

The Demonization of Piracy

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There are a lot of people in this room who have been fighting in the copyright wars. My guess is that if you look around at the people sitting at your table, you'll find at least one soldier, who, in one or another capacity, has been fighting to hold back some Very Bad Law. And, my guess is, if you were to ask that person how the fight is going, she'd tell you that it's going very badly indeed.

I want to take some of your time this afternoon to talk with you about where we are, how we got there, and why we're losing. Then, I'm going to ask you for some help.

The copyright system is changing on a level that's fairly fundamental. The United States is in the forefront of this change. For the first 200 years the US had a copyright statute, it was fair to describe it as giving authors limited rights for limited times while reserving other rights to the public. Copyright owners' control over uses of their works was narrow; and this was considered to be a feature rather than a bug. Under the old model, there were lots of unauthorized but completely legal uses.¹ The premise, here, is that we want authors to have enough control over their works to enable them to extract some of the commercial value of those works -- that's what lets them make a living creating works of authorship. At the same time, the purpose of the system is to benefit the public at large, and that works best when the rest of the value of the work can be enjoyed by the public at large.

¹ Copyright owners had the right to prevent unauthorized copying, but making a personal copy of a music CD was legal whether you kept it or gave it to a friend; recording a TV program off the air was legal whether you watched it now or put it on your shelf to watch it later. Copyright owners had the right to control distribution of copies, but anyone who owned a legitimate copy could sell it, loan it, or give it away whether the copyright owner liked that or not. Copyright owners had the exclusive right to adapt their works, but unauthorized reverse engineering was legal. Copyright owners had control over public performances of their work, but not over private performances. And so forth. A suggestion that copyright law ought to give authors control over who could read their works, or see them, or hear them, would have been ridiculous.

Over the past ten years, the powers that are have come around to the view that, in a networked digital world, limitations on copyright owners' control of their works is no longer so desirable. We've added about 100 pages to the statute, almost all of them billed as loophole-closers.² We've also come around to a new way of thinking about copyright: copyright is now a tool for copyright owners to use to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner's control.

So, under the old way of thinking about things, copying your CD and carrying the copy around with you to play in your car, in your Walkman, or in your cassette deck at work was legal and playing the recording was legal. Taking a music CD and making a copy on some other medium for your personal use was legal.

In the new world, we have MP3.com. MP3.com has come up with a scheme that allows you to play music over your computer from anywhere so long as you demonstrate that you already own, or have borrowed, the CD it's from. This is something you could do yourself. Even under the old law, it isn't something MP3.com could do for you without getting a license from the composers of the songs to perform them publicly. But, MP3.com has such a license. Seems okay, right?

Of course not. MP3.com rolled out this new service and got sued, both by the folks that own the copyrights in the music and by the (different) folks who own copyrights in the records. The suits both claim that in order to play the music for you, MP3.com had to make a copy of it. While MP3.com may have a license to perform the music, it doesn't have a license to make those copies.

Under the old way of thinking about things, if you wanted to design a computer program that was interoperable with another program, or just wanted to look at how the program worked, you reverse engineered it, and, even if this meant you disassembled and decompiled the code, that was

² See Intellectual Property and Communications Omnibus Reform Act of 1999, Public L. 106-113 (1999); Digital Theft and Copyright Damages Improvement Act, Public L. 106-160 (1999); Digital Millennium Copyright Act, Public L. 105-204 (1998); No Electronic Theft (NET) Act, Public L. 105-147, 111 Stat. 2678 (1997); Anticounterfeiting Consumer Protection Act, Public L. 104-153, 110 Stat. 1386, 1388 (1996); Digital Performance Right in Sound Recordings Act, Public L. 104-39, 109 Stat. 336 (1995); Audio Home Recording Act, Public L. 102-563, 106 Stat. 4237 (1992); Copyright Renewal Act, public L. 102-307, 106 Stat. 264 (1992); Computer Software Rental Amendments, Public L. 101-650, 104 Stat. 5089, 5134; Copyright Remedy Clarification Act, Public L. 101-553, 104 Stat. 287 (1990).

completely legal. You could use what you learned to create and sell an interoperable program, or just publish what you discovered about the ideas and functional elements embodied in the program, so long as your end product didn't itself infringe the code. So, when Accolade reverse-engineered Sega Genesis software in order to get around the security system that prevented unlicensed games from being played on the Sega Genesis console, and then marketed its own games that circumvented the security system, the court ruled that what it did was completely legal.³

In the new world, we have the DVD Content Scrambling System. DVDs are protected by a fairly weak encryption that is intended to prevent them from being played on unlicensed players. Somebody reverse-engineered the content scrambling system in order to write a utility that would permit computers running Linux to play DVDs, so that people who went out and bought or rented DVDs wouldn't also have to go out and buy a DVD player or a computer running Windows or Mac OS in order to watch the movie. He distributed the utility on the Internet. Folks mirrored it. Motion picture studios filed suit, arguing that even if the reverse engineering were legal (since its purpose was to create an interoperable computer program), the utility was itself illegal because it allowed folks to circumvent their content scrambling system, and that, therefore, distributing it was illegal without regard to what folks wanted to do with it. The judge went along.⁴

I was at a conference over the weekend⁵ where we talked about some of these cases. A colleague of mine, an Israeli law professor named Niva Elkin Koren, said there that there was not much sense in talking about the old copyright law, because the copyright law we have now doesn't follow the old rules. I think she's right about that. At the same time, if we don't develop a better understanding of why and how we got from there to here, we're not going to be able to figure out how to get out of the box we're now in. So, I want to take a little of your time to tell a couple of stories about how this metamorphosis happened.

The first story is one about models and metaphors. Models, analogies and metaphors matter more than we often think, because not only

³ See *Sega v. Accolade*, 997 F.2d 1510 (9th Cir. 1992). Accord *Sony v. Connectix*, ___ F.3d ___, 53 U.S.P.Q. 2d (BNA) 1705 (9th Cir. 2000).

⁴ See *Universal City Studios v. Reimerdes*, 00-Civ-0277 (LAK), <<http://www.nysd.uscourts.gov/courtweb/pdf/00-01149.PDF>> (SDNY 2/2/00).

⁵ NYU School of Law Information Law Institute, *A Free Information Ecology in the Digital Environment*, New York, Ny, March 31-April 2, 2000.

are they persuasive rhetorical tools, they're also the means by which we snooker ourselves into "realizing" that reality corresponds to the story the model or metaphor tells. From there, it's a short step to interpreting the law accordingly. So, let me give you the whirlwind, Cliff Notes version of an intellectual history of US copyright law:

US Copyrights now last about 95 years.⁶ 95 years ago, in 1905, the predominant metaphor for copyright was the notion of a *quid pro quo*.⁷ The public granted limited exclusive rights (and granted those only to authors who fulfilled a variety of formal conditions), in return for the immediate public dissemination of the work and the eventual dedication of the work in its entirety to the public domain.⁸

As the United States got less hung up on formal prerequisites, that model changed to a view of copyright as a bargain in which the public granted limited exclusive rights to authors as a means to advance the public interest. This model was about compensation:⁹ it focused on copyright as a way to permit authors to make enough money from the works they created that they would be able to make the works available to the public. That view of things persisted until fairly recently. The balance between protection and the material and uses that copyright left unprotected was thought to be the central animating principle of the law, or at least, that's what people said.

In the last 30 years, the idea of a bargain has gradually been replaced by a model drawn from the economic analysis of law, which characterizes copyright as a system of incentives.¹⁰ Today, this is the standard economic model of copyright law, whereby copyright provides an

⁶ 17 U.S.C. § 304.

⁷ See Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 977-92 (1990).

⁸ See, e.g., *London v. Biograph*, 231 F. 696 (1916); *Stone & McCarrick v. Dugan Piano*, 210 F. 399 (ED La 1914);

⁹ I'm indebted to Professor Niva Elkin-Koren for this insight. See Niva Elkin-Koren, *Turning Culture into a Market for Consumer Goods* (3/00 draft).

¹⁰ See, e.g., Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Socy 209 (1982); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600 (1982); William M. Landes & Richard Posner, *An Economic Analysis of Copyright*, 18 J. Legal Stud. 325 (1989).

economic incentive for the creation and distribution of original works of authorship.¹¹

The model derives a lot of its power from its simplicity: it posits a direct relationship between the extent of copyright protection and the amount of authorship produced and distributed -- any increase in the scope or subject matter or duration of copyright will cause an increase in authorship; any reduction will cause a reduction.

The economic analysis model, here, focuses on the effect greater or lesser copyright rights might have on incentives to create and exploit new works. It doesn't bother its head about stuff like balance or bargains except as they might affect the incentive structure for creating and exploiting new works. To justify copyright limitations, like fair use, you need to argue that authors and publishers need them in order to create new works of authorship,¹² rather than, say, because that's part of the public's share of the copyright bargain. The model is not rooted in compensation, and so it doesn't ask how broad a copyright would be appropriate or fair; instead it inquires whether broader, longer, or stronger copyright protection would be likely to lead to the production of more works of authorship.

More and stronger and longer copyright protection will always, at the margin, cause more authors to create more works -- that's how this sort of liner model operates. If we forget that it's just a useful thought tool, and persuade ourselves that it straightforwardly describes real world stuff, then we're trapped in a construct in which there's no good reason why copyrights shouldn't cover everything and last forever.

Lately, that's what seems to have happened. Copyright legislation has recently been a one-way ratchet, and it's hard to argue that that's bad within the confines of the conventional way of thinking about copyright.

That brings me up to about 1995. In the past five years we've seen another evolution. Copyright is less about incentives today than it is about control.¹³

I read a paper a few weeks ago¹⁴ that seemed to me to capture the tenor of current thinking about copyright, at least in mainstream quarters.

¹¹ See, e.g., Dennis Karjala, *Copyright in Electronic Maps*, 35 *Jurimetrics J.* 395 (1995); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 *U. Colo. L. Rev.* 1173 (1991).

¹² See Litman, *supra* note 7, at 1007-12;

¹³ Again, I'm indebted to Professor Elkin-Koren for the taxonomy.

The author of this article argues that, in a digital age, the copyright clause of the US constitution permits, *and may even require* Congress to grant authors exclusive rights to control *access* to their works. In a nutshell, the Constitution tells Congress to grant authors the "exclusive rights" to their writings, and in a digital age, the only way to accomplish that is to give authors control over access -- not merely initial access, but continuing control over every subsequent act of gaining access to the content of a work. In essence, that's an exclusive right to use. In other words, in order to effectively protect authors' "exclusive rights" to their writings, which is to say, control, we need to give them power to permit or prevent any use that might undermine their control. And if you look at the cases I described a little while ago, they are all about control -- indeed, they're about relying on technicalities to prevent what used to be lawful uses, because those lawful uses threaten copyright owners' control.

Here's another story about how we got here from there. This story is the story of the infamous RAM copy. It's a very familiar story for those of you who have been following the copyright wars, so I'll tell it in short form.¹⁵ The copyright act is structured to give copyright owners exclusive control over enumerated uses, subject to specific enumerated exceptions. The classic, original enumerated use is an exclusive right over the making and sale of copies. About 10 years ago, we began to see arguments that any appearance of a work in the random access memory of a computer should count as the creation of a copy under the copyright statute, and should therefore be subject to the copyright owner's control.

The watershed moment in the transition from an incentive model of copyright to a control model came when a guy named Eric Francis quit his job with one computer company and went to work for a business that maintained and repaired computer systems designed by other companies, including Mr. Francis's original employer. The old company sued Francis for a slew of different causes of action.

The Judge apparently decided that Mr. Francis was scum, and he handed down one of those unfortunate opinions you see sometimes where plaintiff prevails on every single claim and defendant's every argument is

¹⁴ Jane C. Ginsburg, *Essay: From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law*, in HUGH HANSEN, ED, *U.S. INTELLECTUAL PROPERTY: LAW AND POLICY* (Sweet & Maxwell 2000).

¹⁵ For the long form, see Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts & Entertainment L.J.* 29, 39-43 (1994); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 *Oregon L. Rev.* 19, 35-39 (1990); Pamela Samuleson, *The U.S. Digital Agenda at WIPO*, 37 *Va. J. Int'l L.* 369 (1997).

wrong.¹⁶ To get to the conclusion that plaintiff was entitled to an injunction for willful copyright infringement, though, the court had to get past the fact that turning on someone's computer to service it would not normally be seen as infringing the copyright in the software. So, the court held that every time Francis or his new business turned on a customer's computer, the operating system software was loaded into random access memory, which created an unauthorized copy.

Well, if every time something is loaded into Random Access memory without the copyright owner's express permission, an actionable copy is made, that analysis could apply to text files, or digital music files, or any other file in digital form. So, we have this crazy but brilliant theory under which every unlicensed use of any work in digital form is potentially an infringement.

I cannot tell you what a crazy notion this theory sounded like when it first got floated six or seven years ago. Nonetheless, if you're a record company, or a motion picture studio or even a book publisher, and if the Internet scares you silly, then this is just what you need. So, lawyers for the content industry picked it up, declared it to be a well settled legal principle, and sold it to Congress.

The story of how the content industry sold this control-based notion of copyright to Congress, the Courts and the public is an interesting one in its own right, since it starts with a kernel of nationalism and xenophobia. Initially, this piracy story was all about Americans trying to protect their property from foreigners trying to steal it. Once we got comfortable with the idea that any unlicensed use was bad one, though, the evil pirates got moved onshore.

That brings me to the third story, which is a story is about the fact that content owners have been winning the battles of terminology and metaphors. Most strikingly, "unauthorized use" has increasingly ceased to be a good thing; instead, unauthorized use has metamorphosed into "piracy."

Piracy used to be about folks who made and sold large numbers of counterfeit copies. Today, the term "piracy" seems to describe any unlicensed activity especially if the person engaging in it is a male teenager. The content industry calls some things that are unquestionably

¹⁶ *Mai Systems v. Peak Computer*, 1992 US Dist. LEXIS 21829 (C.D. Cal. 1992), *aff'd*, 991 F.2d 511 (9th Cir. 1993).

legal “piracy” -- like making the recordings expressly privileged under the audio home recording act.

People on the content owners' side of this divide explain that it's technology that has changed penny-ante unauthorized users into pirates, but that's not really it at all. These "pirates" are doing the same sort of things unlicensed users have always done -- making copies of things for their own consumptive use, or sharing their copies with their friends, or reverse engineering the works embodied on the copies to figure out how they work. What's changed is the epithet we apply to them.

If we untangle the claim that technology has turned Johnny Teenager into a Pirate, I think what's fueling it is the idea that **if** Johnny Teenager were to decide to share his unauthorized copy with 2 million of his closest friends, the *effect* on the record company would be pretty similar to the effect of some counterfeit CD factory burning 2 million CDs and selling them cheap.

I understand why record companies are worried. But, look at what they've done. They've succeeded in persuading a lot of people that any behavior that has the same effect as piracy must *be* piracy, and must therefore reflect the same moral turpitude we attach to piracy, even if it the same behavior that we all called legitimate before.

Worse, any behavior that *could potentially cause the same effect* as piracy, even if it doesn't, must also be piracy. Because an unauthorized, unencrypted digital copy of something *could* be uploaded to the Internet, where it *could* be downloaded by two million people, even making the digital copy is piracy. (Seen from this vantage point, the idea of making RAM copies actionable seems to make sense, since the potential undesirable uses of a digital copy in RAM aren't appreciably different from the potential undesirable uses of a digital copy on Johnny Teenager's hard disk.)

Or, to take a real example, because an unauthorized unencrypted digital copy of something could be used in a way that could cause all that damage, making a tool that makes it *possible* to make an unauthorized unencrypted digital copy, even if nobody ever actually makes one, is itself piracy, regardless of the reasons one might have for making this tool.

I'm talking, of course, about the DeCSS case.¹⁷ The DeCSS case is one of what has so far been a trickle but will soon become a flood of anti-circumvention suits brought under section 1201 of the Digital Millennium Copyright Act.

The Digital Millennium Copyright Act was signed into law in December of 1998.¹⁸ The law, in a nutshell, says that if the copyright owner puts a cryptographic or technological lock around a work in order to control access, or copying, or performance or display of any work, then it is illegal both to circumvent that lock or to supply any product, service or technology that's designed to help anyone else circumvent that lock.¹⁹ Defendants argued in the DeCSS case that their activities were legal under fair use, and the court held that fair use is not a defense to an anti-circumvention claim.

I would think that what's bad about all this is a no-brainer. But when I talk about it, even to people who are normally rabidly supportive of civil liberties, people I talk to explain to me that the cases were rightly decided, even if the rhetoric might be just a little overbroad, because defendants were pirates.

Why are they pirates? Because circumventing a technological protection system is just like breaking a lock. You hear a lot of this argument: "It's one thing for someone to browse through a book without paying for it, but it is a completely different thing for that person to break the lock on my house to come in and steal the book in order to browse through it without paying for it."

People who break locks are burglars and pirates. If someone with legitimate access to this book sought to read it, or even quote a little bit of it, well, that's fair use. But there can be no fair use privilege to break people's locks and burgle their intellectual property.

¹⁷ Universal City Studios v. Reimerdes, 00-Civ-0277 (LAK), <<http://www.nysd.uscourts.gov/courtweb/pdf/00-01149.PDF>> (SDNY 2/2/00).

¹⁸ Digital Millennium Copyright Act, Public L. 105-204 (1998)

¹⁹ In the DeCSS case, the defendants argued that the purpose of the DeCSS code was to allow DVD owners to play their DVDs in their computers. Writing DeCSS should be completely legal under the fair use clause; Using DeCSS to play DVDs should be completely legal under a section of the statute permitting you to adapt software in order to enable it to run in your computer, on whatever operating system your computer runs, therefore distributing the DeCSS code should also be legal. The court held that if DeCSS is designed to circumvent the access protection system, it doesn't matter what it is intended for or how it is used, since the law says that it cannot be distributed. *See id.*

This image works, both because it appeals to some powerful feelings we have about the safety of our homes, and because the way we think about locks allows us to skip over a whole host of crucial issues. Most importantly, we assume that everything we keep under lock and key is something we own and are entitled to protect. The image the metaphor evokes is of someone breaking into our homes or our cars to take stuff that's *ours*.²⁰

I call this the "my-painting-may-be-in-the-public-domain-but-I-don't-have-to-let-you-into-my-locked-home-to-see-it" metaphor.²¹ If you think about it, you realize that all of the magic in the metaphor is being supplied by my house.

The fact that it's my house gives me legal control over who gets to come in. Backed up by that legal control, I can use a whole bunch of stay-away devices-- locks, burglar alarms, electrified fences, vicious attack dogs.

The property laws about home ownership are what gives the locks and other stay away devices their legitimacy. Without them, there's no reason in the world why people can't break in to see the painting without my permission.

This becomes obvious if one imagines that I'm using a lock or some other protection measure (my well-trained attack dog, say) to prevent strangers from viewing some painting I don't own in some place I don't own. If I set my vicious attack dog to keep folks away from the Mona Lisa in the Louvre Museum, the guards would simply shoot it.

But people don't see it this way. To the extent that people find the Internet to be unfamiliar, intimidating, even frightening, the cyberpirate is a convenient totem for everything about the Internet that's scary. So people *believe* in the cyber-pirate.

What do we do with all this? We're in a box. Whether we collaborated in building it is a story for another day; the question now is

²⁰ That's just plain wrong. Most obviously, it skips right over the fact that when we're talking about intellectual property, the stuff behind that lock is some combination of stuff someone owns and stuff owned by the public at large. It seems a little less heinous if what's behind that lock isn't my stuff, but stuff that belongs to the person who is breaking in. Still, when we're talking about retrieving property that someone has locked up inside of his house, the law says, "well, no, you still can't break in. Go sue for replevin or conversion or something." Similarly, the argument goes, even if you're entitled to view the stuff inside the locked house, that doesn't give you a privilege to break the lock.

²¹ Jessica Litman, *The Tales that Article 2B Tells*, 13 Berkeley Technology Law Journal 935 (1998).

how to get out. I'm pessimistic about any chance we have of changing the *law*. The US Congress is just at the moment firmly in the pocket of the content industries, and there's not much hope that that'll change anytime soon. Trying to rewrite the law right now would be an exercise in tilting at windmills. We *may* have a better time trying to persuade the courts to read the law we have in a way that we can live with. It's too early to be sure about that, but I think that that effort will only succeed if judges come to believe that the stuff being called piracy is in fact completely legitimate unauthorized use. To succeed at that, we are going to need to challenge and to change popular perceptions. We need help in figuring out better stories we can tell, to counter the stories about the cyberpirate.

If we put aside the bravado about cracking and stealing, for example, the fact is that very few people disagree with the idea that artists and authors and designers need to get paid and ought to get paid. Of course they need to get paid, or, at least, they need to be able to get paid if they want to. Very few people disagree with the idea that artists and authors and designers ought to get credit. If authors are sure they're going to be paid, though, and sure they're going to get credit, they really don't need control over what members of the public do with their work. Sure, they might like it, but most of them don't need it. Indeed, getting it may not be good for them. The motion picture industry, after all, tried to eradicate the VCR, claiming that allowing consumers to tape television programs would shut down the movie industry. They lost that fight, and settled (temporarily, anyway) for getting paid.

There will always be some authors who insist on that control. Irving Berlin used to sue Mad Magazine whenever it wrote parody lyrics to be sung to the tune of one of his songs. I'd guess that the majority of *individual* artists and authors and designers wouldn't. Right now, after all, they either don't have that sort of control or they can't keep it because their publishers and employers insist that they sign it away. But at the moment, the authors and content owners who just want to get paid are at least officially aligned with the content owners who insist they need perfect control. We need to separate them. We need to try to foster an environment in which it is easy to pay and to get paid but real hard to exercise the kind of control that content owners insist they need and are entitled to. We need, in short, to marginalize the control mongers, by making sure that folks who feel they can do without all that control have an easy time doing with it.