among other consequences of limitless and unconditional copyrights, the information flowing fluidly through the "fountains of fair use" that nonprofit libraries represent will quickly evaporate.