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Copyright Class War

Niels Schaumann*

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* Professor of Law, William Mitchell College of Law. Thanks are due my research assistants, Genhi Bailey, Chris Sullivan, Nick Kaster, and Samantha Sutton Oertel, who labored mightily and contributed much. Any mistakes, however, are the sole responsibility of the author.

I. INTRODUCTION

We are engaged in an immense, ongoing dispute, one between those who own valuable copyrights and those who do not. To call it a war is overstating the case a little, but only a little. The copyright-rich content industry, fearing the worst from digital technology and believing its back is to the wall, is engaging in tactics more brutal than anyone thought likely even just a few years ago. The copyright-poor, including consumers, new authors, and those whose business is developing and exploiting works in the public domain, have steadily lost ground over the last few years and, also believing their backs are to the wall, are resorting to guerilla tactics including the plainly illicit distribution of files via peer-to-peer ("P2P") technology. How odd that copyright law, which for most of the last century was an arcane backwater, of interest chiefly to the few lawyers practicing in the faintly disreputable areas of entertainment and publishing, has become such a battleground. The announcement by the Recording Industry Association of America ("RIAA") that it intends to file "thousands" of lawsuits[1] against individual users of P2P technology has focused public attention[2] on copyright in a way never seen before. Today, copyright is more visible than it has ever been in its nearly 300-year history, and the battles between the copyright-rich and copyright-poor are coming to resemble a class war. Unlike the "usual" class war, in which the differences among the combatants are based on ownership of tangible property, this war is over intangible rights. Nevertheless, the conflict can be understood as one between haves and have-nots, and the stakes are high. Control over burgeoning digital technology is at issue, as are basic rights of access to information and to use copyrighted works.

During the early years of mass digital technology, two factors (one new, one not) worked together to increase copyright's visibility. First—and this factor was not new—copyright has always protected the content (text, images, music, video) that is distributed via the internet and

[1] *See* Steve Lohr, Fighting the Idea that All the Internet is Free, N.Y. Times, Sept. 9, 2003, *available at* http://www.nytimes.com/2003/09/09/technology/09FREE.html (last visited September 11, 2003).

[2] The author has copies of 46 stories from the New York Times alone directly addressing the recording industry's litigation, between May 2, 2003, when the newspaper reported that the first four defendants settled their cases, and September 25, 2003.

by other digital technologies. Second, in 1980, Congress accepted[3] the recommendation of the National Commission on New Technological Uses of Copyrighted Works ("CONTU")[4] and determined that computer programs[5] should be protected[6] under the Copyright Act of 1976 (the "Copyright Act").[7] Thus, the works of Microsoft and Oracle joined those of Twain and Melville as "literary works" for copyright purposes.[8] So, even as copyright protects the content being distributed, it protects the code—the computer programs—that make digital distribution possible.

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[3] Pub.L. No. 96-517, 94 Stat. 3015, 3028 (1980) (codified at 17 U.S.C. §§ 101, 117) (2000).

[4] *See* National Commission on New Technological Uses of Copyrighted Works, Final Report (1978), *available at* http://www.digital-law-online.info/CONTU/ (last visited Sept. 15, 2003).

[5] Computer programs are defined as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." Copyright Act of 1976, 17 U.S.C. § 101 (2000).

[6] For a critical look at CONTU's decision to protect computer programs with copyright, see Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663. Code is functional, and protecting the "expression" within code is a bit like protecting the "expression" in a bridge. Both code and bridges can be beautiful, but beauty is not the touchstone for copyright protection, which requires original expression. *See id.* at 742 (citing Apple Computer Inc. v. Franklin Computer Corp., 545 F. Supp. 812, 823 (D.C. Pa. 1982); Muller v. Triborough Bridge Auth., 43 F. Supp. 298, 300 (S.D.N.Y. 1942). In both cases, bridges and code, beauty is subservient to (and perhaps arises from) function. As a functional object, any expression in "code"—or in a bridge—is very different from the expression in a novel, poem or play. The extension of copyright to functional objects, and the unwillingness of copyright lawyers to confront the implications of that extension, contribute to copyright's incoherence.

[7] 17 U.S.C. §§ 101 *et seq.* (2000).

[8] One could argue, of course, that software bears no closer a resemblance to literature, or indeed to anything else an ordinary citizen would think of as "literary," than it does to ballet. But software, like literature, is capable of being written down, and this is enough to make it literary for copyright purposes. "'Literary works' are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." 17 U.S.C. § 101 (2000). Although the Copyright Act does not specify that a computer program is to be protected as a literary work, that is the category under which computer programs, whether source or object code, are protected. (For a discussion of source and object code, see Samuelson, *supra* note 6, at 682-86 nn.69-79 and accompanying text). The House Report on the Copyright Act suggests that computer programs are to be considered literary works: "The term 'literary works' does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. *It also includes computer data bases and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.*" H.R. REP. NO. 94-1476, at 54 (1976) (emphasis added); *see also* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1248-49 3d Cir. (1983).

Copyright thus protects both the distribution technology and the distributed content. Moreover, because both software[9] and content[10] have become economic heavyweights, copyright has been elevated to a significance that would have seemed improbable even twenty years ago. Of course, copyright has long been important to the entertainment and media industries, who, together with their lawyers and lobbyists, have focused a great deal of attention on it over the years. What is new, however, is its significance in the everyday lives of the public. And in this case, a little attention from the public is long overdue.

Since 1909, copyright law has been negotiated among representatives of copyright-owning and copyright-using industries (often, the owners in one context are the users in another), sometimes with a little input from librarians or other representatives of non-profit groups, consumer electronics manufacturers, and others whose businesses depend upon creating or using copyrighted works. The public, which is expected and encouraged to use copyrighted works (and thus to generate revenue for copyright owners), is not included in these negotiations. In the past, excluding the public didn't seem to be a problem, because even though in theory copyright exists to benefit the public,[11] copy-

[9] In 2002, the American software industry accounted for approximately $221.9 billion in revenue, or about 2.2% of the nation's Gross Domestic Product ("GDP"). Market Share Reporter: Largest Software Firms (13th ed. 2003) *available at* http://www.lexis.com/research/retrieve/frames?_m=7745ee2373f9eeed10c6f00c11d3c05e&csvc=BL&cform=BOol&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=DGLbVtb-zSkAA&_md5=DB3623dbc0f6ae54cb482bf7a256caf8 (last visited Aug. 9, 2003).

[10] Content, for its part, accounted for revenue of about $433.7 billion, or 4.3% of the GDP. Keith Kupferschmid, *Fighting Software Piracy Through the Law, Technology, Education and Licences* (2002), *available at* http://www.softsummit.com/b2_SIIA.pdf (last visited Sept. 15, 2003). The content industry itself claims that the "copyright industries constitute five percent of the Gross Domestic Product and copyrighted works are the largest single United States export." Letter of Cary H. Sherman, President, Recording Industry Association of America, to Sen. Norm Coleman, Chairman, Permanent Subcommittee on Investigations of the Senate Committee on Government Affairs, Aug. 14, 2003, *available at* http://www.senate.gov/~govt-aff/_files/081403riaaresponseltr.pdf (last visited Sept. 25, 2003).

[11] "The monopoly created by copyright . . . rewards the individual author *in order to benefit the public.*" Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (dissenting opinion) (emphasis added). "Encouragement of individual effort by personal gain is the best *way to advance public welfare* through the talents of authors and inventors in 'Science and the useful Arts.'" Mazer v. Stein, 347 U.S. 201, 219 (1954) (emphasis added). "[T]he ultimate aim [of copyright] is . . . to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932), *quoted in* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2001) [hereinafter NIMMER ON COPYRIGHT]. James Madison wrote that in the case of copyright, the "public good fully coincides . . . with the claims of individuals." THE FEDERALIST 43. Copyright accomplishes its public benefit by granting a temporary monopoly on works of authorship to the author. The author can thereby (for a limited

right's workings were largely invisible to those outside the copyright industries. The law worked silently in the background, providing incentives for the creation of works of authorship which, in the fullness of time, became the common property of everyone. The lack of public representation, however, did produce some odd side effects. For example, the Copyright Act includes almost nothing addressing the rights of the public to use copyrighted works. This is unusual for a statute that spells out copyright owner's rights in broad, inclusive language and precisely and narrowly carves out the rights of (industry) users. The few provisions that exist seem almost accidental; the first sale doctrine, for instance, which says that the owner of a legally-made copy may "dispose of the possession of that copy" without the copyright owner's permission,[12] expands the scope of permitted activity by permitting members of the public to lend copies to their neighbors. But it seems to be aimed more at libraries than at the public at large.

For a long time—for most of the last century, in fact—this was not a problem. Members of the public weren't being sued, or threatened with lawsuits, by content owners, so it didn't really matter that their rights weren't spelled out clearly, or at all. But as digital technology has advanced, the public has for the first time been able to obtain content in ways that bypass the content industry. Today, lawsuits against the public for copyright infringement are a reality.

Two years ago, just as the possibility of widespread copyright litigation against the public was beginning to take shape, two books were published, each addressing copyright policy and each aimed at a general audience. Jessica Litman's *Digital Copyright*[13] is a masterful study of the American copyright law in the last 100 years, and Siva Vaidhy-

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period of time) extract monopoly rents, which in turn can subsidize the creation of more works. When the author licenses the publication of a work to a publisher, the latter becomes the beneficiary of the copyright law and the sole source for the work, which (in at least some cases) subsidizes the distribution of works to the public. No significant amount of money is earned, and thus no significant economic incentive is created, until the work is made accessible to the public. It has been true historically that some members of the public subsidize these activities more than do others; that is, some will purchase copies, while others seek out the work in places where it may be accessed for free (for example, in a library). Copyright law has tolerated this because the public is its intended beneficiary; copyright ultimately exists to benefit the public, not the author. Thus it is no accident that the owner of a legally-made copy is permitted to lend it to others; this is one way by which the public captures an immediate benefit from the copyright monopoly. *See* 17 U.S.C. § 109(a) (2000). And it bears repeating that the monopoly is temporary: Once the work falls into the public domain, it may be used and re-used without having to seek permission or pay a fee.

[12] 17 U.S.C. § 109(a) (2000).

[13] JESSICA LITMAN, DIGITAL COPYRIGHT (2001) [hereinafter DIGITAL COPYRIGHT].

anathan's *Copyrights and Copywrongs*[14] is a cultural history of copyright in America over roughly the same period. In part, the purpose of this article is to review both books, and make the case that their contents are important to everyone affected by copyright—that is to say, to everyone. But it has a number of other aims, too. In Part II, it briefly addresses some foundational ideas of copyright, and shows how digitization has to a large extent invalidated certain of the assumptions on which copyright has been based for the last 400 years. This leads to the content industry's struggle to maintain its business model in the face of an unprecedented threat, one which is highly dangerous to the public interest. In Part III, it addresses Litman's and Vaidhyanathan's books and describes what they contribute to understanding of copyright, both for the public and for copyright professionals. Finally, in Part IV, it considers developments in copyright since Litman's and Vaidhyanathan's books were published, placing the events of the last three years in the context of the patterns revealed by these two authors.

II. From Content Containers to Containerless Content

A. *Copyright Foundations*

American federal copyright is specifically authorized by the Constitution, which provides that, "Congress shall have the power . . . to promote the progress of science . . . by securing to authors . . . for limited times, the exclusive right to their writings . . . ."[15]

There are three important points that even a cursory look at this Constitutional language will reveal. First, Congress is given the power to accomplish something, "to promote the progress of science," by legislating in a particular way—"by securing [exclusive rights] to authors for limited times." Second, the rights are given to *authors*; it is this that defines copyright.[16] An author's economic rights are freely transferable,[17] however, and the most-common scenario is that authors transfer some or all of them to an entity (for example, a publisher, film distributor, or music recording company) with access to the channels of distri-

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[14] Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity (2001) [hereinafter Copyrights and Copywrongs].

[15] U.S. Const. art. I, § 8, cl. 8.

[16] Copyright-like rights that are not conditioned upon authorship are often called "neighboring" rights. These are a class of rights, common in Europe, much less so in the U.S., that resemble copyright but inhere in entities that arguably lack a claim to authorship, for example radio broadcasters, performers, and others. *See* S.M. Stewart, International Copyright and Neighboring Rights, § 7.15 (2d ed. 1989).

[17] *See* 17 U.S.C. §§ 101 (definition of "transfer of copyright ownership"), 201(d)(1) (ownership of copyright may be transferred "in whole or in part") (2000).

bution. Finally, the term of copyright is limited.[18] In light of the Constitution, copyright can be understood as a limited monopoly interest ("exclusive right") that the government bestows ("Congress shall have the power") on authors, with a view to stimulating the production of creative expression ("promote the progress of science"). Congress has no power under the Constitution to adopt copyright laws that exceed this Constitutional authorization.

The current American copyright statute is the Copyright Act of 1976, as amended.[19] At its inception, the Act gave the author certain exclusive rights,[20] which were the right to: (1) make copies; (2) make adaptations; (3) publicly distribute copies; (4) publicly perform; and (5) publicly display the work.[21] These rights were broad enough that, taken together, they were almost—with two notable exceptions—the entire set of rights needed to commercially exploit the author's work. The first exception, that is, the first "missing right," is the right to distribute the work after its first sale (for example, to lend it or resell it). Under the "first sale doctrine," this right is reserved to the owner of a lawful copy, who may "sell or otherwise dispose of the possession of that copy"[22] in any way she sees fit. This is why the video rental indus-

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[18] Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769 (2003). Nevertheless, in Eldred, the Supreme Court held that a copyright term that lasts through 99.8% of the economic value of the copyright is not perpetual: "It is doubtful, however, that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar." 537 U.S. at 210 n.16; 123 S. Ct. at 784 n.16.

[19] *See supra* note 5.

[20] The rights given to authors by American copyright have steadily expanded. The first American copyright statute gave authors only the rights of "printing, reprinting, publishing and vending." Act of May 31, 1790, ch.15, § 1, 1 Stat. 124, *quoted in* DIGITAL COPYRIGHT, *supra* note 13, at 32 n.2 (2001). As Professor Litman points out, in an age when the only means of exploiting works was the sale of copies, this worked well enough, but as soon as other means of exploitation became possible and commonplace, additional rights were needed. *Id.* at 22-23.

[21] *See* 17 U.S.C. § 106(1)-(5) (2000). The right conferred by section 106(6) was added in 1995. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, *codified at* 17 U.S.C. § 106(6) (2000).

[22] 17 U.S.C. § 109(a) (2000). A word of caution is in order, however. The first sale doctrine applies only to "owners" of lawfully-made copies. *Id.* This excludes virtually all software and internet content, which is licensed rather than sold. *See infra* note 198. In addition, sound recordings and computer programs may not be "dispos[ed] of . . . by rental, lease or lending, or by any other act or practice in the nature of rental, lease or lending." 17 U.S.C. § 109(b)(1)(A) (2000). One key right was added since 1976, in partial recognition of the role digital technology would ultimately play. This is the right of digital performance in sound recordings, added in 1995 at the behest of the recording industry. *See* 17 U.S.C. § 106(6). As has become common, especially for recent amendments to the Act, the section 106(6) right, as a whole, is a composite of a broad right and several highly complex, specific exceptions. The right of section 106(6) is conferred in only 19 words. The exceptions, contained in section 114, require 7,316 words. *See* 17 U.S.C. § 114(d)-(j) (2000).

try (and libraries) can exist without paying royalties.[23] The second exception is that owners of copyright in sound recordings (generally speaking, record companies) did not have an exclusive right of public performance in their works.[24] Musical works, however, do carry a public performance right, and so when sound recordings embodying musical works were performed publicly, the copyright owners of musical works (the songwriters and publishers) received compensation while the record companies did not.[25] Finally, none of these exclusive rights under copyright extend to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.[26]

Since 1976, Congress has not abridged any of these rights. However, in 1995, it added one right, the digital performance right in sound recordings.[27] By the mid-1990s, technology presaged a future in which record companies would become entirely obsolete. To understand this, imagine a world in which musical content can be selected and listened to without ever purchasing a tangible object. Now imagine that this can be done in your home, at work, in your car, while jogging, and anywhere else you might want to do it. In such a world, record companies would be unnecessary, because no one would need to possess their products in order to listen to music. The delivery of audio performances on request would doubtlessly be a "public performance,"[28] but before 1995 such a performance was not compensable to the record company. Record companies made their money by selling copies, not

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[23] Since the late 1990s, however, video rental enterprises typically enter into revenue-sharing arrangements with the owners of video content (that is, movie studios), notwithstanding that the Copyright Act does not require the content owner's permission. *See* David Pogue, *The File-Sharing Debates*, N.Y. TIMES, Oct. 9, 2003, at http://www.nytimes.com/2003/10/09/technology/circuits/09POGUE-EMAIL.html (last visited Oct. 10, 2003). Such agreements could be useful to video rental enterprises for many reasons, including access to broad selection, early releases, and favorable pricing.

[24] *See* 17 U.S.C. § 114(a) (2000).

[25] *See id.* § 106(4) ("in the case of . . . musical . . . works, to perform the copyrighted work publicly"). On the distinction between sound recordings and musical works, see Niels B. Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 WILLIAM MITCHELL L. REV. 1001, 1011-13 (2002).

[26] 17 U.S.C. § 102(b). *See, e.g.*, Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

[27] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336. *See* Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2001).

[28] *See* 17 U.S.C. § 101 (definition of "to perform or display a work 'publicly'") para. 2 (2000):

> To perform . . . a work 'publicly' means . . . (2) to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

Id.

from public performances.[29] The advent of such a "celestial jukebox" would make record companies superfluous, and so the 1995 legislation made a digital public performance a royalty-generating event for the owner of copyright in the sound recording.[30] In this way, the celestial jukebox would generate some revenue for an industry that currently has a large stake in the public consumption of music.

But, in hindsight, the new legislation was too-far ahead of its time. While it offered some protection against the relatively distant future and the advent of music-on-demand-anywhere, it did little to shield record companies from the short-term changes that were already gaining momentum. These were faster, and in some ways more profound, than the industry realized: content was separating from the containers in which it historically had been packaged. Until the late 1990s, it was more or less impossible for the public to acquire content without acquiring some tangible object in which the content was embedded. Digital technology is changing that, and the change will be permanent. The next section will examine the phenomenon of containerless content and its counterpart, digital distribution.

B. *Containerless Content and Digital Distribution*

Historically, content was closely identified with the material object in which the content was embodied.[31] People referred to a "book," and

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[29] Of course, record companies had no objection in principle to being compensated for public performances of their sound recordings. However, their desire for such a royalty was counterbalanced by the broadcast industry's equally ardent desire *not* to pay such a royalty, and no such right found its way into the Copyright Act until digital technology threatened record companies *raison d'etre*.

> [T]he Committee has sought to address the concerns of record producers . . . regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers . . . and broadcasters that have served . . . these industries well for decades. Accordingly, the Committee has chosen to create a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.

S. Rep. No. 104-128, at 17 (1995).

[30] More detail on the compromise leading to the Digital Performance Right in Sound Recordings Act of 1995 can be found in Schaumann, *supra* note 25, at 1014-17.

[31] The identification between content and container is so strong that some argue that copyright actually protects the container. *See* Dan L. Burk, *The Trouble With Trespass*, 4 J. SMALL & EMERGING BUS. LAW 27, 40 (2000) ("copyright in fact protect[s] only the physical embodiments of . . . creativity"); John Perry Barlow, *The Economy of Ideas*, WIRED *2 (March 1994), *available at* http://www.wired.com/wired/archive/2.03/economy.ideas.html (last visited Sept. 16, 2003) ("the bottle was protected, not the wine"). Indeed, copyright does not attach until a work has been "fixed" in a tangible medium of expression. 17 U.S.C. § 102(a) (2000). Nevertheless, to say that copyright attaches to the container rather than the content pushes the identification between content and container too far. The fixation requirement is merely a *condition* of protecting the work; the medium does not thereby be-

meant the physical aggregation of paper, cardboard, cloth, thread and ink, as well as the literary work that was manifested within its physical envelope. Much the same can be said of most other kinds of works, for example CD's, photographs, paintings, and so on. Reproducing and distributing content containers was the function of the publishing industry. Copyright infringement was limited in part by the difficulty of reproducing and distributing content's physical containers.[32] The elements of tedium and nuisance,[33] as well as the inaccessibility to most people of the industrial materials and processes needed to make content containers, made personal, noncommercial infringement necessarily a small-scale and economically insignificant activity. In addition, the mechanical processes involved in reproducing analog containers (for example, recording an audio- or videotape) ensured that copies made from copies would degrade. After only a few generations, copies became unacceptably garbled. The fact that high-quality copies could be made only from the original or, perhaps, from a first-generation copy limited the ability of infringing copies to spread. Copyright law took these practical difficulties for granted, functioning side-by-side with them to protect the content industry. While personal, noncommercial infringement was in theory actionable, lawsuits were usually reserved for sellers of counterfeit copyrighted goods and large-scale commercial infringers; the former was limited by the practical difficulties of container copying and distribution. The intangible work and the tangible embodiment of the work were closely identified, and copyright law no less than the population at large incorporated that identification and assumed it would always be so.

But the congruence of content and container lasted only until the widespread adoption of digital technology. Digitization of content is rapidly divorcing content from its previously inescapable material em-

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come the *object* of protection. *Cf.* 17 U.S.C. § 202 (ownership of a copyright is distinct from ownership of a work's container). The discussion itself, however, is powerful testimony to the close identification between container and content. It is noteworthy that in most civil law countries, there is no fixation requirement; copyright can exist even in unfixed (and therefore entirely containerless) works. *See* Stewart, *supra* note 16, § 4.05 ("In [civil law] jurisdictions a lecture given without a script or a musical performance of a work without a score is protected. . . . [T]he Berne Convention (1971) does not take sides . . . .").

[32] *See* DIGITAL COPYRIGHT, *supra* note 13, at 171 ("Newsstands turn out to be an effective way of marketing newspapers and magazines in part because it is difficult as a practical matter to make and distribute additional copies of newpapers and magazines that one buys from the newsstand.").

[33] Stephen Manes, *Surfing and Stealing: An Author's Perspective*, 23 COLUM.-VLA J.L. & ARTS 127, 133 (1999) ("A few years ago, when Ricoh announced a copying machine that turned the pages of books automatically, Paul Aiken, [executive director of the Authors Guild], was quoted as saying that it 'removed the tedium from copyright infringement.'").

bodiment. Books, music, movies—all forms of content are being liberated from the material objects that were historically necessary to read, listen to or view the content they captured. And this separation of content from container is dramatically changing the way we think about content. Content can now be copied without the need to reproduce its container,[34] and containerless digital content presents few of the practical obstacles to copying that limit infringement of analog containers. A click of the mouse, and a copy is made. And digital copying is accurate to a degree not possible in the analog domain: it is effectively generationless. A copy of a copy of a copy is indistinguishable from the original.[35] This point bears repeating: digital, containerless content is trivially easy to copy, and the copies are generationless. This greatly facilitates personal, noncommercial copying, as well as large-scale, organized piracy.

It seems hard to imagine a more threatening series of developments for the content industry, at least as far as copying is concerned. But even more dangerous—and more revolutionary—than changes in *copying* technology were changes in the technology for content *distribution*. The content industry's business model is based on dominating distribution channels.[36] Content must be distributed before it has eco-

[34] Digital content, of course, still needs to be stored in something, but the containers are generic (*e.g.*, hard disks), and they do not have to be reproduced when the content is reproduced. I may need a disk on which to store the content you emailed to me, but I don't need a copy of *your* disk. And the process of emailing (that is, distributing) the content to me takes place through a digital pipe; no container need ever change hands.

[35] This in itself poses a formidable threat to the content industry. When generationless digital copying first became available to consumers (in the form of digital audiotape ("DAT") equipment), the music industry banded together and threatened to sue the first U.S. importer of consumer DAT technology. *See* Schaumann, *supra* note 25, at 1008-10. A lawsuit was in fact filed, precipitating inter-industry negotiations that resulted in a compromise: The content industry agreed to permit DAT technology, on the condition that its ability to make generationless copies was eliminated. *Id.*

[36] Loosely speaking, while creation is the function of an author, distribution is the function of a publisher. The content industry is principally a publishing enterprise; it has never been able to dominate the creation of works. While the industry can provide access to the latest technologies of creation, and that is always nice, creation does not depend on it. Most authors continue to work off the payrolls of American content providers, which purchase or license the creative fruit of the authors' work. American copyright provides incentives for both creation and distribution. *See* Eldred v. Ashcroft, 537 U.S. 186, 205-06, 123 S.Ct. 769, 781 (2003); Harper & Row, Pubs., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("copyright supplies the economic incentive to create and disseminate" works of authorship). In order to encourage distribution, American copyright assures exclusivity and thus monopoly pricing during the life of the copyright. The fact that distribution technology for containerless works is so cheap has led some to conclude that copyright protection for distribution is no longer justifiable. *E.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002). Even the creation of certain new works, for example sound recordings, has become

nomic value; consumers don't pay for what they can't access. And as long as content was available only in physical containers, access to the distribution channels required doing business with the content industry.[37] The content industry had access to manufacturing facilities, trucks that could haul tons of product, warehouses, relationships with wholesalers and retailers, sales forces, marketing budgets, and all the other essentials of a national distribution enterprise. Foreign distribution historically was left to foreign entities, because product distribution requires a substantial local presence. These foreign distributors were sometimes, but not always, affiliated with their U.S. counterparts.

Containerless content changes all this. The distributor of containerless content needs only a digital pipe through which the content can be pushed. The essential attribute of a distribution channel for containerless content is bandwidth (referring to the amount of data that can be pushed through a digital connection in a unit of time), rather than trucks, warehouses, and huge capital investments. In the beginning (say, 10 years ago) bandwidth was still fairly expensive, relative to container-bound content, and so the content industry's distribution oligopoly maintained its competitive advantage. Internet time, however, passes quickly. Today, anyone who can afford to pay $50 a month can obtain enough bandwidth to distribute large amounts of content worldwide, 24 hours a day, seven days a week. Because the cost is so low, it can be (and is being) done without any profit motive, something unheard of before digital technology. In other words, the impact of containerless content is to reduce to zero the marginal cost of distributing a relatively small number of copies. Personal, noncommercial distribution is free of charge. On a commercial scale, digital distribution requires dedicated servers and much more bandwidth than what is available for most personal internet connections, as well as marketing,

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much cheaper. It is now possible to make a high-quality digital recording on equipment that is available for under $30,000. *See id.* at 306. While that relatively small investment will not purchase the latest or best technology, it is adequate for a professional result.

[37] This is the reason that a "distribution deal" was (and still is) highly sought-after by musicians and film-makers. One can make the record (or the movie), but if it isn't in stores or on screens no one will ever know about it. *See Music Distribution for Independent Artists & Labels, available at* http://www.musicdistribution.com (last visited August 11, 2003); *Q&A With Kenny Love: The Elusive Pressing and Distribution Deal*, at http://www.musicbizacademy.com/comment/kloveqa3.html (last visited August 11, 2003); *Music Distribution*, at http://www.nzmusic.org.nz/pag.cfm?i=495) (last visited August 11, 2003); Schuyler M. Moore, *Distribution Agreements*, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 369 (John David Viera, et al., eds., 1998-99); Michael L. Maddren, *Choice of Entity and Securities Aspects of Independent Film Offerings by First-Time Filmmakers*, 22 HASTINGS COMM. & ENT. L.J. 65, 91 (1999) ("Since distribution is such a crucial factor in a film's success, the fact that a filmmaker does not have a distribution agreement, as well as the fact that he may be forced to deal with an independent distribution company, should be disclosed to offerees.").

advertising, and relationships. Commercial digital distribution isn't free, but personal distribution is.

Digitization, with its combination of generationless copying and containerless distribution, is thus profoundly subversive of the content industry's business model.[38] In fact, digitization makes it possible for consumers to replicate most of the content industry's value proposition—easily accessible, high-quality content, with minimal (or no) restrictions on use[39]—at a price approaching zero.[40] Surprisingly, the content industry apparently didn't see this coming.[41] The music business paid little attention to the new technology until Napster, the first widely-accepted (and illegal) P2P distribution network,[42] appeared and

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[38] *See* Lionel S. Sobel, *DRM as an Enabler of Business Models: ISPs as Digital Retailers*, 18 BERKELEY TECH. L.J. 667, 667-68 (2003) ("Unauthorized digital reproduction and distribution have shattered traditional music industry business models and are on the verge of doing the same to movie industry models.").

[39] Fearing widespread piracy, the content industry attempted to limit the ability of consumers to use digital works, by preventing copying, transferring to other devices, eliminating access when subscriptions expire, and other similar strategies. Although these measures are both technologically feasible and are legally backed up by the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 ("DMCA"), *see* 17 U.S.C. § 1201 (2000), they ultimately failed, because consumers showed no interest in the limited-use content the industry was supplying. Later, when Apple Computer introduced its iTunes service, which offered a large catalog of material, with few restrictions on use, consumers responded favorably, downloading more than five million works in the first eight weeks, all at a time when only Macintosh users—a small fraction of the total number of internet users—could make use of the service. *See* John Zahlaway, *New Music-Download Service sets Sights on Windows Users*, LIVEDAILY, at http://www.livedaily.com/news/5246.html (July 22, 2003) (last visited Sept. 17, 2003). The value of the industry's product is thus linked to the freedom with which the consumer can use the digital work.

[40] There are other important sources of added value from the content industry; for example locating talent and bankrolling initial creative ventures (such as recording music, shooting a movie, writing a book). Often, however, these functions are carried out by smaller companies. If successful, the project becomes a party to a distribution contract, *see supra* note 37, with an international content company. In such an arrangement, the international content company distributes the content to agreed-upon markets, in exchange for a percentage of sales. The largest content companies (in the music industry, the "Big Five"—AOL Time Warner, Bertelsmann, EMI Group, Sony Music Entertainment, and Universal Music Group) are also the ones most tied to distribution, and therefore most threatened by digital reproduction and distribution.

[41] In addition to overlooking the potential markets created by digital technology, the music industry in 1992 negotiated a legislative compromise that confounded containers with content, thereby leaving MP3 files out of the definition of "digital musical recordings." Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. §§ 1001-1010 (2000)); *see also* Recording Industry Ass'n v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999); *see infra* notes 50-69 and accompanying text.

[42] P2P technology reconfigures the typical model of information storage and retrieval. Non-P2P networks involve a "one-to-many" distribution model, in which a central server stores information and transmits it to user on request. P2P is a "many-to-many" model, in which the information is stored locally with a user who permits others users to search his or

forced the industry to take digital distribution seriously. Hollywood, too, was passive until it saw the impact of P2P distribution on the music business.[43] The content industry missed its first, crucial window of opportunity to get high-quality, legal digital distribution services in front of consumers. Had they done so, many consumers might have chosen legal services over illegal ones. Instead, the legal digital services record companies provided were too little, too late.[44] And worse still, the post-Napster generation of illegal P2P services has proven to be extremely difficult to close down.[45]

C. *The Vanishing Rights of the Public*

P2P distribution eventually forced the content industry to recognize the impact of containerless distribution. The industry responded with an all-out assault on the enabling digital technology. Industry lobbyists requested, and Congress enacted, the Digital Millennium Copyright Act of 1998 ("DMCA"),[46] a law restricting technology that can be

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her hard disk and retrieve desired information. Each user of a P2P network can be a storage point. Using P2P technology to search for a popular song, for example, is likely to turn up hundreds of other users who have the song available for download. *See* Schaumann, *supra* note 25, at 1020-23.

[43] Hollywood has made fewer missteps than record companies in addressing digital technology. This is no doubt due in part to the vastly larger size of digital video files relative to music files, especially when the latter are compressed into the MP3 format. The immense size of a digital movie continues to be unwieldy for most internet users. While that will very likely change in the future, as compression technology and bandwidth improve, Hollywood is already putting compelling legal alternatives in front of viewers. Digital video-on-demand, for instance, permits a viewer to watch a movie, pause, fast-forward, and generally do all of the things one can do with a rented videotape, for a 24-hour period. In the author's market, the price is the same as renting a new release at Blockbuster, but one doesn't need to get up and go anywhere, and there is no videotape to return. Picture and audio quality are exemplary. This kind of a legal alternative makes the illegal alternatives far less attractive, because they involve time, inconvenience, lower quality, and at least some potential risk.

[44] *See* Amy Harmon, *Grudingly, Music Labels Sell Their Songs Online*, N.Y. TIMES, July 1, 2002 at C1; Edna Gundersen, *Any way you spin it, music industry in trouble*, USA TODAY, June 4, 2002, at A1; Nick Wingfield, *Even You Can Download Music: Sites Add User Friendly Features*, WALL ST. J., May 15, 2002, *available at* http://online.wsj.com/article_print/0,,SB1021409028751246560,00.html (last visited Aug. 11, 2003); Anna Wilde Matthews, Martin Peers & Nick Wingfield, *Music Industry is Finally Online, But there Aren't Many Listeners*, WALL ST. J., May 7, 2002, *available at* http://online.wsj.com/article_print/0,,SB1020718334251265480,00.html (last visited Aug. 11, 2003). Most recently, Apple Computer's iTunes service appears to be succeeding where the content industry failed.

[45] *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003) (granting summary judgment motions of two defendants who supply P2P technology; distinguishing the P2P technology at issue from the technology supplied by Napster).

[46] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

used to access copyrighted works.[47] And in addition to waging battles in Congress, the content industry has both threatened and filed lawsuits to try to control technology and intimidate consumers—although the industry has sometimes "won" when it has lost its lawsuits, and "lost" when the lawsuits are won. There may be no better example than *Sony Corp. v. Universal City Studios, Inc.*,[48] in which Hollywood attempted to control the sale of videocassette recorders. Even though Hollywood lost the case, sales of movies on videotape generate more revenue for it today than do box-office ticket sales.[49]

1. Digital Audiotape and the Audio Home Recording Act

Taking a page from Hollywood's book, in 1992 the music industry threatened to sue the first person to import a consumer digital audiotape recorder. When Sony went ahead with its plans a lawsuit was filed against it, reprising the events surrounding the videocassette recorder of ten years earlier.[50] The resulting negotiations between content owners and the consumer electronics industry led to the Audio Home Recording Act of 1992 (the "AHRA").[51] The AHRA, among other things, required all consumer digital audiotape equipment to include built-in protection against digital serial copying—the practice of making a digital copy of a digital copy.[52] Serial copying, which takes advantage of the generationless quality of digital recordings, is immensely threatening to the content industry because it permits the viral

[47] The DMCA prohibits the manufacture, importation, provision, or offering to public of any "technology, product, service, device, component, or part thereof" that is used to defeat access-restriction schemes that lock up copyrighted works (for example, encryption). 17 U.S.C. § 1201(a)(2) (2000). It is clear that the section prohibits software that can be used to defeat access controls; in one of this section's first applications, a court found a violation when a Norwegian teenager defeated the encryption for DVDs in order to play them on a computer running the Linux operating system. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437 (2d Cir. 2001). Recently, new and far more restrictive legislation has been proposed. *See* discussion *infra* Part IV.

[48] 464 U.S. 417 (1984).

[49] According to one commentator, "box office revenues make up less than a quarter of a film's total take, with the largest amount coming from rental and sales of DVD's." Jeffrey R. Armstrong, Sony, Napster, *and* Aimster: *An Analysis of Dissimilar Applications of the Copyright Law to Similar Technologies*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 13 (2003). Even ten years ago, the home video market doubled box-office revenue. Nicholas E. Sciorra, *Self-Help & Contributory Infringement: The Law and Legal Thought Behind a Little "Black-Box,"* 11 CARDOZO ARTS & ENT L.J. 905, 907 (1993).

[50] Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. filed July 9, 1990). *See generally* 2 NIMMER ON COPYRIGHT, § 8B.01[C], at 8B-7 (2001).

[51] Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. §§ 1001-1010 (2000)).

[52] 17 U.S.C. § 1001(11) (2000) (definition of "serial copying"); *id.* § 1002(a) (requirement of serial copy control).

spread of copies. That is, every recipient of a copy can make a vast number of additional copies, the recipients of which can make still more copies, and so on. No doubt the content industry believed they had successfully eliminated a dangerous technology by limiting the ability of consumers to copy serially. That compromise, however, came at a price: the content industry agreed to a limitation on its ability to sue consumers, agreeing that:

> No action may be brought under [the Copyright Act] alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or *based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.*[53]

Just what this language meant would soon be put to the test.

2. *Diamond Multimedia* and the MP3 Format

During the mid-1990's, the MP3 audio format[54] became popular for the digital transfer of audio over the internet.[55] As interest in MP3-encoded music grew, a small California company called Diamond Multimedia Systems Inc. looked for new markets created by MP3 music.[56] Diamond eventually began to manufacture and market a small portable device called the "Rio."[57] The Rio, similar in size and functionality to a Sony Walkman, played MP3 files rather than CDs or tapes. These music files were usually downloaded from the internet and then transferred to the Rio using the included software. In 1999 the RIAA filed a lawsuit against Diamond.[58] The RIAA claimed that the Rio was a "digital audio recording device," and therefore the AHRA required the Rio to include serial copy prevention technology.[59] But in the 1992 compromise that produced the AHRA,[60] the content industry agreed to exempt computer hardware and peripheral devices from the Act's requirements, including the requirement that serial copying be pre-

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[53] 17 U.S.C. § 1008 (2000) (emphasis added).

[54] MP3 files contain music converted to digital form and then compressed using an algorithm that dramatically reduces the amount of bytes needed to represent the music. *See* Recording Industry Ass'n v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1073-74 (9th Cir. 1999). Although some information is lost in compression (*i.e.*, the compression is "lossy"), MP3 files when played are entirely acceptable to the average consumer. Most of the music files distributed via P2P networks are in the MP3 format.

[55] *Diamond*, 180 F.3d at 1074.

[56] *Id.*

[57] *Id* at 1073.

[58] *Id* at 1075.

[59] *Id.* at 1075.

[60] *See Diamond*, 180 F.3d at 1078 n.6.

vented.[61] The Ninth Circuit thus had to decide whether the Rio was a "digital audio recording device" within the AHRA, or whether the Rio was so bound up with the use of a computer that it was exempt from AHRA requirements. If it was subject to AHRA regulation, the Rio would be required to incorporate serial copy prevention; if not, then no copy prevention was mandated.

It seems to be a straightforward question: is the Rio a "digital audio recording device" or isn't it? Copyright law had become so intricate, however, that almost nothing was as simple as it seemed. Applying the AHRA, the Ninth Circuit held that the Rio would be a digital audio recording device only if it were capable of making a "digital audio copied recording," which was in turn defined as a digital reproduction of a "digital musical recording."[62] A great deal, then, turned on whether MP3 files were "digital musical recordings." To a layperson, the answer seems obvious: MP3 files are digital, they are musical, and they are recordings. Legally, however, it turns out they are no such thing: "Digital musical recording" is defined in the AHRA as a *material object* with certain properties, namely, that it stores sounds, and that the sounds can be reproduced from it.[63] (The paradigm digital musical recording is a CD.) Expressly carved out from the definition of "digital musical recordings" are material objects "in which one or more computer programs are fixed."[64] Computer hard disks, the Ninth Circuit reasoned, cannot be "digital musical recordings," because they contain computer programs, as well as many other things besides fixations of audio and incidental instructions.[65] Because the

[61] 17 U.S.C. §§ 1001(3), (4)(B)(ii), (5)(B)(ii). One might wonder why the content industry agreed to exempt technology that within a few years would become arguably the biggest threat in history to the industry's business model. The answer is that in 1992, the vast majority of personal computers lacked the storage and transmission capabilities necessary to make them practical devices for copying and distributing musical content. *See* Schaumann, *supra* note 25, at 1010. Evidently the industry did not anticipate the how quickly storage and distribution technology would progress.

[62] *Diamond*, 180 F.3d at 1075-76.

[63] 17 U.S.C. § 1001(1); *see also Diamond*, 180 F.3d at 1076.

[64] 17 U.S.C. § 1001(5)(B); *see also Diamond*, 180 F.3d at 1076. Also excluded from the definition are material objects that contain fixations of things other than sounds (except instructions incidental to the sounds). 17 U.S.C. § 1001(5)(A).

[65] *Diamond*, 180 F.3d at 1076. Because a device is a "digital audio recording device" only if it can make "digital audio copied recordings," which are in turn digital reproductions of "digital musical recordings," the determination that MP3 files are not digital musical recordings would suffice to decide this part of the case. However, for good measure, the Ninth Circuit went on to decide that computers and their hard disks are not "digital audio recording devices" because their primary purpose is not to make digital audio copied recordings. *Id.* at 1078. The court also addressed the RIAA's contention that the Rio could indirectly reproduce a transmission of a digital musical recording. The Ninth Circuit held that digital audio recording devices must be able to do at least one of two things: either directly

Rio can only receive MP3 files that are transferred from a computer hard disk—which are *not* "digital musical recordings"—the Rio is not a "digital audio recording device."[66]

The *Diamond Multimedia* case (and the AHRA, which it interpreted) furnishes a good example of copyright law's reliance on assumptions about the congruence of content and container. The case turned on whether an MP3 file was a "digital musical recording"; from the perspective of content, it would seem the answer must be "yes." What else would one call something that is digital, musical, and recorded? But the statute defines digital musical recordings by reference to containers, and a container that includes computer programs along with music cannot be a digital musical recording.[67] Once technology made a content-specific container unnecessary, the statute became obsolete.[68] Containers aren't synonymous with content anymore.

The *Sony* and *Diamond Multimedia* cases are chapters in the story of the content industry's efforts to control threatening technology. Like *Sony*, *Diamond Multimedia* is an example of the industry's litigation losses becoming business wins. Although in *Diamond,* the RIAA tried and failed to control MP3 technology, the reason for that failure—that computer fixations in the MP3 format are not "digital musical recordings"—would just a few years later become part of the foundation of the content industry's attack on P2P technology.

3. *MAI* and the Nature of a Digital "Copy"

While Diamond was contemplating the possibilities of the MP3 format, the Ninth Circuit decided what might be the single most important copyright case of the digital era to date. That case is *MAI Systems Corp. v. Peak Computer, Inc.*,[69] the aftershocks of which are still reverberating. *MAI* involved a manufacturer of mainframe hardware and software (MAI), and an upstart company (Peak) that attempted to take away some of MAI's business by servicing MAI's computers.[70] When

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reproduce digital musical recordings, or directly reproduce *transmissions* of digital musical recordings (thereby *indirectly* reproducing the underlying digital musical recordings). *Id.* at 1076. The Rio could do neither. *Id.* at 1079-81.

[66] *Id.* at 1081.

[67] 17 U.S.C. § 1001(5)(A) (2000).

[68] The consumer digital audio tape format from which the statute was supposed to protect the content industry never caught on. Today, the only digital consumer format about which the industry cares—MP3—is unaddressed by the AHRA. From the industry's perspective, however, that may not be a bad thing. *See infra* notes 140-41 and accompanying text.

[69] 991 F.2d 511 (9th Cir. 1993).

[70] *Id.* at 513.

MAI's customer service manager and three other employees joined Peak, MAI sued.[71]

Lawsuits by former employers of key employees against the latter's new employers are, of course, routine. But among the causes of action MAI asserted was, strangely enough, copyright infringement[72]—based not on the copying of MAI manuals, etc. (which might be expected), but rather on the *operation* of MAI computers.[73] The Ninth Circuit held this to be infringement. Specifically, the court held, when a computer runs, it necessarily loads operating system software into its random access memory ("RAM") from its "permanent" storage device (which could be tape, floppy disk, hard disk, or anything else non-volatile; *i.e.*, that does not require uninterrupted electrical power to store information). RAM, by contrast, is volatile, as anyone knows who has suffered a power interruption while working on a computer. The issue therefore was whether the copying of operating system software that takes place inside a computer, when it is turned on, is "copying" that infringes the software's copyright.[74]

Many people confronted with this proposition would find it astonishing. After all, the software on a hard (or floppy) disk cannot be *used* without this kind of copying. Surely the law cannot require a separate or additional license to *use* software, once one is in possession of a licensed copy? But that is exactly what the Ninth Circuit held. The court held that the copy made in a computer's RAM is a "copy" under the Copyright Act,[75] and therefore that operating an MAI computer was copyright infringement when the operator did not have a license from MAI to do so. In this way, the Ninth Circuit created what amounts to a new exclusive right under the Copyright Act: the exclusive right to use software.[76] Many have criticized this "RAM copy doctrine," often on persuasive grounds.[77] Regardless, it has fundamentally

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[71] *Id.*

[72] "The complaint includes counts alleging copyright infringement, misappropriation of trade secrets, trademark infringement, false advertising, and unfair competition." *Id.*

[73] *Id.* at 514. Also claimed as infringement were Peak's unlicensed use of MAI software at its headquarters and its loaning of MAI hardware and software to Peak customers without authorization. *Id.* at 517.

[74] *Id.* at 517-18.

[75] *Id.* at 519.

[76] *See generally* Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT L.J. 29 (1994). Chapter Four of Digital Copyright is based in part on this article, which I highly recommend for those interested in the "RAM copy doctrine."

[77] The first case finding a defendant liable for making a RAM copy was a district court case in Illinois, which was almost entirely devoid of reasoning. *See* ISC-Bunker Ramo Corp. v. Altech, Inc., 765 F.Supp. 1310, 1332 (N.D. Ill. 1990). Thereafter, the idea of RAM "copies" remained obscure until 1993, when it returned in the *MAI* case. Like *Altech*, however, *MAI* did little more than conclude that copies in RAM were fixed and therefore legally

changed the law of digital copyright. For it is not just software that is loaded into a computer's RAM: all content accessed digitally is transferred to RAM before it is made perceptible to humans.[78] Thus, all content in digital format must be licensed not only for reproduction and distribution, but also for use.[79]

4. Legislative Erosion in the Late 1990s

In 1997, and again in 1998, copyright was strengthened, and in each case the public's rights respecting copyrighted works were diminished. First, in 1997, Congress passed the Copyright Term Extension Act,[80] extending the term of copyright by 20 years. Today, if the author is a natural person, copyright lasts for the author's life plus seventy years.[81] If the author is a corporation, or in the case of works works for hire and works for which the author's identity is unknown, copyright lasts for the shorter of 95 years from publication, or 120 years from creation.[82] These periods are so long that, from an economic perspective, they may as well be forever.[83] In 1998, as we have already noted,[84] Congress passed the DMCA, giving copyright owners a new cause of action: Circumventing technological measures designed to control access to a

"copies" for copyright purposes. On fixation, the court said only that by showing that Peak loads the software into the RAM and is then able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. *MAI*, 991 F.2d at 518 (quoting 17 U.S.C. § 101). After *MAI*, the doctrine was uncritically accepted in a series of lower court cases, none of which engaged in any critical examination of the rule or what it might mean. *See* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 550-52 nn.20 & 26 (1997) (discussing case law that suggests RAM copies are fixed, and unfixed).

[78] This process is invisible to the computer's user; the engineering reason for it is that permanent storage is relatively slow compared to RAM. Manipulating data, reading, listening, and so on would become intolerably slow if they were mediated by hard disk accesses.

[79] Actually, there is one exception to this rule, but it seldom, if ever, applies anymore. Section 117 of the Copyright Act gives the "owner of a copy of a computer program" the right to copy the program, if doing so is "an essential step in the utilization of the computer program." 17 U.S.C. § 117(a)(1) (2000). This section has no practical value, however, because no computer program (or any other digital content for computer use) is "sold." Rather, it is "licensed," with significant reservations of rights in the content owner. Section 117 does not apply to licensing transactions. *See, e.g.*, *MAI*, 991 F.2d at 518 n.5.

[80] Copyright Term Extension Act, Pub.L. No. 105-298, 112 Stat. 2827 (1997) (codified in scattered sections of 17 U.S.C.).

[81] 17 U.S.C. § 302(a) (2000).

[82] *Id.* § 302(c).

[83] Eldred v. Ashcroft, 537 U.S. 186, 267, 123 S. Ct. 769, 808 (2003) (Breyer, J., dissenting) (the current copyright period of protection, "even under conservative assumptions, is worth more than 99.8% of protection in perpetuity").

[84] *See supra* notes 39, 46-47 and accompanying text.

copyrighted work is illegal, even when the access is for a non-infringing purpose.[85]

5. The Assault on P2P Technology

By the late 1990s, the storage capacity of the average home computer had increased by a factor of 4,000 over what it was in 1992, the year the AHRA was enacted.[86] While in 1992 the idea of consumers storing large amounts of digital music on their hard disks was far-fetched, just a few years later it was a reality. In addition, with the rapid multiplication of connections to the internet, the ability of consumers to distribute content grew manyfold. As long as illicit content distribution took place from central nodes on the internet, for example from web sites, the content industry had at least some capacity to control the threat. P2P technology, however, decentralized distribution, by enabling individual users to distribute content to other individual users. Napster, the first widely popular P2P network, took advantage of the vastly increased storage capabilities of personal computers and the fact that many of those new computers were connected to the internet by offering users a means to connect to each other and distribute content—specifically, music in the MP3 format—via Napster's P2P network.[87]

Napster's popularity exploded. News stories placed the number of Napster users at 60-100 million.[88] The content business was clearly facing the next great challenge to its business model, and record companies and others filed a lawsuit against Napster.[89] The claim was not that Napster was itself infringing any copyrights; rather, the industry argued, Napster was contributing to infringement by its users.[90] The courts agreed.[91] But what of the AHRA provision[92] that no infringement action can be brought based on "noncommercial use by a consumer of . . .

[85] *See* 17 U.S.C. § 1201(a)(1)(A) (2000).

[86] *See* Schaumann, *supra* note 25, at 1017-18.

[87] *See* Steven Levy, *The Noisy War Over Napster*, NEWSWEEK, June 5, 2000, at 46; Karl Taro Greenfeld, *Meet the Napster*, TIME, Oct. 2, 2000, at 59.

[88] *See* sources cited *supra* note 87.

[89] A&M Records, Inc. v. Napster, Inc., 114 F.Supp. 2d 896, 902 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

[90] The industry also claimed that Napster was vicariously liable for its users' infringement. The court agreed, *Napster*, 239 F.3d at 1023-24, a controversial decision because vicarious liability generally requires a financial benefit to the defendant. It is most commonly applied "against a defendant whose economic interests [are] intertwined with the direct infringer's . . . ." Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996) (vicarious liability may be imposed on the operator of a swap meet at which vendors, renting space from the operator, were selling infringing materials).

[91] *Napster*, 239 F.3d at 1019-23.

[92] *See supra* note 53 and accompanying text.

a [digital or analog recording] device or medium for making digital musical recordings or analog musical recordings?"[93] Would this provision protect Napster users from infringement liability? It was an important question, because if consumers were protected by the AHRA, Napster might not have been secondarily liable.[94] Consumers, however, were not protected by section 1008. The reason can be found in *Diamond Multimedia*, which held that MP3 files stored on a computer hard disk are not "digital musical recordings."[95] Therefore, consumer downloading of MP3 files—which under *Diamond* does not involve making "digital musical recordings"—is not exempted by section 1008, which permits the making of digital musical recordings. Thus, *Diamond Multimedia*, a defeat for the content industry when it was decided, became the reason that home copying of MP3 files can be infringement, notwithstanding that the language of the AHRA at the time it was drafted was intended comprehensively to insulate from liability all noncommercial home copying of music files.[96] Again, content owners won by losing their lawsuit.

III. Sounding the Alarm

Notwithstanding the content industry's aggressive pursuit of expanded copyright protection at the expense of consumers, the latter have remained passive. Sounding the alarm, however, are the books of Professors Litman and Vaidhyanathan. Both are aimed at non-lawyers, and that is in itself noteworthy. Most books on copyright for non-lawyers fall into either the "here's how to protect your work" category, aimed at authors taking a do-it-yourself approach to copyright, or the "copyright for librarians and educators" category. Few books aimed at general audiences have addressed copyright policy, and fewer still—maybe none—are as insightful as these. Jessica Litman's book, *Digital Copyright*, provides a thought-provoking tour of the history that has shaped our copyright present, and a accurate description of where we

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[93] 17 U.S.C. § 1008 (2000).

[94] Because the court held that Napster's users were infringing, this question was not reached. *See Napster*, 239 F.3d at 1014. Had the court held that Napster users do not infringe, it would have left open the question whether § 1008, which says that "[n]o action may be brought under [the Copyright Act] alleging infringement of copyright based on [exempted conduct]," also prohibits actions for contributory infringement when the primary conduct is exempted. Contributory infringement actions might not be prohibited, because section 1008 does not say that the exempted conduct isn't infringing; it merely says that it cannot be the basis for (direct) suit. The argument to the contrary is that under these circumstances, an action for contributory infringement is "based on" exempted conduct. Therefore it is barred. It remains unclear which interpretation is correct.

[95] *Napster*, 239 F.3d at 1024-25. *See supra* notes 54-68 and accompanying text.

[96] Nimmer on Copyright, *supra* note 11, § 8B.07.

now stand. Litman, a professor at Wayne State University School of Law, writes in a clear, cogent style that makes her book a pleasure to read. Her focus is on copyright policy, rather than the arcane details of copyright law. Enough details are included, however, to lend credibility to her central idea: If copyright law is to be applied to consumers, then consumers ought to have a seat at the table where the copyright bargain is struck.

Siva Vaidhyanathan takes a different approach in *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. He focuses on authors rather than consumers, pointing out that the creators of copyrighted works suffer when copyright is expanded too far. Not a lawyer, he courageously wades into this arcane legal subject with an acute perception of what is at stake. He is most interested in the cultural consequences of today's copyright policies, and so his book is complementary to rather than repetitive of Litman's. While Litman shows us that present-day American copyright law is special-interest politics on steroids, Vaidhyanathan traces the development of popular American culture and how it was and continues to be influenced by copyright. Both authors make the case that United States copyright law has gone dramatically awry and both conclude that the fault lies in part with a Congress in thrall to the content industry, unwilling to master the challenges posed by the combination of digital technology and copyright.

A. *Digital Copyright*

Digital Copyright is closely reasoned and solidly grounded in the history of American copyright law. Professor Litman is a master not only of copyright law, but also of legal argument and advocacy, and the result is a book both accessible and compelling. Unlike most legal academics, Professor Litman uses everyday language and lucid exposition. This is a book anyone can read, and a book every student of copyright, every copyright lawyer, and perhaps every lawyer, should read.

Professor Litman focuses on the history of American copyright since 1900. Early on she identifies copyright lawmaking as a unique process in which the affected industries negotiate among themselves and agree upon what the law should be, and Congress enacts it.[97] This,

[97] The sole exception, according to Professor Litman, was the enactment of section 117 of the Copyright Act in 1980. This section was enacted upon the recommendation of the Commission on New Technological Uses of Copyrighted Works ("CONTU"). CONTU was at least "a learned commission charged with divining a solution to the problems posed by computers and photocopy machines." Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275, 279 n.11 (1989). Section 117 permits copying of computer

of course, might be said to describe the federal legislative process in general, but copyright is different in the degree to which the law is purely the result of inter-industry agreement. Public debate over the contents of copyright legislation is unheard of. The predictable result is that the negotiators—in other words, the content industry, along with broadcasters and other industries that use copyrighted works—allocate all rights to use copyrighted works among themselves. Although the public uses copyrighted works every day, almost nothing in the Copyright Act confers such rights. But to understand the present, we must understand the past, and Professor Litman provides historical context and explanation through her study of the recent history of copyright.

1. The Beginnings of Industry-Controlled Copyright

In Professor Litman's account, the process of copyright legislation by industry negotiation began at the turn of the last century, when the nation's first Register of Copyrights, Thorvald Solberg, repeatedly asked Congress for a copyright revision bill to simplify and prune the copyright law. Congress paid no attention; the Senate Patent Committee could not even muster a quorum to consider the subject. Solberg, who believed that a revision of copyright was essential, asked the Patent Committee to appoint a special commission to consider copyright revision, but the Patent Committee was hostile to the idea. Herbert Putnam, the Librarian of Congress, then suggested that Congress could by resolution authorize the Library of Congress to convene a commission of experts to consider copyright revision. That proposal also failed, because the Committee was uncertain that Senate authorization was appropriate. But the Committee suggested that it would be happy if the Library of Congress simply appointed a commission on its own.[98]

The Library gratefully accepted the Patent Committee's invitation, and representatives of the copyright industries were invited to negotiate an acceptable revision among themselves. Uninvited, however, were industries that did not yet have any rights under the copyright

programs in certain cases. *See supra* note 79. It is interesting to note that the only respect in which Congress deviated from CONTU's recommendation was that as adopted, section 117 gave the right to copy only to the *owner* of a copy. 17 U.S.C. § 117(a) (2000). CONTU recommended that the right be given to *the rightful possessor* of a copy. Final Report of the Commission on New Technological Uses of Copyrighted Works 12 (1978), *available at* http://digital-law-online.info/CONTU/ (last visited Sept. 11, 2003). But for this change, the mischief wrought by the RAM copy doctrine would largely have been avoided, as RAM copies are almost always made by persons lawfully in possession of (licensed) copies. They are rarely if ever made by "owners," because digital content is inevitably licensed and not sold. *See supra* note 79.

[98] DIGITAL COPYRIGHT, *supra* note 13, at 38-39.

statute, including the emerging piano roll and "talking machine" (phonograph) industries.[99] The invited industries produced a bill, but when it reached Congress, testimony from the uninvited industries was scathing, in some cases going "so far as to suggest that Congress was being hoodwinked by a monopolistic conspiracy."[100]

Revisions to the bill failed to produce agreement, and the following year each camp submitted its own preferred bill. At the joint hearings on these bills, the testimony was as contentious as before, but at the conclusion of the hearings, a representative of the songwriters suggested that his group might sit down with counterparts from the piano roll and talking machine industries to work out a compromise. Congress gave its assurance (through Rep. Currier, chairman of the House Patent Committee) that if the industries present through their witnesses reached agreement on a bill, Congress would pass it.[101] This process resulted in the Copyright Act of 1909, and provided the template for all subsequent revisions and amendments of American copyright law. Although the piano roll and talking machine industries participated, the emerging radio and motion picture industries were missing from the 1909 compromise. This soon became a problem, as it did not take long for motion pictures and radio to become significant players in the market for exploitation of copyrighted works. The 1909 Act had to be amended several times in the next couple of decades to take account of the interests of these industries.

2. The Copyright Act of 1976

By the 1950s, it was clear that the 1909 Act was obsolete, and work began on a successor that was ultimately enacted as the Copyright Act of 1976. The new Act was created by a process of inter-industry negotiation similar to that which created its predecessor.[102] The new statute, however, suffered through a much longer period of negotiation, partly due to the proliferation of new technologies, including cable television. Nevertheless, many interests went unrepresented because they didn't

[99] *Id.* at 39.

[100] *Id.*

[101] *Id.* at 40.

[102] Professor Litman notes that an opportunity was missed at the time discussions for revision of the 1909 Act began. In 1956, the Register of Copyrights, Arthur Fisher, envisioned a process in which a committee of experts (mainly lawyers from the American Bar Association Section of Intellectual Property Law) acted in an advisory capacity only, while policy decisions were made in the Copyright Office. This process was predictably disfavored by the experts, who insisted on being given a voice in policy. Shortly before the completion of Register Fisher's Report to Congress on copyright revision, Fisher died. His successor, Abraham Kaminstein, returned the process to the form it had taken in the preceding half-century, as outlined above. *Id.* at 49-51.

yet exist, including "videocassette manufacturers, direct satellite broadcasters, digital audio technicians, personal computer users, motion picture colorizers, online database subscribers, [and] Internet service providers."[103] Notably, the public was uninvited and unrepresented, and when the public interest was asserted, it went unheeded. In this respect the new Act was not different from the old.

Professor Litman's central criticism of copyright is that the absence at the copyright bargaining table of the public and emerging copyright industries *cannot* result in satisfactory legislation. Inter-industry negotiations inevitably shortchange those not present. They shortchange the public because the resulting legislation speaks explicitly only to commercial uses, and almost never to public uses. They shortchange industries businesses not yet in existence because legislation adopted by inter-industry agreement more closely resembles a highly detailed contract than it does an expression of policy, and the contract allocates all rights to those present when it was negotiated. The 1976 Act states ownership rights in the broadest possible terms, while exceptions permitting use are as narrowly drawn as possible.[104] This style of drafting results in the participants laying claim to all the territory, with little risk of interference from latecomers, who are unlikely to fit within one of the exceptions (which, after all, were narrowly tailored to the requests of a participant in the negotiations). It seems to be working: By one means or another, every new use has been allocated back to the holder of an existing right.[105] Notably, the right of the public to use copyrighted works, something that happens every day, is not described and rarely even mentioned in the Act.[106]

3. Does it Matter? The Impact of Copyright on Consumers Today

This, of course, is the way it has been for nearly 100 years. Is there reason to be concerned now, when perhaps there wasn't for a rather long time? There is indeed reason to be concerned, because for the first time, consumer uses are being targeted by copyright owners. In

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[103] *Id.* at 51.

[104] *Id.* at 54-57.

[105] For example, merely viewing a work on a computer monitor involves making a "copy" of the work and requires permission from the copyright holder, even when the viewer has no ability to store the work or to reload it for later viewing. If the user does reload it, say by visiting a web site a second time, then two "copies" have been made. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993); Stenograph LLC v. Bossard Associates, Inc., 144 F.3d 96, 100 (D.C. Cir. 1998); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1294 (D. Utah 1999).

[106] *See supra* note 12 and accompanying text.

the past, consumers were unrepresented in the process of making copyright law, but it didn't matter much because, after all, no one was threatening to cut off consumer uses or sue consumers. Copyright litigation took place between industry players; although technically consumers could infringe, copyright owners typically were not very concerned about it. Inability to manufacture large quantities of tangible copies made large-scale infringement by consumers unlikely. Small-scale copying, too, was rarely pursued: The difficulty of detecting small-scale copying, combined with the expense of pursuing litigation and the uncertainty of the outcome, deterred copyright owners from suing consumers.[107]

But we have already seen how the internet changed all that. Once content is liberated from its containers, copying becomes trivially easy, and distribution not much more difficult. As a result, we see content owners threatening to file lawsuits against consumers en masse. "Parents, roommates—even grandparents—are being targeted in the music industry's new campaign to track computer users who share songs over the Internet, bringing the threat of expensive lawsuits to more than college kids."[108] The Associated Press reports that the RIAA has issued at least 911 subpoenas seeking information on possible P2P infringers so far.[109] As of this writing, 261 lawsuits have been filed, with the promise of "thousands" more to come.[110] The Copyright Act provides for statutory damages of $200 to $150,000 for each work infringed,[111]

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[107] It is worth noting that the absence of consumer rights in the Act has left some important areas of copyright policy unclear. For example, what are we to make of the relative lack of litigation involving small-scale copying by consumers? Should we consider it infringement that is rarely sued upon because it is hard to detect, or is it perhaps not infringement at all? Currently, the answer under the Act is almost certainly that it is infringement, if only because the Act is almost entirely silent on the rights of the public regarding copyrighted works. The question matters, because digital technology doesn't only make it easy to copy and distribute—it also makes it easier to detect and limit copying and distribution. Thus, the DMCA endorses access-prevention and copy-prevention technologies. *See supra* note 47.

[108] Ted Bridis, *Music-Sharing Subpoenas Target Parents*, NEWS ON RED NOVA, July 24, 2003, at www.rednova.com/news/stories/3/2003/07/24/story003.html) (last visited July 25, 2003).

[109] *Id.*

[110] Steve Lohr, Fighting the Idea that All the Internet is Free, N.Y. Times, Sept. 9, 2003, at C1, *available at* http://www.nytimes.com/2003/09/09/technology/09FREE.html (last visited Sept. 11, 2003).

[111] 17 U.S.C. § 504(c) (2000). A great deal of popular music can now be purchased at Apple Computer's online iTunes Music Store for $1 per track, and so a demand for immense statutory damages might be nullified by a jury. *See* Zahlaway, *supra* note 39. Nevertheless, even the costs of a defense are enough to cause serious financial hardship to most prospective defendants in the threatened RIAA cases.

making litigation potentially a very costly proposition for defendants in RIAA cases.[112]

Another danger arises from the fact that so much information is now accessed mainly in digital form. As Litman points out, the result is that copyright has *de facto* become the United States' information policy.[113] It is, of course, axiomatic that copyright neither protects nor restricts ideas, procedures, processes, systems, methods of operation, concepts, principles or discoveries.[114] Is it possible, then, that much or most readily-accessible information could become the content industry's property? To a surprising degree, the answer is yes. Because content is now containerless, the content industry is seeking laws that are no longer tied to containers. The danger is that restricting the copying and distribution of containerless content *is* restricting the copying and distribution of information. Content, separated from its container, is simply information. Of course, not all information is protected by copyright.[115] But non-copyrightable information is often—perhaps most often—intermingled with copyrightable expression. For example, an encyclopedia is packed with non-copyrightable information, but the information is bound up with the authors' copyrightable expression. If the owner of copyright in the encyclopedia can limit how and when the encyclopedia is used (meaning how and when the information is accessed), then the information itself is effectively locked up, along with the expression that conveys it. In 1998, Congress passed the DMCA, which as we have seen[116] prohibits circumventing access restrictions that protect copyrighted work. Circumvention is a violation, even if the purpose of accessing the work is legal (for example, to make fair use of it, or to extract non-copyrightable information). So, if the encyclopedia is protected by access restrictions, the information it contains is available only upon meeting the content owner's conditions, and paying the price. In effect, the information has become the "property" of the cop-

[112] The music industry's threats have also attracted Congress' attention. Sen. Coleman (R-Minn.) has registered concern about consumers' privacy rights, and about whether the penalties for downloading music fit the offense. *See* Amy Harmon, *Efforts to Stop Music Swapping Draw More Fire*, N.Y. TIMES, Aug. 1, 2003, at C1, *available at* http://www.nytimes.com/2003/08/01/business/01MUSI.html?tntemail1 (last visited Aug. 1, 2003).

[113] This is a crucial point; unfortunately, Professor Litman never really follows up on it. It is mentioned in passing in nearly every chapter, but never addressed in more depth.

[114] *See* 17 U.S.C. § 102(b) (2000).

[115] The idea of "copyrightable expression" has in the last twenty years ballooned almost beyond recognition, partly as the result of the protection of software by copyright. Software is almost entirely functional; finding "expression" in it distorts the meaning of expression beyond what anyone would have imagined before 1980. *See supra* notes 4-7 and accompanying text.

[116] *See supra* notes 46-47 and accompanying text.

yright owner. Other sources may exist for the information, but over time these could diminish as more and more copyrightable material becomes protected by DMCA-backed restrictions on access.

The trend toward ownership of information is helped along by the metaphors content owners choose for the rights they assert. Professor Litman notes that copyrights are now more often than not referred to as "property," and analogies are frequently drawn between a copyright interest and an interest in a tangible piece of personal property,[117] or even real property.[118] But, she points out, it was not always so. At the turn of the last century, the 1909 Act "granted authors limited exclusive rights (and only if the authors fulfilled a variety of formal conditions) in return for the immediate public dissemination of the work and the eventual dedication of the work to the public domain."[119] Neither authors and publishers, nor the public, were entitled to all the economic benefits generated by a new work. "Rather, they shared the proceeds, each entitled to claim that portion of them that would best encourage the promiscuous creation of still newer works of authorship."[120] Unhappy with this arrangement, she says, content owners began to shift the rhetoric away from "limited rights" and bargains between the author and the public, toward "property."[121] Property is owned by someone; with property, there is a presumption that the owner's rights are supreme and whatever the owner prohibits is legally impermissible.

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[117] A nice example of this appeared in the New York Times recently. In a letter to the editor, Marilyn Bergman, the president of the American Society of Authors, Composers and Publishers ("ASCAP"), said that "[t]he notion that some musicians are at fault because they want to prevent people from casually listening to their music without payment is akin to saying that drivers are at fault for locking their cars because they want to prevent strangers from casually taking them out for joyrides." Marilyn Bergman, *Artists Deserve Support*, N.Y. TIMES, July 19, 2003, at A12 (letter to the editor). Ms. Bergman's letter, of course, begs the question whether copyright should be treated like personal property.

[118] During the debate over the DMCA, for example, the content industry argued that "breaking into technological protection . . . was like breaking into a home or stealing a book." DIGITAL COPYRIGHT, *supra* note 13, at 132. But this is merely bootstrapping. *Why* is it like breaking into a home? In the absence of pre-existing property rights in the protected content—including a right of exclusive use and possession—the analogy fails. And until the DMCA, copyright had never provided such a right in published works. Part of the historical copyright bargain was that copyright owners provided full, unfettered access to published works. Since there was no right to exclude others from use and possession, the argument in support of access restrictions is specious.

[119] *Id.* at 78.

[120] *Id.* at 79.

[121] *Id.* Even some of those concerned about content industry excesses have succumbed to the property talk.

> 'If you're taking someone else's property, that's wrong, that's stealing,' Senator Coleman, Republican of Minnesota and chairman of the Senate Permanent Subcommittee on Investigations, said . . . . 'But in this country we don't cut off people's hands when they steal. One question I have is whether the penalty here fits the crime.'

And along with "property talk," Litman notes, today the industry (and the media) are using a lot of "piracy talk." At one time, "piracy" meant making and distributing large quantities of counterfeit copies; the term was generally reserved to commercial enterprises engaged in criminal activities. Today, any copying to which the content industry has not consented, it calls "piracy." It even refers to *legal* copying as piracy (for example, taping a CD borrowed from a friend).[122] By shifting the rhetoric, the industry is trying to change people's ideas about content and the use of content.

So far, the content industry's attempt to persuade the public that no use is allowed without the copyright owner's permission has not been very successful. Amazingly large numbers of consumers seem to be paying no attention whatsoever to the copyright rules that purportedly apply to them.[123] Indeed, Professor Litman points out, most consumers have no idea what copyright law provides, and wouldn't believe it if they were told.[124] Realizing this, the content industry throughout the 1990's has sought to enhance the penalties for infringement and simultaneously to broaden its scope by defining more activities as copyright violations. They succeeded on both counts. Criminal copyright infringement, formerly reserved for commercial, for-profit activity, since 1997 includes even non-commercial infringements, provided the dollar value of infringed material exceeds $1000.[125] The following year, Congress passed the DMCA, with its prohibition on circumventing any technological measure applied by a copyright owner to protect a work.[126] A year after that, statutory damages for infringement were increased by 50 percent.[127]

Amy Harmon, *Efforts to Stop Music Swapping Draw More Fire*, N.Y. TIMES, Aug. 1, 2003, at C1, *available at* http://www.nytimes.com/2003/08/01/business/01MUSI.html?tntemail1 (last visited Aug. 1, 2003).

[122] DIGITAL COPYRIGHT, *supra* note 13, at 85 (citing a statement to Congress by Hilary Rosen, then-president of the RIAA).

[123] Consider the statistics on use of P2P services. Tens of millions of Americans have used, and many continue to use, these illicit sources of entertainment. *See supra* notes 42-43 and accompanying text.

[124] DIGITAL COPYRIGHT, *supra* note 13, at 112.

[125] 17 U.S.C. § 506(a)(2) (2000). This paragraph was added in 1997 by the No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997). That Act also directed the United States Sentencing Commission to "ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property . . . is sufficiently stringent to deter such a crime" and to "ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed." 111 Stat. 2678 (1997).

[126] *See supra* notes 46-47 and accompanying text.

[127] 17 U.S.C. § 504(c) (2000). This section was amended by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-260, 133 Stat. 1774, which raised the minimum and maximum amounts of statutory damages per work infringed

In chapters titled, respectively, "The Bargaining Table" and "The Copyright Wars," Professor Litman describes the enactment of the DMCA and the efforts by the content industry to control the digital distribution of content. Although the industry won a battle when the DMCA was enacted, nothing so far has slowed the tide of digital distribution.[128] Professor Litman attributes this to the public's lack of understanding of copyright law,[129] and to the law's apparent embodiment of values that the public doesn't share:[130]

> [T]he only people who appear to believe that the current copyright rules apply as written to every person on the planet are members of the copyright bar. Representatives of current stakeholders, talking among themselves, have persuaded one another that it must be true, but that's a far cry from persuading the [general public].[131]

In her penultimate chapter, Professor Litman offers an admittedly radical proposal for the reform of copyright in the information age: Jettison copying as the fundamental right of the copyright owner, and substitute commercial exploitation.[132] Although she recognizes that this

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by 50 percent. The new minimum is $750, and the new maximum is $30,000, and up to $150,000 per work for "willful" infringement. *Id.*

[128] *See* Amy Harmon & John Schwartz, Music File Sharers Keep Sharing, N.Y. TIMES, Sept. 19, 2003, *available at* http://www.nytimes.com/2003/09/19/technology/19TUNE.html (last visited Sept. 19, 2003). After dipping in June, when the RIAA announced it would sue consumers on P2P networks, traffic on the networks has remained steady, even after the lawsuits were filed. *See* Amy Harmon, *261 Lawsuits Filed on Internet Music Swapping*, N.Y. TIMES, Sept. 9, 2003, at A1, *available at* http://www.nytimes.com/2003/09/09/technology/09MUSI.html (last visited September 11, 2003) ("Traffic on file-sharing services dropped after the recording industry announced its plans to sue file sharers in June."); Reuters, *Music Firms, DJ Offer to Pay 12-Year-Old's Fine*, N.Y. TIMES, Sept. 11, 2003, *available at* http://www.nytimes.com/reuters/technology/tech-media-music-lawsuit.html (last visited Sept. 11, 2003) ("Traffic has remained steady on peer-to-peer networks since the lawsuits were filed"); Reuters, Activity on Song-Swapping Networks Steady, N.Y. TIMES, Sept. 11, 2003, *available at* http://www.nytimes.com/reuters/arts/entertainment-media-riaa.html (last visited Sept. 11, 2003) (number of users in the first 10 days of September up 20% from the August average).

[129] Indeed, Professor Litman argues that copyright's complexity has made it impossible for the public to understand. DIGITAL COPYRIGHT, *supra* note 13, at 113.

[130] *Id.* at 112-17. There is a great deal of support for this view. "[T]o many Americans, file sharing seems . . . like taping a song off the radio." Amy Harmon & John Schwartz, *Music File Sharers Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, *available at* http://www.nytimes.com/2003/09/19/technology/19TUNE.html (last visited Sept. 19, 2003). No infringement lawsuit could be brought against a consumer for taping a song off the radio. 17 U.S.C. § 1008 (2000). *See* Katie Hafner, *Is It Wrong to Share Your Music? (Discuss)*, N.Y. TIMES, Sept. 18, 2003, *available at* http://www.nytimes.com/2003/09/18/technology/circuits/18kids.html (last visited Sept. 19, 2003). *But see* Reuters, *Record Group Says Poll Shows Support for Hard Line*, FINDLAW.COM, Sept. 10, 2003, *available at* http://news.findlaw.com/entertainment/s/20030911/mediariaadc.html (last visited Sept. 11, 2003) (52% of Americans surveyed "supported the music industry's position").

[131] DIGITAL COPYRIGHT, *supra* note 13, at 115.

[132] Professor Litman's proposal would also include as infringement uses, even consumer uses, that adversely affects commercial exploitation. In this way, Napster would still be en-

proposal is unlikely to become law any time soon,[133] it is fascinating to consider how it would change the copyright world. Copyright lawyers have become so acclimated to the bizarre intricacies of their specialty that certain things, like the inability to explain the law in a way that makes sense to a non-specialist, are taken for granted.[134] The immense simplification of copyright that would result from adopting her proposal might be worth some temporary uncertainty. It would be refreshing not to have to explain why it is legal to borrow a neighbor's CD and copy it,[135] but illegal to download the same content from the same neighbor via a P2P connection.[136] The proposal has a lot to commend it, not least that it makes sense to non-copyright specialists,[137] and allows the content industry to keep most of what it has had for the last 100 years. It would not be supported by the content industry, however,

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joined from operating its P2P network, as the widespread distribution of MP3 files adversely affect the record companies' commercial exploitation of their sound recordings. DIGITAL COPYRIGHT, *supra* note 13, at 180-81.

[133] *Id.* at 189 n.29. This is the only place where Professor Litman acknowledges that such a proposal would violate the obligations of the United States under international treaties (for example, the Berne Convention).

[134] Professor Litman effectively described this phenomenon: "There is something fundamental about coming to understand that current law may make it technically illegal to watch a movie and then imagine what it would have looked like if the studio had cast some other actor in the leading role, that renders one unfit for ordinary reflective thinking," *Id.* at 22 (footnote omitted). The example she provides is based on the exclusive right of the copyright owner to prepare derivative works. 17 U.S.C. § 106(2). While a derivative work, like any other work, must be "fixed" before it can be protected, *see supra* note 31, the definition of "derivative work"on its face does not require fixation, *see* 17 U.S.C. § 101. Thus it is possible that an unprotectable (because unfixed) but nevertheless infringing derivative work could exist in someone's mind. Enforcement in this case would be difficult, to say the least.

[135] *See* 17 U.S.C. § 1008 (2000).

[136] *See Napster*, 239 F.3d at 1014.

[137] *See* Katie Hafner, Is It Wrong to Share Your Music? (Discuss), N.Y. TIMES, Sept. 18, 2003, *available at* http://www.nytimes.com/2003/09/18/technology/circuits/18kids.html (last visited Sept. 19, 2003) (Statement by a 13-year-old girl who downloads music: "If it's something for personal use, as long as you're not redistributing it, it should be O.K."). This statement shows a remarkable degree of insight into the law; it tracks closely the provisions of the AHRA, *see supra* notes 50-53 and accompanying text, and distinguishes between copying and distributing, something even the Ninth Circuit failed to do in *Napster*. The *Napster* court's discussion of the infringement by Napster's users takes up merely three sentences:

> We agree that plaintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.

Napster, 239 F.3d at 1014. Of course, uploading file names cannot infringe record company copyrights; titles are generally lack the originality needed for copyright protection, and file names in any case generally consist of more than the title of the song. *See* Schaumann, *supra* note 25, at 1028-29 & notes 108-09.

because the industry has little to gain and much to lose from any revision of the law.[138]

The final chapter of Professor Litman's book is a rather gloomy coda, but one that in hindsight appears extraordinarily prescient. She offers little hope for the legislative process as a means of reintroducing the public into the matrix of copyright interests. Instead, she says, "in order to actually enforce the rights that content owners claim the statute gives them, it will be necessary to enforce [the statute] against individual consumers."[139] And that is exactly what is happening today. Whether the industry can survive its own tactics remains to be seen; already, it appears that the RIAA's anti-consumer lawsuits are resulting in more civil disobedience than compliance.[140] These lawsuits, perhaps more than any other development in the last 50 years, might get the public involved in copyright again. For nearly 100 years, copyright policy was made in backroom deals by representatives from content industries. The public's elected representatives in Congress have, for the most part, abdicated their responsibility and simply enacted whatever industry compromise they were presented with. Slash-and-burn litigation, aimed squarely at the public, may prove to be the catalyst for a new model of copyright. Litman explains that copyright law is as it is because the public doesn't know or care what the law says. But getting sued can be a wonderful catalyst for public concern. It may be that the P2P lawsuits are the seeds of real copyright change.

B. *Copyrights and Copywrongs*

The second book sounding the copyright alarm, Siva Vaidhyanathan's *Copyrights and Copywrongs*, is different in many respects from Litman's book. Professor Vaidhyanathan is a master of the anecdote. He has a talent for bringing legal policy to life using stories about popular personages, including Mark Twain, Willie Dixon, Muddy Waters, the Marx Brothers, Led Zeppelin, and many others. The result is a breezy book that occasionally lacks intellectual rigor but is always

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[138] For example, such a change in copyright law would take away the control over consumer *uses* that resulted from the combined effect of the *MAI* decision, the practice of licensing rather than selling digital content, and the DMCA. This alone would make it unacceptable to the content industries.

[139] DIGITAL COPYRIGHT, *supra* note 13, at 195.

[140] *See* Amy Harmon & John Schwartz, *Music File Sharers Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, *available at* http://www.nytimes.com/2003/09/19/technology/19TUNE.html (last visited Sept. 19, 2003); Katie Hafner, *Is It Wrong to Share Your Music? (Discuss)*, N.Y. TIMES, Sept. 18, 2003, *available at* http://www.nytimes.com/2003/09/18/technology/circuits/18kids.html (last visited Sept. 19, 2003).

highly readable, and even entertaining. It is a fascinating cultural history of copyright.

1. Early Copyright in England and the United States

It is clear early on, starting with the subtitle—"The Rise of Intellectual Property and How it Threatens Creativity"—that the perspective in which Vaidhyanathan is most interested is that of authors (including writers, musicians, and artists), and his book tells a story built around their views and needs. The emphasis on authors might at first lead one to expect that Vaidhyanathan would take a high-protection stance. Vaidhyanathan in fact reaches much the same conclusion that Litman does, that copyright has become too protective of established interests and has lost sight of its Constitutionally-mandated goal "To promote the Progress of Science and the useful Arts."[141] In his first chapter, Professor Vaidhyanathan provides a sort of layperson's summary of American copyright law. It is reasonably accurate and interesting, even for those knowledgeable about copyright law, because it provides the perspective of a highly educated and intelligent non-lawyer. For example, a section on the idea/expression dichotomy ponders the nature and origin of meaning, something few copyright lawyers pause to consider.

The book hits its stride in the second chapter, "Mark Twain and the History of Literary Copyright." In it, Vaidhyanathan describes how copyright originated, in a system designed for censorship by the Crown and monopoly by the publisher. In 1557, Queen Mary issued a charter to the Stationers' Company, which was thereby empowered to control the book trade by allocating the rights to publish particular works among the members of the Company. This early publishing right existed solely to prevent competition among publishers,[142] and while it lasted, it was ideal for that purpose. But it was not to last. In 1694, the licensing acts under which the Stationers' Company exercised its monopoly privileges expired. Because the publishers had no legally recognized property interest, but merely a protection against competition, the expiration of the Licensing Act spelled the end of their monopoly.

For the next 14 years, publishers competed against one another over the same books. Soon, however, the publishers recognized that allying with authors would enhance their chances of reclaiming a pub-

[141] U.S. CONST. art. I, § 8, cl. 8.

[142] "Publishers" as the term is understood today did not exist in the 16th century; nevertheless, early participants in the book trade did carry out the various functions of printing and publishing and fairly early on began to specialize in ways reminiscent of today's market. *See* LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 45-51 (1968).

lishing monopoly. The ploy worked: Parliament took notice, and the resulting statute (known as the Statute of Anne[143]) represented the first recognition of author's rights in English law. For this reason it is often called the "first copyright statute," although Vaidhyanathan notes that its antecedents the Stationers Charter and the Licensing Acts are perhaps more entitled to that distinction.[144] As a practical matter, though, the nominal grant of rights to authors lacked substance—a "manuscript is worth nothing on the market until the author assigns the rights to a publisher."[145] Like its predecessors, the Statute of Anne principally benefitted publishers, granting them statutory monopolies for limited times. Authors were merely straw men, expected to assign their rights to publishers, who were enlisted by the publishers to enhance their case before Parliament.[146] Nevertheless, for the publishers, asserting the rights of authors was a brilliant tactic. It was so good, in fact, that it is still employed today.[147] Sometimes the claims are wildly implausible (for example, that authors are likely to create more works if copyright is extended to last not fifty, but seventy years after the author's death);[148] at other times, the content industry simply lines up authors

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[143] 8 Anne ch. 19 (1710), *reprinted in* 8 NIMMER ON COPYRIGHT App. 7 (2001).

[144] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 40.

[145] *Id.*

[146] As Professor Alfred C. Yen has described it:

> [The booksellers'] tactic succeeded. The resulting statute, the Statute of Anne, secured for authors the exclusive right to print their works. . . . The Statute protected the interests of the booksellers by extending the exclusive rights to the assigns of authors as well. The booksellers knew that their position in the market was such that authors would, as a practical matter, be forced to sell their manuscripts to the Stationers' Company if they wanted to get their work published at all.

Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 526 (1990).

[147] *See, e.g.*, Declan McCullagh, *Piracy and peer-to-peer*, CNET NEWS.COM (July 7, 2003), *available at* http://news.com.com/2010-1071-1023325.html (last visited July 9, 2003) (Matt Oppenheim, Senior Vice President of Business and Legal Affairs of the Recording Industry Association of America: "How does [the struggle between the RIAA and P2P users] have anything to do with corporations? This has to do with artists and creators.").http://news.com/2102-1027-1023325.html

[148] In extending the term of copyright in 1998, "[m]embers of Congress expressed the view that, as a result of increases in human longevity and in parents' average age when their children are born, the pre-CTEA term did not adequately secure 'the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children—and perhaps their children—might also benefit from one's posthumous popularity.' 141 Cong. Rec. 6553 (1995) (statement of Sen. Feinstein)." Eldred v. Ashcroft, 537 U.S. 186, 207 n.14, 123 S.Ct. 769, 782 n.14. It seems implausible that authors are motivated to any important degree by the prospect of providing for their grandchildren, not least because the present value of a dollar earned 50 years in the future is quite small, no more than $0.0872 (assuming a discount rate of 5%). The present value of a dollar earned 50 years after one's (yet-uncertain) date of death is smaller still. "[I]f an author expects to live 30 years after writing a book, the copyright extension (by increasing the copyright term from

who support the industry's position, without arguing the specifics.[149] This is not to suggest that there is no community of interest between authors and the content industry; obviously there is, at least for some commercially successful authors. The point is rather that ever since the publishers took the authors' case to Parliament, the content industry has tended to assert the claims of individual authors, rather than its own claims.

Early American copyright was based to a large extent on the law in England. The English law itself, however, was for a time unclear whether the authors' (and assignees') rights established in the Statute of Anne were based on natural law, or on "economically-inspired statutory law."[150] Whether natural law or statutory law is the foundation of copyright matters, because, among other things, cases at the margin may be decided differently depending on the law's source. Natural law suggests that doubts should be resolved in favor of the owner; the law of property, based on the concept of rivalrous land or chattels that can be possessed by just one person at a time, tends to skew the outcomes of cases toward the copyright owner. Copyright in this view is a sort of Lockean justice, whereby something becomes the property of its creator and the law merely confirms what the owner is already entitled to and specifies remedies for infringement. A statutory basis for copyright, on the other hand, implies a utilitarian approach that grants just enough to the author to stimulate the production of creative works, for the ultimate benefit of the public. In the early case of *Millar v. Taylor*,[151] two of the four justices held for the plaintiff based on natural law principles, the third member of the majority decided for the plaintiff on

"life of the author plus 50 years" to "life of the author plus 70 years") increases the author's [heirs'] expected income from that book—i.e., the economic incentive to write—by no more than about 0.33%." *Id.* at 814 (Appendix to dissenting opinion of Breyer, J.).

[149] "Congress heard testimony from a number of prominent artists; each expressed the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create." *See, e.g.*, House Hearings 233-239 (statement of Quincy Jones); Copyright Term Extension Act of 1995: Hearings before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 55-56 (1995) (statement of Bob Dylan); *id.* at 56-57 (statement of Don Henley); *id.* at 57 (statement of Carlos Santana)." Eldred v. Ashcroft, 537 U.S. 186, 207 n.15, 123 S.Ct. 769, 782 n.15; *see also* Lisa M. Bowman, *Labels Aim Big Guns at Small File Swappers*, CNET News.com, June 25, 2003, *at* http://news.com.com/2100-1027-1020876.html (last visited Sept. 18, 2003) ("The RIAA has lined up nearly three dozen artists . . . to support its plans to sue music fans.") *at* http://news.com/2102-1027_3-1020876.html.

[150] Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 528 (1990). It is a little difficult to understand how this question could have been so unclear; before the Statute of Anne was enacted, the publishers had tried in vain to have their supposed "natural right" to monopoly recognized. Perhaps it was believed that authors might have a natural law right, while publishers did not.

[151] 98 Eng. Rep. 201 (K.B. 1769).

other grounds, and the fourth dissented. Five years later, however, in the case of *Donaldson v. Beckett*,[152] *Millar* was reversed and the idea that natural law was a basis for copyright in England was discredited.[153]

Based as it was on the English law, early American copyright law was no more clear about its source.[154] Eventually, however, in the case of *Wheaton v. Peters*,[155] the Supreme Court held that natural law considerations were not important to the resolution of copyright cases and that the foundation of American copyright was based on the Constitution and the Acts of Congress passed under the Constitution's authority.[156]

During the mid- and late nineteenth century, American readership grew and Congress expanded copyright, both in duration and in terms of the works protected. But by the turn of the century, some American literary figures—including Mark Twain—were arguing for still-stronger copyright. Professor Vaidhyanathan identifies Twain's 1906 testimony before Congress as a pivotal moment in American copyright history. Twain, then at the end of his career, sought "maximum protection for authors, the thickest possible copyright."[157] While Twain's views were largely ignored in the Copyright Act of 1909, Vaidhyanathan notes that at the beginning of the 21st century, American copyright law is beginning to resemble Twain's "Continental value system of authorship."[158] Indeed, Vaidhyanathan devotes a good deal of ink to describing the copyright views of Mark Twain, and how they changed over time.[159] In contrast to the later Twain, he tells us, the early Twain favored very thin (less-protective) copyright. What might account for this shift? Inexplicably Vaidhyanathan concludes that the difference between the early and the late Twain is attributable to Twain's keen appreciation of the

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[152] 98 Eng. Rep. 257 (H.L. 1774).

[153] *See* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1156-71 (1983).

[154] *See* Benjamin Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 12-16, 26-27 (1968); Mark Rose, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 67-112 (1993). Some have concluded that both natural law and utilitarian bases underlie the constitutional Copyright Clause. *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 10 (1994); Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 696 (2000) (remarks of Jane C. Ginsburg); *see also* Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 262 n.55 (1997).

[155] 33 U.S. 591 (1834).

[156] *Wheaton*, 33 U.S. at 656-61.

[157] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 37.

[158] *Id.* at 36.

[159] *Id.* at 58-80.

difference between "piracy" and "plagiarism."[160] But how can that difference account for the change in Twain's views over time? Any distinction between piracy and plagiarism might well have been as clear to the younger Twain as to the older. Even if Twain's understanding of this distinction became more refined as he grew older, the reader is left to guess just how piracy and plagiarism would make Twain change his view about the merits of thin versus thick copyright. Finally, in the penultimate sentence of the chapter, Vaidhyanathan provides a more plausible explanation for the change in Twain's views on copyright: "Only near the end of [Twain's] life did self-interest . . . trump his concern for future authors and artists."[161] Ultimately, then, he identifies self-interest as the factor that changed Twain's mind. But even this is unsatisfying. Was the younger Twain really less self-interested than the older? Perhaps, but Vaidhyanathan does not make this case.

A better explanation might look a little deeper at Twain's status over the years. Let us assume that Twain at all times acted in a manner both reasonable and self-interested. We can surmise that Twain acted in a way that he perceived to be to his benefit, but also with a decent regard for his reputation and his humanity. Consistent with this hypothesis, is there a plausible explanation of his changing view of copyright? Certainly one thing that changed as his views were changing was his relative copyright "wealth"—that is, the number and value of his copyrights. The younger Twain was relatively copyright-poor; the older, rather copyright-rich. Indeed, this alone could explain Twain's changing views of copyright. If a copyright-poor author prefers thinner copyright, while a copyright-rich author prefers thicker, more-protective copyright, we might explain Twain's views without resorting to either a distinction between piracy and plagiarism or an increase in self-interest. Moreover, there is reason to suppose that authors' views on copyright do vary depending on their relative copyright wealth. The copyright-poor are more interested in preserving the raw materials for their future creations than they are in protecting the few works they have already created. The copyright-rich, by contrast, have "arrived." They have little to gain from maximizing the chances for their future success; by hypothesis, they have already succeeded. Protecting their existing work against real or imagined depredations would make sense.

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[160] *Id.* at 67-69. By "piracy," Vaidhyanathan means copyright infringement. "Piracy is an offense created by the notion of copyright. It could not exist as a concept without the granted monopoly of copyright that it violates." *Id.* at 67. Vaidhyanathan indentifies plagiarism as something "older and more complex. . . . A writer can use a small portion of another's work, yet fail to credit the source, and be accused of plagiarism. . . . [It] is more often than not an unrequested and uncredited use of another's ideas." *Id.* at 67-68.

[161] *Id.* at 80.

This explanation of the change in Twain's views could gain support from the actions of other authors and the content industry. Is there a pattern in which the copyright-poor take one position, and then, when success arrives, do an about-face? Although Professor Vaidhyanathan does not identify such a pattern, he does provide us the raw material from which we ourselves might draw some conclusions.

2. Content Industries—The Poor Get Rich

In Chapter 3, "Celluloid Copyright and Derivative Works, or How to Stop *12 Monkeys* with One Chair," Vaidhyanathan takes on Hollywood, beginning with the observation that in its early days, the motion picture industry "had an interest in allowing free and easy adaptation of works from copyright-rich literary authors, such as Mark Twain and Jack London. As the industry grew more lucrative . . . studios found themselves on the plaintiff's side in copyright suits."[162] Here, then, we might find some confirmation: As Hollywood grew from a copyright-poor upstart to a copyright-rich member of the establishment, its views about copyright changed. It might well be that the key to understanding the seemingly contradictory positions taken over time by Hollywood, and earlier by Mark Twain, is the change from copyright poverty to copyright wealth.

But even when addressing Hollywood, Vaidhyanathan never quite makes this point. For example, in describing modern Hollywood, he tells us that Hollywood executives "sometimes still act as though they are copyright-poor as a way to get 'copyright-richer,' or just plain richer."[163] But Hollywood is not acting copyright-poor. The copyright-poor Hollywood was always a copyright defendant, never a plaintiff; the copyright-poor Hollywood always argued for less protection, never more.[164] Today's copyright-rich Hollywood is merely acting as one would expect the copyright-rich to act, vigorously asserting its copyrights and demanding more protection[165] while taking as much as it can

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[162] *Id.* at 82.

[163] *Id.*

[164] *See* DIGITAL COPYRIGHT, *supra* note 13, at 40-41. Once Hollywood gained some copyright wealth, it "became increasingly uncomfortable with the formalities of a copyright statute written without attention to [its] needs"; the result was a series of private conferences among industry participants "to work out a consensus on copyright revision." *Id.* at 42. The revision was stalled, however, by the failure to invite all of the various affected industries, and by the growth of new industries, notably radio, which had their own agendas to pursue. *Id.* at 42-45.

[165] Hollywood has been in the forefront of content industry demands for expanded copyright protection. *See, e.g.*, 144 Cong. Rec. S 4884, S 4885 (1998) ("the DMCA enjoys widespread support from the motion picture, recording, software, and publishing industries . . . ."); 144 Cong. Rec. H 7074, H 7103 ("This legislation [the DMCA] protects our nation's

from any available source. Wanting to have it both ways is not acting copyright-poor. The copyright-poor do not demand stronger copyright from Congress—that is what the copyright-rich do, whether in the person of Mark Twain, or the Walt Disney Company.[166] To the copyright-poor, the copyright wealth of others feels oppressive. But to the copyright-rich, more protection is better.

Sentiments about copyright are thus dynamic: persons, industries, and nations can change from copyright-poor to copyright-rich (and, theoretically at least, from copyright-rich to copyright-poor[167]). When

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movie producers . . . ."). Indeed, during the passage of the DMCA, Hollywood successfully lobbied at the last minute for the inclusion of mandatory anti-copying technology even in analog videocassette recorders. *See* 17 U.S.C. § 1201(k) (prohibition against trafficking in VHS videocassette recorders unless they conform to the "automatic gain control copy control technology"); 144 Cong. Rec. S 11887, S 11890 ("there are provisions in Title I [of the DMCA] that address certain technologies used to control copying of motion pictures in analog form on video cassette recorders which were not part of either the original Senate or House DMCA bills."). In court, Hollywood studios were the plaintiffs in the first cases extending copyright protection to the "total concept and feel" of copyrighted works. *See* 4 NIMMER ON COPYRIGHT § 13.03 (2000). "Total concept and feel" protection was extended to to greeting cards in Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970), and to non-theatrical audiovisual works in Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). In 1990, a federal district court in Massachusetts extended the concept, now called "look and feel," to software user interfaces. Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37 (D. Mass. 1990). Lotus thus had established a precedent by defeating Paperback Software (an adversary much smaller and less-well-financed than itself). Lotus immediately put the precedent to work by suing Borland Corp., a much more formidable opponent, on the same "look and feel" theory of infringement. The case produced no fewer than four district court opinions, which ultimately held that Borland had infringed the "look and feel" of Lotus's user interface. The First Circuit reversed, finding the user interface to be a "method of operation" excluded from copyright by 17 U.S.C. § 102(b). The Supreme Court, after granting Lotus's petition for certiorari, affirmed by an equally divided vote. *See* Lotus Dev. Corp. v. Borland Int'l, Inc., 788 F. Supp. 78 (D. Mass. 1992); Lotus Dev. Corp. v. Borland Int'l, Inc., 799 F. Supp. 203 (D. Mass. 1992); Lotus Dev. Corp. v. Borland Int'l, Inc., 831 F. Supp. 202 (D. Mass. 1993); Lotus Dev. Corp. v. Borland Int'l, Inc., 831 F. Supp. 223 (D. Mass. 1993), *rev'd*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

[166] *See* Michael Freedman, *Supreme Court Upholds Copyright Extension*, Forbes.com, Jan. 15, 2003, *at* http://www.forbes.com/2003/01/15/cz_mf_0115copyright.html (last visited September 17, 2003) ("In the face of intense lobbying from The Walt Disney Co. and other companies, Congress passed the [Copyright Term Extension Act] in 1998, making corporate copyrights good for 95 years . . . .").

[167] The change from copyright-rich to copyright-poor is much less common, but does occur sometimes as the result of transfers made by authors to publishers. *See, e.g.*, Fantasy, Inc. v. Fogerty, 654 F. Supp. 1129 (N.D. Cal. 1987), *aff'd*, 984 F.2d 1524 (9th Cir. 1993), *rev'd and remanded on other grounds sub nom.* Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) (possible that author can infringe own copyright, transferred earlier); Gross v. Seligman, 212 F. 930 (2d Cir. 1914) (photographer held to infringe earlier, transferred work); *see also* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410 (7th Cir. 1992). Both *Fogerty* and *Gross* involved efforts by the transferee to prevent the author from creating new works, which can have the effect not merely of making the author copyright-poor as to past works but also

they do, their views of copyright change. Vaidhyanathan expresses a worthy sentiment when he says, "[c]opyright should not be meant for Rupert Murdoch, Michael Eisner and Bill Gates at the expense of the rest of us. Copyright should be for students, teachers, readers, library patrons, researchers, freelance writers, emerging musicians and experimental artists."[168] But of course, some of those students, teachers, and others will become copyright-rich eventually—and when that happens, their views will likely change. At one time, the ranks of "emerging musicians" included the members of the rock group Metallica, which in those early days permitted fans freely to record its concerts and trade the live tapes they made.[169] Years later, when the group was copyright-rich, it took a highly public stance against Napster, and its members filed suit personally against the proprietors of that P2P network.[170]

Vaidhyanathan turns to the popular music business in "Hep Cats and Copy Cats," his fourth chapter. Here he emphasizes the African-American blues tradition, out of which grew jazz, rock, disco, rap, and virtually all else that is original about American pop music. He notes that American musical creativity—which, more often than not, means African-American musical creativity—has been at least as much about style and performance as it has been about composition. Improvisation, rather than formal composition, has been the chief strength and most widely-imitated feature of American popular music.[171] Improvi-

keeping the author copyright-poor by directly interfering with the ability to create new works.

[168] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 5.

[169] "[T]he band couldn't think of a good reason to forbid taping" and frequently supplied a designated "tapers' section" behind the sound board so that fans could record a concert, take photos and shoot videos. CHRIS CROCKER, METALLICA: THE FRAYED ENDS OF METAL 197-98 (1998). The only other band to allow this type of taping was the Grateful Dead. *Id.*

[170] *See* Geoff Boucher, *Metallica's Rocky L.A. Road,* L.A. TIMES, July 13, 2000, at A6; Ron Harris, *Metallica demands Napster cut off 335,000 song-traders*, WINNIPEG FREE PRESS, May 8, 2000, at D5; Associated Press, *Metallica Demands on-Line Service Dump Illegal Song Traders*, CHI. TRIB., May 4, 2000, at 16. Predictably, some less copyright-rich musicians spoke out in favor of Napster. *See* Courtney Love, *Courtney Love does the Math, at* http://archive.salon.com/tech/feature/2000/06/14/love/ (last visited Sept. 18, 2003); Janis Ian, *The Internet Debacle—An Alternative View,* at http://www.janisian.com/articles.html (last visited Sept. 18, 2003).

[171] In the past, improvisation was practiced by musicians in Europe, notably during the Baroque era when harpsichordists were expected to improvise complex parts based only on "figured bass" notation (which provided a skeletal roadmap to the music and indicated which chord inversions the composer wanted the performer to play). Since the end of the Baroque era, however, improvisation has played little if any role in European music; musical creativity is considered to be situated more in the work of the composer than the performer. Certainly there is a role for interpretation, but interpretation and improvisation are not the same thing. The former is found in the subtle shadings that cannot be written down; the latter *is* the music. While there are virtuosi whose instrumental performances attract crowds regardless of what they play, for the most part the musician's task is faithfully to recreate

sation has been central to American music since at least the heyday of the Dixieland bands, playing the funeral music of turn-of-the-century New Orleans. Dixieland bands included numerous musicians improvising melodies at the same time; what held it all together were the chords, which formed a structure within which each soloist improvised a melody. Blues was another improvisational style, based on a single chord progression[172] that by 1910 was known to all from Memphis to New Orleans to Chicago and points north. But in improvised performance, the basic blues chords reveal countless inflections, and have proven capable of supporting profound emotional expression. When blues performers played the "standards" with their own, personal style—their own inflection and emotion—they became not merely craftsmen, but artists. The music wasn't complete until it had been played and the solos improvised. Each performance was something entirely new, different from those before and those after, and the performer, not the song, was often the chief attraction.

Jazz, which closely followed Dixieland, is the most-recognized American music based on improvisation. In jazz, although blues tunes were often used as the basis for improvisation, almost any music could and did serve as a starting point. One common jazz technique was to take popular music and "jazz it up." Because popular songs had a wide variety of chord structures, the jazz musician had more raw material with which to start than did blues players. Nevertheless, four or five dozen "standards" found (and still find) their way into the repertoire of most jazz performers. Jazz performers borrowed the blues technique of starting with a chord structure and a melody, and then making it one's own through performance and improvisation.

How would the music most distinctively American—Dixieland, the blues, and jazz—fare under the modern American copyright regime? Professor Vaidhyanathan suggests it would not do well.[173] Today, the exclusive right afforded authors to create derivative works could sharply limit the ability of later performers and composers to play and write their songs, as the chord progressions, melodies, tempos, and

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what the composer had written in the way the conductor wanted to hear it. And so, after the Baroque era, improvisation became a lost art in European and "serious" American music. Not until African-American musicians began to play Dixieland did improvisation return as a substantial expression of musical creativity. Today, improvisation is rare outside jazz (and occasionally pop) music.

[172] "[T]he Blues always consists of twelve bars divided into three equal parts, with a different chord for each 4-bar section." E. Simms Campbell, *The Spirit of the Blues*, in ESQUIRE'S WORLD OF JAZZ (1975 ed.) at 23. Authentic blues always follows the chord pattern I-IV-V.

[173] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 123.

overall similarity of expression would in many cases be too close to those of the first composer. Vaidhyanathan is correct when he points out that American musical creativity, with its roots in an African-American culture of improvisation and performance, is poorly served by American copyright law. In American music, what matters most is the performance.

To modern audiences, the importance of performance is perhaps nowhere as apparent as it is in the case of rap music, with its heavy emphasis on "sampling" of the recordings of others, in a process of transformation that often makes the sampled works unrecognizable. Professor Vaidhyanathan devotes a dozen or so pages to rap music's uneasy relationship with copyright law, beginning with rap's assault on copyright, followed by copyright's revenge as lawsuits based on sampling succeeded.[174] Today, sampling has become commonplace, but the samples are licensed by the sampler's record company.[175] Thus, rap artists without content industry support typically infringe, by sampling without licenses; as soon as they gain record company support, licenses must be obtained.[176]

Vaidhyanathan's chapter on the American popular music business provides perhaps the strongest support for his thesis that copyright is restricting and inhibiting American culture and creativity. It is clear that postmodern genres of art that depend on images, sounds, and other elements from popular culture for their vocabulary are threatened by the expansion of copyright.[177] Unfortunately, Vaidhyanathan sometimes sacrifices doctrinal consistency for the sake of a point. For example, he tells the story of the 1985 dispute between the rock group Led Zeppelin and the legendary blues composer Willie Dixon. Seventeen years before, the (then copyright-poor) Led Zeppelin on its 1968 debut had properly credited two songs to Dixon.

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[174] "Success" in this context includes out-of-court settlements as much as victories in court. Vaidhyanathan cites a dispute between two former members of The Turtles and the group De La Soul, in which the latter paid the former some $1.7 million as a settlement. Regarding litigation, he refers mainly to Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

[175] *See* Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11MEDIA LAW AND POLICY 12 (Fall 2002); Ronald Gaither, *The Chillin' Effect of Section 506: The Battle Over Digital Sampling in Rap Music*, 3 Vanderbilt J. Enter. L. & Practice 195 (2001).

[176] *See* Grand Upright Music, Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

[177] In the 1980's and 1990's, there was a genre of visual art called "appropriation art" that had troubles similar to those of rap music. Because it was based on the recasting of existing materials, it inevitably wound up risking infringement litigation. The genre was sued out of existence. *See* Schaumann, *supra* note 154. Rap has been more successful, because, unlike appropriation art, rap has the support of the content industry.

On its second album, however, the group did not credit Dixon for the song "Whole Lotta Love," resulting in a lawsuit settled in 1987 for an undisclosed payment to Dixon. Vaidhyanathan, disapproving of the suit, concludes that "both songs do share some lyrics, but they both take elements from the deep well of the blues tradition. What's more, the two songs have completely different 'feels.' . . . They are very different songs."[178] But just nine pages earlier Vaidhyanathan told us that American culture has suffered great harm under the "total concept and feel" theory of copyright infringement claimed by Hollywood.[179] If "feel" shouldn't be the basis for a copyright lawsuit, should it be a defense to one? Vaidhyanathan never addresses this point.

All the same, when he is talking about American music, Vaidhyanathan is at his best, and this chapter is a fascinating excursion into the cultural impact of copyright. Here, he puts his finger on the dynamic of copyright change: "The tension in the law is not between urban lower class and corporate überclass. It's not between black artists and white record executives. . . . It is in fact a struggle between the established entities in the music business and those trying to get established."[180] Once again, we are looking at the struggle between the copyright-rich and the copyright-poor, and what happens when the latter become the former.

3. The Future

In the final chapter ("The Digital Moment") Vaidhyanathan attempts to apply what has gone before to make some normative claims about what should be the future of copyright. He begins promisingly, with the statement that digitization and networking have "collapsed some important distinctions that had existed in the American copyright system for most of the twentieth century."[181] Certainly, as he points out, the distinction between "reading" and "copying" a digital work has disappeared.[182] Similarly, the distinction between producers and consumers has been eroded, if not "collapsed," by digitization and networking. This is in large part due to the open access to distribution channels provided by the internet.[183] But many of his statements here are indecipherable. He asserts, for example, that "[c]onverting Mo-

[178] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 123.

[179] *Id.* at 114; *see supra* note 161.

[180] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 133.

[181] *Id.* at 152.

[182] This is the result of the decision in the *MAI* case. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993). *See supra* notes 70-80 and accompanying text.

[183] *See supra* notes 36-45 and accompanying text.

zart's Jupiter Symphony into a series of ones and zeros has collapsed the idea-expression dichotomy."[184] Why a digital medium erodes the (admittedly, sometimes hazy) distinction between idea and expression is left to the reader. He continues, "[p]erhaps the ones and zeros are ideas, and the analog versions we inhale are the expressions."[185] Perhaps—but why would we consider the ones and zeros to be ideas? And if they were, whose ideas would they be? Certainly not Mozart's.[186] Are the and zeros more "idea" than are the analog grooves in a vinyl LP record? A little later, having *sub silentio* abandoned his position, he asks, "if strings of ones and zeros operate as an alphabet, a code, for *representing* ideas, shouldn't they enjoy status as expressions? Are strings of digital code worthy of both copyright protection and First Amendment protection?"[187] But his copyright questions were answered twenty years ago,[188] and a consensus existed as to the First Amendment status of computer code long before the question was resolved by courts in 2000 and 2001.[189] All too often, Vaidhyanathan seems to be out of his depth with this material, especially when contrasted with Litman's mastery of copyright nuances.

But Vaidhyanathan does identify some questions worthy of discussion, even if he doesn't build a normative case for their resolution. He argues that recent history has seen "four surrenders"[190] of important safeguards of public rights: (1) balance (the traditional copyright model) was surrendered to control (via digital rights management) by the DMCA; (2) the public interest was surrendered to private interest, visible in the rhetoric of "property" and "theft" from the content industries; (3) republican deliberation was surrendered to unelected, multi-

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[184] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 152.

[185] *Id.*

[186] Vaidhyanathan (though it's hard to be sure) appears to be struggling with the idea that a fixation of sounds might not be perceptible without the aid of a machine or device. But it is elementary that such fixations are protectable in copyright law, and acting as if this were unclear doesn't advance public understanding of copyright. Perhaps public understanding is too much to ask in any event.

[187] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 152 (emphasis added).

[188] *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1247-48 (3d Cir. 1983) (programs in binary code protectable); *see also* Universal City Studios, Inc. v. Remeirdes, 111 F.Supp. 2d 294, 326 (2000) ("Principally those familiar with the particular programming language will understand the source code expression. And only a relatively small number of skilled programmers and computer scientists will understand the machine readable object code. But each form *expresses* the same idea, albeit in different ways") (emphasis added), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

[189] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445-46 (2d Cir. 2001) (machine code can be "speech"); Junger v. Daley, 209 F.3d 481, 482 (6th Cir. 2000) (source code considered "speech").

[190] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 159-60.

lateral non-governmental organizations (for example, the World Intellectual Property Organization and the World Trade Organization); and (4) culture was surrendered to technology, again via the DMCA (meaning that "leaky" copyright permits culture to grow in the margins, while digital rights management—even when it doesn't work—exposes copyright-poor authors to legal liability that is clear-cut and admits of no defense). There is little question that each of these deserves a public discussion. If *Copyrights and Copywrongs* facilitates that discussion, it will be a success, even if not all the copyright details are quite right.

IV. THE COPYRIGHT-RICH GET RICHER

Litman and Vaidhyanathan address roughly the same period in American copyright history, but each emphasizes a different consequence of the development of the law. Litman focuses on the consequences to the (copyright-poor) consumer, which result predictably from the process of copyright lawmaking. Vaidhyanathan deals primarily with the consequences to creativity and the impact on new (and therefore copyright-poor) authors of copyright policy that increasingly entrenches the copyright-rich. Litman appears content to leave authors with the rest of the content industry; she dismisses the incentive function of copyright as "a useful thought tool . . . that [doesn't] straightforwardly describe[ ] the real world."[191] But authors must figure into the copyright calculus somewhere. "Balances" and "bargains" are critical parts of the American system of copyright, to be sure, but focusing only on consumers and what is happening to their interests omits the creative side of the copyright equation. There is something to be said, therefore, for reading these books together. If one had to choose between them, copyright lawyers, and perhaps most lawyers, will likely find Litman's book more satisfying than Vaidhyanathan's. The latter raises too many unanswered questions to please those of us indoctrinated into legal modes of thought.[192] Non-lawyers, on the other hand, may well prefer Vaidhyanathan's breezy style and anecdotes, which,

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[191] DIGITAL COPYRIGHT, *supra* note 13, at 80.

[192] As Litman notes, only a little jokingly:

> Copyright lawyers are a peculiarly myopic breed of human being. There is something fundamental about coming to understand that the current law may make it technically illegal to watch a movie and then imagine what it would have looked like if the studio had cast some other actor in the leading role, that renders one unfit for ordinary reflective thinking.

Id. at 22 (footnote omitted). The possibility that a derivative work could be created without tangible fixation accounts for possible "infringement by imagining." *See* 17 U.S.C. § 106(2) (2000) (author has exclusive right to *prepare* derivative work, rather than a right to reproduce, distribute, etc.).

though not as incisive as Litman's analysis, do quite a good job of conveying the essential issues and tensions in American copyright today. Reading the books together, however, is undoubtedly the way to get the most out of each, and is especially interesting because taken together the books show that consumers' and authors' interests are not inevitably in opposition.

Both books suggest, though neither one explicitly states, that the principal tension in American copyright exists between the copyright-rich and the copyright-poor. Those that have valuable copyrights tend to want more protection; the threat of digital distribution arouses enormous fears that the business model upon which the content industries were built will disappear and with it, the industries themselves. The copyright-rich therefore seek as much protection as their well-funded lobbyists and lawyers can muster, and use public relations as a tool to indoctrinate the copyright-poor into the belief that unauthorized use of copyrighted work is "stealing." The latter (including consumers and new artists, authors, and musicians), for their part, are losing ground as industry efforts to maintain and extend protection steadily erode the public domain and the rights of the public to access and use copyrighted works. At the moment, it seems, Congress and the courts are for the most part disposed to give the copyright-rich the protection they seek; the rhetoric of "property" and "theft" dominates the copyright discourse.

But copyright wasn't meant only, or even mainly, to protect the copyright-rich. Copyright's mandate, to "promote the progress of science," is more about increasing the public dissemination of expression. This is a prerequisite for democratic government and an enlightened society.[193] The prevailing copyright climate of ever-more protection focuses on providing and defending incentives for commercial distribution, even as it justifies reducing or eliminating access by those unwilling or unable to pay a fee. Dissemination disserves its constitutional purposes when access is limited to those who can pay the publisher's price.[194]

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[193] "[C]opyright serves fundamentally to promote democratic governance by promoting the dissemination of information, supporting independent media, and venerating individual self-expression." Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 Vand. L. Rev. 217, 220 (1998); *see also* sources cited *id.* n.10.

[194] Some will object that in 1789 books were not given away, nor need they be today. However, libraries and archives served the needs of those who could not afford to build large collections of books. By eliminating fair use (and quite possibly the first sale doctrine), the DMCA promotes a society where simply accessing information will carry a price.

But there may be some hope still. A review of developments since 2001 shows that although many battles have been won by those seeking maximum protection, the tide may still turn toward the copyright-poor.

A. *Recent Copyright Legislation*

On the legislative front, the news for consumers and the copyright-poor is generally bad. While bills that would benefit the copyright-poor[195] are about equal in number to those designed to benefit the copyright-rich, the content industry supports only the latter. Given the pattern of copyright lawmaking in the last 100 years, in which no bill without the support of substantially all the affected industries can pass, it is hard to be optimistic about the prospect for legislative reform.

Following the pattern of the DMCA, some of the new industry-supported bills would prohibit the use (or, in some cases, the posses-

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[195] The pro-public bills include three that are designed to mandate disclosure to consumers of access, reproduction, or distribution control technologies, because such technologies might violate the reasonable expectations of consumers regarding the content they acquire. *See* S. 692, 108th Cong., 1st Sess., § 3 (2003); H.R. 107, 108th Cong., 1st Sess., § 3 (2003); S. 1621, 108th Cong., 1st Sess., § 4(c) (2003). The last of these would also (I) prohibit the FCC from mandating access or redistribution control technologies for devices utilizing digital works, S. 1621, 108th Cong., 1st Sess., § 3 (2003); (ii) eliminate the right of copyright owners to compel disclosure of personal consumer information from internet service providers for purposes of enforcing copyright, *id.* § 5; and (iii) preserve secondary markets for used digital media products by prohibiting technology used to defeat the first sale doctrine, *id.* § 6. The "Public Access to Science Act" would restrict copyright in works "produced pursuant to scientific research substantially funded by the Federal Government." H.R. 2613, 108th Cong., 1st Sess. (2003). The "Public Domain Enhancement Act," introduced on June 25, 2003 by Reps. Lofgren and Doolittle, would require the payment of a nominal fee to the Copyright Office in order to continue the copyright in a published United States work for longer than 50 years after the date of its first publication. H.R. 2601, 108th Cong., 1st Sess. (2003). Finally, the Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003 was introduced by Reps. Lofgren and Boucher on March 4, 2003. H.R.1066, 108th Cong., 1st Sess. (2003). The BALANCE Act would make explicit that fair use of a work can include analog and digital transmissions. *Id.* § 3(a). It would also make clear that copyright is not infringed when the lawful possessor of a copy of a work reproduces, stores, adapts, or accesses the work for either archival purposes or for the purpose of performing or displaying the work privately. License terms to the contrary would be unenforceable. *Id.* § 3(b). The Act would make the first sale doctrine expressly applicable to digital formats, provided the "owner of a particular copy" or her designee does not retain a copy of the work. *Id.* § 4. This provision is problematic in that the widespread practice of licensing, rather than selling, many digital works sharply limit the number of "owners" of digital copies. Although CDs are still sold, rather than licensed, the provision would not apply to digital conversions (for example, to the MP3 format) of CDs because its language limits applicability to cases in which the "work is . . . sold or otherwise disposed of in its original format." *Id.* Finally, the BALANCE Act would expressly allow the circumvention of access controls and the provision of technology to circumvent access controls if the technology is used to make a non-infringing use of the protected work—as long as the copyright holder "fails to make publicly available the necessary means to make such non-infringing use without additional cost or burden." *Id.* § 5.

sion) of technology that can be used to reproduce or distribute copyrighted works in digital formats. Consider, for example, the misleadingly-named Author, Consumer, and Computer Owner Protection and Security (ACCOPS) Act of 2003.[196] This bill would make it a felony to place a single copyrighted work "on a computer network accessible to members of the public who are able to copy the work through such access."[197] It would further criminalize offering P2P software for download unless the offeror first "clearly and conspicuously warn[s] any person downloading that software, before it is downloaded, that it . . . could create a security and privacy risk for the user's computer."[198]

In a similar vein, the Piracy Deterrence and Education Act of 2003[199] requires the Director of the FBI to "develop a program to deter members of the public from committing acts of infringement by (A) offering on the Internet copies of copyrighted works, or (B) making copies of copyrighted works from the Internet."[200] Certainly deterrence will be difficult when, as a result of the *MAI* decision, merely viewing infringing works on one's computer constitutes "making copies of copyrighted works from the Internet." Perhaps even more chilling, the bill instructs the FBI Director to "facilitate the sharing among law enforcement agencies, Internet service providers, and copyright owners of information concerning [such] activities."[201] Moreover, the innocuous-sounding "facilitated sharing" of information described in the bill is far from "sharing." Rather, it amounts to coercion of ISPs, which in general don't want to share information about their customers with copyright owners. Although the RIAA's attempt to force Verizon to disclose subscriber information because of alleged copyright infringe-

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[196] H.R. 2752, 108th Cong., 1st Sess. (2003), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2752: (last visited Sept. 29, 2003) (the "ACCOPS Act"). The bill was introduced in the House on July 17, 2003, by Representatives Conyers, Berman, Schiff, Meehan, Wexler, and Weiner, all members of the House Judiciary Committee.

[197] ACCOPS Act § 301.

[198] ACCOPS Act § 302. Warning users of possible dangers is a good idea. There are, however, many serious security and privacy risks in other (non-P2P) software, for example in the Windows operating system. *See, e.g.*, Katie Hafner & Kirk Semple, *Fearing P.C. Havoc, Gumshoes Hunt Down a Virus*, N.Y. TIMES, Aug. 23, 2003, at C1; Kirk Semple, *Computer Worm Widely Attacks Windows Versions*, N.Y. TIMES, Aug, 13, 2003, at C1. Selectively imposing a warning requirement on P2P software seems an obvious attempt to scare users away from technology that the content industry doesn't like.

[199] H.R. 2517, 108th Cong., 1st Sess. (2003), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2517: (last visited Sept. 29, 2003).

[200] H.R. 2517, *supra* note 195, § 3.

[201] *Id.*

ment of Verizon subscribers succeeded at trial,[202] Verizon has appealed. Later efforts to force other ISP's to provide subscriber information are being contested by the ISP's.[203] The bill contemplates that internet service providers will—or will be forced to—cooperate with the content industry by revealing subscribers whose online activities the content owners have monitored.

These bills follow similar legislation introduced in 2002, including a bill introduced by Senator Hollings that would have required "any hardware or software that reproduces copyrighted works in digital form" to include built-in copy prevention systems.[204] The Hollings bill seriously underestimated the penetration of digital technology into American society. By requiring copy prevention systems based on reproduction of works in digital form, it would have regulated many more items than just computers (including talking dog collars, Barbie's Travel Train, cockpit voice recorders, musical car horns, and many others).[205]

Another bill introduced in 2002 would immunize copyright holders from liability for "disabling . . . or otherwise impairing the unauthorized

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[202] Recording Indus. Ass'n v. Verizon Internet Servs., Inc., 257 F.Supp.2d 244 (D.D.C. 2003) (denying Verizon's motion to quash subpoena), *on appeal*, 2003 U.S. App. LEXIS 11250.

[203] *See* Amy Harmon, *Efforts to Stop Music Swapping Draw More Fire*, N.Y. TIMES, August 1, 2003, at C1, *available at* http://www.nytimes.com/2003/08/01/business/01MUSI.html?tntemail1 (last visited August 1, 2003) (SBC Communications has filed a lawsuit challenging the constitutionality of the subpoenas obtained by the record industry seeking subscriber information).

[204] Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong., 2d Sess., *available at* http://thomas.loc.gov/cgi-bin/query/z?c107:S.2048: (last visited Sept. 29, 2003). *See* Freedom To Tinker: Fritz's Hit List (Dec. 8, 2002), *available at* http://www.freedom-to-tinker.com/archives/cat_fritzs_hit_list.html (last visited Sept. 29, 2003).

[205] Freedom to Tinker, *supra* note 185. The Hollings bill is an example of an attempt to restrict technology so far that the restriction becomes unworkable on its face. The DMCA came close to this when it prohibited trafficking in technologies that circumvent access controls used by content owners. Because "technologies" include software, trafficking in software that can circumvent access controls is a DMCA violation. Even telling others where to find such software can be a violation. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). Simply wearing a T-Shirt printed with source code that can be compiled into a program that circumvents access controls may be a DMCA violation, insofar as it is "provid[ing] . . . [a] technology" that circumvents access. Such T-Shirts are widely for sale. *See, e.g.*, http://www.copyleft.net/item.phtml?dynamic=1&referer=%2Fitem.phtml%3Fdynamic%3D1%26page%3Dproduct_271_front.phtml&page=product_1174_front.phtml (last visited Sept. 29, 2003). The point is that in the world of containerless content, technology may be nothing more than information. So, by attempting to restrict technology, the DMCA is actually attempting to restrict information. The practical difficulties of this effort are revealed by the immense variety of objects and texts that on their face seem to violate the DMCA by revealing how to circumvent access controls. Dozens of examples appear at http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/ (last visited Oct. 8, 2003). These include versions of the access-circumvention code set to music, dramatic readings, square-dance, and many other implementations.

distribution . . . of . . . copyrighted work" on a P2P network.[206] Even non-infringing files may be impaired "as may be reasonably necessary" to impair allegedly infringing files.[207] Evidently destruction of non-infringing material is acceptable, if it is necessary to stop infringement. It is tempting to dismiss this as an isolated and extreme case, but that might be a mistake: In 2003, Sen. Orrin Hatch (R-Utah), Chairman of the Senate Judiciary Committee (which has jurisdiction over copyright issues) told witnesses at a committee hearing that he favored *destroying the computers* of those suspected of online copyright infringement.[208] Questioned about his statement, he later said by way of explanation that "I do not favor extreme remedies—unless no moderate remedies can be found."[209] Even so, the Senator's statement remains an endorsement of "extreme measures" up to and including the destruction of consumers' computers by the content industry.

B. *Copyright's Redemption?*

Recent developments, then, suggest that Professors Litman and Vaidhyanathan are correct. Proposed copyright legislation has been dangerous both to consumer interests and to creativity; the ability of consumers and authors to access content and create new content may be even more restricted tomorrow than it is today. But there is a development, also predicted by Professor Litman, that may yet change the direction of copyright. This is the litigation brought by the RIAA against consumers who use P2P networks to distribute music files.[210]

The last paragraph of Professor Litman's book reads:

> People don't obey laws they don't believe in. Governments find it difficult to enforce laws that only a handful of people obey. Laws that people don't obey and that governments don't enforce are not much use to the interests that persuaded Congress to enact them. If a law is bad enough, even its proponents might be willing to abandon it in favor of a different law that seems more legitimate to the people it is intended to command. Even if copyright stakeholders refuse to

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[206] H.R. 5211, 107th Cong., 2d Sess. § 1(a) (2002), *available at* http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.5211: (last visited July 26, 2003).

[207] *Id.*

[208] Senator Takes Aim at Illegal Downloads, USAToday.com, June 19, 2003, *available at* http://www.usatoday.com/tech/news/techpolicy/2003-06-18-hatch-wants-computers-dead_x.htm (last visited Sept. 29, 2003).

[209] *Hatch Comments on Copyright Enforcement*, *available at* http://www.senate.gov/~hatch/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=205147 (last visited Sept. 29, 2003).

[210] *See supra* notes 106-135 and accompanying text.

> give the public a seat at the bargaining table, they may discover that they need to behave as if they had.[211]

We may now be facing precisely this situation. In an effort to deter the widespread distribution of copyrighted sound recordings, the recording industry has filed hundreds of lawsuits against consumers. Defendants have included a twelve-year-old girl living in public housing in New York City[212] and a 66-year-old retired schoolteacher (who denies ever having downloaded any music or letting anyone else do so).[213] The cases have attracted an enormous amount of publicity[214] and have sparked public concern, including a hearing called by Senator Norm Coleman, chair of the Senate Committee on Governmental Affairs Permanent Subcommittee on Investigations.[215] It seems that enforcement of copyright law against consumers has attracted the kind of attention that Professor Litman predicted: For the first time in almost 100 years, Congress is paying attention and the rights of consumers to use copyrighted works are the subject of a public discussion.

It is too early to predict where the public attention to copyright might lead. It could result in a copyright law that addresses the rights of the public to make use of works of authorship; a law that provides an incentive for creation and distribution of works of authorship without restricting the flow of information necessary for a democratic society and an informed electorate; a law that supports the artists who help create a vibrant culture without stifling the next generation of artists who will remake the culture into their own artistic vision. In Professor Vaidhyanathan's words: "Maybe some summer not too many years from now a young woman will enjoy a performance of *Appalachian Spring* and will be inspired to borrow from it to create a life of creativity and beauty."[216] If this is the result, then we will have reason to rejoice. But the recording industry lawsuits might also have their intended effect: the public might simply accept that one must never use

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[211] DIGITAL COPYRIGHT, *supra* note 13, at 195.

[212] *See* John Borland, *P2P group: We'll pay girl's RIAA bill*, CNET NEWS.COM, Sept. 10, 2003, *available at* http://news.com.com/2100-1027-5074227.html (last visited Sept. 29, 2003); Reuters, *Music Firms, DJ Offer to Pay 12-Year-Old's Fine*, at http://www.nytimes.com/reuters/arts/entertainment-media-music-lawsuit.html) (last visited Sept. 29, 2003).

[213] *See* John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES, Sept. 25, 2003, *available at* http://www.nytimes.com/2003/09/25/business/media/25TUNE.html (last visited Sept. 25, 2003).

[214] The author has copies of 48 stories from the New York Times alone directly addressing the recording industry's litigation against P2P users, between May 2, 2003, when the newspaper reported that the first four defendants settled their cases, and October 8, 2003.

[215] The schedule for the hearing is available at http://govt-aff.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=120 (last visited Sept. 29, 2003).

[216] COPYRIGHTS AND COPYWRONGS, *supra* note 14, at 189.

content in a way that the owner has not expressly agreed to in advance. "Property" might become the best-understood metaphor for copyrighted content. Should this be the outcome, our culture will have become uniquely impoverished without our ever being aware of what was happening.

V. CONCLUSION

Joseph de Maistre wrote, "Toute nation a le gouvernement qu'elle mérite."[217] If every nation has the government it deserves, then perhaps it is also true that every nation has the copyright law it deserves. This is a moment when technology and the law have opened a potentially robust debate over the scope and nature of the ownership of copyrighted content and the public's rights therein. If we choose to be passive in the face of diminishing public rights in content and information, then surely our rights will continue to diminish. If, on the other hand, we engage the debate over the copyright balance and the public's rights in information and content, then perhaps we can reverse the trend of the last 100 years. In either case, what we get will be what we, as the result of our action—or inaction—deserve.

[217] SUZY PLATT, ED., RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE (1989), *available at* http://www.bartleby.com/73/740.html (last visited Nov. 2, 2003).