

# REFORMING INFORMATION LAW IN COPYRIGHT'S IMAGE

*Professor Jessica Litman*

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*Professor Jessica Litman\**

The First Amendment has always provided a completely different standard with regard to liability for actions that constitute speech as compared to actions that constitute copyright infringement. They're really just apples and oranges. And I think it would disserve both areas of law—I know there's been some discussion, some people have attempted to link these two areas of law recently, and I think it does a disservice to both areas of law, even though the same technologies may be involved. And I think it really does a disservice both to the law of the First Amendment and the law of copyright to attempt really to try to analogize from one to the other.

Commissioner Bruce Lehman<sup>1</sup>

Only a copyright lawyer could think that copyright law was an exemplary vehicle for a national or international information policy, that copyright rules provided appropriate standards for regulating consumers' access to and use of information, or that copyright norms supplied adequate insights to guide our adjustment of that policy to the claims of competing interests. Only a copyright lawyer would view it as progress if consumers agreed that their everyday reading, viewing and listening behavior should henceforth be conducted in rigorous compliance with the provisions of title 17 of the U.S. Code.

Because we copyright specialists take pride in the arcane technicalities of our specialty, we too often exclude from our policy discussions—or fail to take seriously—the contributions of the vast number of interested observers who are not copyright lawyers. We talk with each other instead, and forget to recognize the degree to which we have come to take for granted that the terms of our discourse are the appropriate ones. We all know that, without strong incentives cast in the property mold, authors will lack the will to create and publishers have no motive to disseminate the works that form the currency of our information economy.<sup>2</sup> We all agree that the copyright system's solicitude for copyright owners is an appropriate, nay, indispensable element in its role as the

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1. *NII Copyright Protection Act of 1995: Joint Hearing on H.R. 2441 and S. 1284 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm. and the Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) (testimony of Bruce Lehman, Commissioner of Patents) available in LEXIS, News Library, SCRIPT file.

2. See, e.g., *Intellectual Property Issues Involved in the National Information Infrastructure Initiative: Public Hearing Before the National Information Infrastructure Task Force Working Group on Intellectual Property* 14-22 (Nov. 18, 1993) [hereinafter Nov. 18, 1993, *IITF Hearing*] (testimony of Steven J. Metalitz, Information Industry Association); see also *id.* at 99-106 (testimony of Fritz E. Attaway, Motion Picture Association of America).

engine of free expression. We all believe that copyright's success in fostering authorship is what made America great. Outsiders may say intemperate things, but that's probably because they are too unsophisticated in the ways of intellectual property to understand the intricacies of the system, and are thus unable to appreciate its virtues.

The recent celebrity of the Internet has inspired lobbyists and policymakers to scramble for solutions to problems both real and imagined, and has generated an opportunity for copyright specialists to remake significant sectors of the nation's information policy into a form predicated on extant copyright rules and copyright norms. To a core community of copyright experts, such a change seems good and true. The incomplete accommodation of copyright policy in our information law until now has been a persistent problem,<sup>3</sup> and appropriate legislative response to the threats posed by digital technology in general and the Internet in particular may offer a comprehensive solution, discouraging courts from too easily privileging substantial uses of copyrighted material in the interest of an asserted policy favoring access.<sup>4</sup>

The White House Information Infrastructure Task Force issued a lengthy report in September, 1995, prescribing specific reforms intended to ensure that familiar copyright rules would function as "rules of the road" for the information superhighway.<sup>5</sup> When alarmed observers complained that copyright-centric proposals might impede the progress of science and the useful arts,<sup>6</sup> supporters of the proposals suggested that these naysayers were advancing

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3. See, e.g., Nov. 18, 1993, *IITF Hearing*, *supra* note 2, at 107-120 (testimony of Hilary B. Rosen, Recording Industry Association of America); *id.* at 193-200 (testimony of Ronald J. Palenski, Information Technology Association of America); *id.* at 201-19 (testimony of Mark Traphagen, Software Publishers Association); *Public Hearing at University of California Los Angeles Before the Information Infrastructure Task Force Working Group on Intellectual Property*, 29-32 (Sept. 16, 1994) [hereinafter Sept. 16, 1994, *IITF Hearing*] (testimony of Mary O'Hare, Intellectual Property Section, State Bar of California); Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 378 (1992); INFORMATION INDUSTRY ASSOC., *IIA. Public Policy & Government Relations Council—U.S. Industry Needs Legislation to Protect Investment in Databases* (Feb. 10, 1997) <<http://www.infoindustry.org/ppgrc/prc/prdoc001.htm>>.

4. See *NII Copyright Protection Act of 1995: Hearing on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 277-296 (Feb. 8, 1996) [hereinafter Feb. 8, 1996, *House Hearing*] (testimony of William Cook, trial attorney); see also *Copyright Protection on the Internet, Hearing on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 21-25 (Feb. 7, 1996) [hereinafter Feb. 7, 1996, *House Hearing*] (testimony of Jack Valenti, Motion Picture Association of America); *National Information Infrastructure, Hearing on S. 1284 Before the Senate Judiciary Comm.*, 104th Cong., 2d Sess. (May 7, 1996) [hereinafter May 7, 1996, *Senate Hearing*] (testimony of Kenneth Kay, Creative Incentive Coalition), available in LEXIS, News Library, SCRIPT file.

5. See Feb. 8, 1996, *House Hearing*, *supra* note 4, at 184-202 (prepared statement of the Association of American Publishers); INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 201-36 (1995) [hereinafter WHITE PAPER].

6. See, e.g., James Boyle, *Overregulating the Internet*, WASH. TIMES, Nov. 14, 1995, at A17; Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134; DIGITAL FUTURE COALITION HOME PAGE (visited Feb. 15, 1997) <[www.ari.net/dfc/](http://www.ari.net/dfc/)>.

misleading arguments, perhaps from sincere but ill-informed mis-apprehensions,<sup>7</sup> or perhaps in pursuit of other, unacknowledged agendas.<sup>8</sup> Proponents of the legislation have insisted that the privilege of fair use will continue to permit appropriate uses,<sup>9</sup> and will thus forestall any major problems raised by the proposals' opponents. They have resisted suggestions, however, to extend the fair use privilege to legitimize private, educational or library uses in the digital environment. The White House Information Infrastructure Task Force Working Group On Intellectual Property Report's response is exemplary:

Some participants have suggested that the United States is being divided into a nation of information "haves" and "have nots" and that this could be ameliorated by ensuring that the fair use defense is broadly generous in the NII context. The Working Group rejects the notion that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of "universal access."<sup>10</sup>

Other contributions to this symposium examine whether current copyright law is a sensible scheme when applied to networked digital technology.<sup>11</sup> In this article, I argue that, whatever the outcome of that debate, copyright doctrine is ill-adapted to accommodate many of the important interests that inform our information policy. First Amendment, privacy, and distributional issues that copyright has treated only glancingly are central to any information policy. I argue further that suggestions that fair use will resolve any important conflicts between these interests and the proprietary claims of copyright holders

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7. See, e.g., *NII Copyright Protection Act of 1995: Joint Hearing on H.R. 2441 and S. 1284 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm. and the Senate Judiciary Comm.*, 104th Cong., 1st Sess. 30-39 (Nov. 15, 1995) [hereinafter Nov. 15, 1995, *Joint Hearing*] (testimony of Bruce Lehman, Commissioner of Patents); Ken Kay & Steve Metalitz, *Respecting Cyberproperty: The Urgency of a Digital Update of Copyright Law*, LEGAL TIMES (April 8, 1996) <<http://www.cic.org/clip5.html>>; CREATIVE INCENTIVE COALITION, *Ten Myths About the NII Copyright Protection Act* (visited Feb. 15, 1997) <<http://www.cic.org/myths.html>>.

8. See, e.g., Nov. 15, 1995, *Joint Hearing*, *supra* note 7, at 30-39 (testimony of Bruce Lehman, Commissioner of Patents).

9. See, e.g., Charles H. Kennedy, *Letter to the Editor: Internet Not Immune to Copyright Law*, L.A. TIMES, May 27, 1996, at D6.

10. WHITE PAPER, *supra* note 5, at 84. See also *id.* at 82 ("[I]t may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine"); Feb. 8, 1996, *House Hearing*, *supra* note 4, at 64-79 (statement of Barbara A. Munder, Information Industry Association). For an articulate critique of this reasoning, see JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 135-39 (1996).

11. See, e.g., Howard C. Anawalt, *Nine Guidelines and a Reflection on Internet Copyright Practice*, 22 U. DAYTON L. REV. 393 (1997); I. Trotter Hardy, *Computer RAM "Copies": Hit or Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 U. DAYTON L. REV. 423 (1997); Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997). Much of the commentary about the wisdom or perils of importing copyright rules into cyberspace unchanged focuses on fundamental and philosophical problems. There are also more prosaic difficulties. The access-plus-substantial-similarity test for copying, for example, seems likely to be a casualty of the new era. Imagine a 21st Century Arnstein, who, like all aspiring young songwriters everywhere, puts his creative output on his World Wide Web homepage. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

are unrealistic. The advantage of remaking our information policy on the model of our copyright law is that it will greatly enhance the value of copyright lawyers' expertise. As gratifying as that attainment might be, it seems insufficient to be worth saddling our citizens with the deformed information policy likely to result from it.<sup>12</sup>

Part I of this article argues that the copyright proposals currently under consideration appear likely to supplant important elements of our information law for communications over digital networks. Part II examines the longstanding axiom that copyright law and First Amendment law complement each other, rather than conflict. I suggest that the most important reasons for the compatibility between copyright and free expression law lie not in copyright's incentive structure, as is commonly asserted, but rather in legal and practical limitations on the scope of exclusive copyright rights. In Part III, I examine the effects that technological progress and the proposed copyright improvements are likely to have on those limitations. I conclude that, in the digital age, those legal and practical restrictions may no longer ensure the meaningful public access to ideas, facts, and other unprotected content that is the predicate for the asserted harmony between copyright law and the First Amendment. In Part IV, I examine copyright's hospitality to elements of our information policy other than First Amendment concerns, and find it ill-suited to accommodate them. Copyright's asserted solicitude for privacy, for example, turns out to be largely illusory, especially in the context of the Internet. Copyright's approach to distributional issues has long been to leave them to the marketplace. Copyright, in short, is too limited a prism through which to focus the many conflicting interests that make up our information law.

## I. INFORMATION POLICY

American information policy is an elaborate mixture of competing and sometimes contradictory imperatives. The architectural core is supplied by the First Amendment, but different First Amendment norms and models operate in tension with each other.<sup>13</sup> In addition (and sometimes in opposition) to First Amendment values, our information policy incorporates concerns ranging from protecting children<sup>14</sup> to vindicating injured reputations,<sup>15</sup> defending individual

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12. Professor Neil Netanel has recently published an ambitious article that takes the contrary view. According to Professor Netanel, copyright law itself incorporates structural features that enhance the democratic character of civil society. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

13. See Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

14. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, *reh'g denied*, 495 U.S. 913 (1990); J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1137-41 (1996); Symposium, *Safe Harbors and Stern Warnings: FCC Regulation of Indecent Broadcasting*, 3 VILL. SPORTS & ENT. L.J. 1 (1996).

15. See, e.g., *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991); *Milkovich v. Lorain Journal*, 497

privacy,<sup>16</sup> preserving the value of business property,<sup>17</sup> preventing misleading advertisements,<sup>18</sup> ensuring the fairness of elections,<sup>19</sup> and guarding our national security.<sup>20</sup> The balance among all these policies is at best delicate, because the law seeks to reconcile irreconcilable things.<sup>21</sup> Intellectual property laws have, until now, been a minor blip on the information policy radar screen. Occasional cranky commentators have suggested that copyright and the First Amendment cannot easily be harmonized,<sup>22</sup> but the usual way of looking at it

U.S. 1 (1990).

16. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

17. See, e.g., *Carpenter v. United States*, 484 U.S. 19 (1987); *Zachini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

18. See, e.g., *United States Healthcare, Inc. v. Blue Cross of Philadelphia*, 898 F.2d 914 (3rd Cir.), cert. denied, 498 U.S. 819 (1990); see also JANE GINSBURG ET AL., *TRADEMARK AND UNFAIR COMPETITION LAW* 633-660 (2d ed. 1996).

19. See, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976).

20. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980).

21. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *NW. L. REV.* 1212 (1983); Weinberg, *supra* note 13.

22. I include myself in this crowd. See Jessica Litman, *Copyright and Information Policy*, 55 *LAW & CONTEMP. PROBS.* 185 (1992):

The received wisdom about the interaction between copyright and the first amendment is that the two are not in conflict. Both advance "the right to speak freely and the right to refrain from speaking at all." Thus, enjoining a biographer from publishing a biography that quotes her subject is not a prior restraint; prohibiting a data base from furnishing its customers with the page numbers on which language in a legal opinion may be found raises no first amendment implications; prohibiting a magazine from recounting a former President's description of his official actions poses no problems for freedom of the press.

The bromide that copyright and the first amendment do not conflict with each other is said to derive from copyright law's own solicitude for ensuring the free flow of ideas. That solicitude, it is said, is reflected in the principle that copyright protects only expression and leaves ideas and information free for use by others, and in copyright's fair use privilege. Together, the distinction between idea and expression and the fair use privilege are said to supply more than sufficient protection for first amendment values within copyright law's own internal structure.

So, here is the box that we've built for ourselves: copyright owners have frequently relied on the copyright protection accorded to the expression in their works to try to restrict the use of the ideas and information that the works express. In recent years, copyright owners have developed increasingly clever strategies to advance those goals. In a society committed to freedom of expression and its corollary of unfettered access to ideas and information, that trend might be a cause for concern. The common wisdom, however, is that no such concern is appropriate. We do not have to worry about the use of copyright to impede the dissemination of ideas and information, it is said, because fair use is there to privilege such uses. Nor need we worry about shrinking the scope of the fair use privilege, because the idea-expression distinction ensures that ideas and information will remain in the public domain. Finally, we need not concern ourselves with the specter of copyright's restricting anyone's opportunities to exercise her freedom of expression, because the fair use privilege and the idea-expression distinction provide adequate protection for such rights.

*Id.* at 204-05 (footnotes omitted); see also Floyd Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture*, 35 *J. COPR. SOC'Y* 1 (1987); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 *CAL. L. REV.* 283 (1979); Gary L. Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 *U. PA. L. REV.* 519, 552-53, 598 (1986); Lyman Ray Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 *VAND. L. REV.* 1161 (1975); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 *EMORY L.J.* 393 (1989); Andrea Simon, Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 *COLUM. L. REV.* 425 (1984).

insists that “[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>23</sup>

It seems at first fanciful to suggest that any serious effort is afoot to refashion our information policy to give primacy to intellectual property laws. Yet, the proposals emanating from the White House Information Infrastructure Task Force seem to have that goal. The President’s Task Force was charged to come up with “comprehensive telecommunications and information policies aimed at articulating and implementing the Administration’s vision for the NII.”<sup>24</sup> It set up working groups on a variety of topics.<sup>25</sup> The various working groups—save one—seem to have issued documents suggesting, in essence, that there is no need for precipitous government action. Thus, the Task Force’s ultimate position on privacy is that privacy is a good thing, and proprietors of databases collecting private information should be reminded that members of the public prefer respect for privacy over the alternative.<sup>26</sup> The Task Force’s ultimate position on technical standards appears to be that interoperability is good, and private industry, acting in accord with private firms’ business plans, may choose to adopt interoperable technology to some degree.<sup>27</sup> Most documents emanating from the IITF have cautioned against undue haste, suggesting that the value of permitting the private sector to thrash things out and work towards consensus could not be overemphasized.

The White Paper Report of the Working Group on Intellectual Property,<sup>28</sup> in contrast, made specific, highly controversial recommendations,<sup>29</sup> and proposed that Congress act on them immediately rather than wait around for interested groups to engage in debate. Commissioner Lehman<sup>30</sup> agreed to

23. Harper & Row Publishing, Inc. v. Nation Enters., 471 U.S. 539 (1985):

Moreover, freedom of thought and expression “includes both the right to speak freely and the right to refrain from speaking at all . . . Courts and commentators have recognized that copyright . . . serve[s] this countervailing First Amendment value.

*Id.* at 559 (citations omitted).

24. See Patent and Trademark Office Request for Comments on Intellectual Property Issues Involved in the National Information Infrastructure Initiative, 58 Fed. Reg. 53,917 (Oct. 19, 1993); WHITE PAPER, *supra* note 5, at 1.

25. See IITF COMMITTEES AND WORKING GROUPS (visited Feb. 21, 1997) <<http://www.iitf.nist.gov/committee.html>>.

26. See INFORMATION INFRASTRUCTURE TASK FORCE INFORMATION POLICY COMMITTEE PRIVACY WORKING GROUP, *Privacy and the Information Infrastructure: Principles for Providing and Using Personal Information* (June 6, 1995) <[http://www.iitf.nist.gov/ipc/ipc/ipc-pubs/niiprivprin\\_final.html](http://www.iitf.nist.gov/ipc/ipc/ipc-pubs/niiprivprin_final.html)>; NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, *Privacy and the NII: Safeguarding Telecommunications-Related Personal Information* (Oct. 23, 1995) <<http://www.nita.doc.gov/ntiahome/privwhitepaper.html>>.

27. See, e.g., *IITF Committee on Applications and Technology Working Group on Technology Policy Charter*, (visited Feb. 21, 1997) <[http://nii.nist.gov/cat/tp/tpwg\\_charter.html](http://nii.nist.gov/cat/tp/tpwg_charter.html)>.

28. WHITE PAPER, *supra* note 5.

29. See generally Boyle, *supra* note 6; Samuelson, *supra* note 6.

30. Bruce Lehman, Commissioner of Patents, chaired the White House Information Infrastructure Task

encourage private meetings to facilitate compromise on difficult issues,<sup>31</sup> but insisted that Congress should enact the proposed legislative package without delay rather than waiting for agreement to emerge from those meetings. When pitched opposition to central elements of the legislation blocked immediate enactment,<sup>32</sup> the Commissioner pursued what he termed a "second bite of the apple."<sup>33</sup> He persuaded U.S. negotiators to make the substance of the provisions that Lehman had been unable to shepherd through Congress the centerpiece of U.S. proposals for a new international instrument.<sup>34</sup>

The probable impact of those proposals has been intemperately disputed in a variety of fora.<sup>35</sup> I'm not sure it is possible, any longer, to characterize them in a neutral manner. I read the White Paper to paint a picture of a rosy future in which copyright owners would not be "taxed . . . to facilitate the legitimate goal of 'universal access,'"<sup>36</sup> in which the owners of particular

Force Working Group on Intellectual Property Rights and has played the leading role in peddling the Working Group's recommendations to Congress, to the press, and to the members of the World Intellectual Property Organization (WIPO).

31. Two controversies led the Working Group and the Register of Copyrights to encourage private, multi-party negotiation rather than responding to the expressed concerns by modifying the White Paper's proposals. The Working Group responded to suggestions that its preliminary draft had paid far too little attention to fair use's place in the copyright balance by convening an invitational conference on fair use, or "CONFU," where representatives of publishers, libraries, and educational institutions could discuss their differences. The Working Group then proceeded to finalize the IITF recommendation that fair use not be addressed in any NII copyright legislation while the CONFU process was still ongoing. Witnesses testifying before Congress on the NII copyright bills expressed some frustration with the CONFU meetings, and significant doubts over whether they would yield constructive solutions. *See, e.g.,* Feb. 8, 1996, *House Hearing, supra* note 4, at 166 (testimony of Jeanne Hurley Simon, Chairperson, U.S. National Commission on Libraries and Information Science). The Working Group's recommendation that Internet and online service providers should be held strictly liable for the infringing acts of subscribers using their facilities inspired widespread concern. The IITF and the Copyright Office encouraged informal, off-the-record negotiations among service providers and content providers, but urged Congress to move forward while those talks continued.

32. *See* Mark Voorhees, *Better Luck Next Year: The Death, Life and Death of the NII Bill*, INFORMATION L. ALERT: A VOORHEES REP., June 17, 1996, available in LEXIS, News Library, CURNWS File.

33. *PTO Chief Remains Optimistic About NII Copyright Bill; Offers Views on Database Right, Domain Name Squabbles*, 11 Information Pol'y & L. Rep. (BNA) 262, 264 (June 21, 1996). *See Copyrights, Clinton WIPO Treaty Proposals Meet with Significant Opposition*, Daily Rep. for Executives (BNA) 183 (Sept. 20, 1996).

34. *See, e.g.,* Pamela Samuelson, *On Authors' Rights in Cyberspace: Are New International Rules Needed?* (October 7, 1996) <<http://www.firstmonday.dk/issues/issue4/samuelson/index.html>>. The proposed WIPO Treaty language is available online at WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* (Aug. 30, 1996) <[http://www.wipo.int/eng/diplconf/4dc\\_star.htm](http://www.wipo.int/eng/diplconf/4dc_star.htm)> and at U.S. COPYRIGHT OFFICE HOME PAGE (Aug. 30, 1996) <<http://lcweb.loc.gov/copyright/wipo.html>>; and has been reprinted in 43 J. COPYRIGHT. SOC'Y 371 (1996). A number of interests opposed to the substance of the White Paper's recommendations have charged that the Commissioner's international efforts have been an improper end-run around Congress's lawmaking authority. *See, e.g.,* UNION FOR THE PUBLIC DOMAIN HOME PAGE (Aug. 30 1996) <<http://www.public-domain.org/>>; *Intrigue in Geneva: Who Will Back Down on the Way to the Copyright Conference*, INFORMATION L. ALERT, Oct. 11, 1996, at 1, available in LEXIS, News Library, CURNWS File.

35. *See, e.g.,* Feb. 8, 1996, *House Hearings, supra* note 4; May 7, 1996, *Senate Hearing, supra* note 4; *see also infra* note 50.

36. WHITE PAPER, *supra* note 5, at 84.

copies of works could not transmit a copy to another person without authorization,<sup>37</sup> where “someone who believes that all works should be free in Cyberspace” would be criminally liable if that belief inspired him to make and distribute copies of protected works,<sup>38</sup> and where “technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine.”<sup>39</sup> That vision has garnered impressive, although not universal, support from copyright lawyers<sup>40</sup> and many of their clients,<sup>41</sup> and has inspired impressive, although not universal, opposition from library organizations,<sup>42</sup> civil liberties groups,<sup>43</sup> educators<sup>44</sup> and computer scientists.<sup>45</sup> Copyright specialists debating this future have been lured into a particularly acrimonious debate, sprinkled with accusations on all sides of bad faith and inept analysis. Because of the rancor, suggestions taking the form that these decisions need to be made well, rather than quickly,<sup>46</sup> or that more interests need to be repre-

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37. *Id.* at 92.

38. *Id.* at 228-29.

39. *Id.* at 82.

40. See, e.g., AMERICAN INTELLECTUAL PROPERTY LAW ASSOC., *Copyright Law Committee* (visited Feb. 21, 1997) <<http://www.aipla.org/rpts/copynlaw.rpt.html>>; CREATIVE INCENTIVE COALITION HOME PAGE (visited Feb. 21, 1997) <<http://www.cic.org/>>; Feb. 8, 1996, *House Hearing, supra* note 4, at 277 (testimony of William J. Cook, trial attorney).

41. See, e.g., ASCAP, *ASCAP Legislative Issues: NII Copyright Protection Act* (visited Feb. 15, 1997) <<http://www.ascap.com/legislative/nii.html>>; BMI, *NII Copyright Protection Act of 1995* (visited Feb. 15, 1997) <<http://bmi.com/legislation/niiact.html>>; SOFTWARE PUBLISHERS ASSOC., *SPA Releases: SPA Testifies on NII Protection Act* (visited Feb. 15, 1997) <<http://www.spa.org/gvmnt/releases/niihj.htm>>.

42. See, e.g., ASSOCIATION OF RESEARCH LIBRARIES, *Copyright and NII Issues: Administration and Congressional Activities* (visited Feb. 15, 1997) <<http://arl.cni.org/info/frm/copy/nii.html>>; AMERICAN LIBRARY ASSOC. WASHINGTON OFFICE, *House Judiciary Subcomm. Conducts Hearings on NII Copyright Legislation*, 5 ALAWON, March 6, 1996, at 1; *Public Hearing at Andrew Mellon Auditorium Before the Information Infrastructure Task Force Working Group on Intellectual Property Rights*, Sept. 22, 1994, at 62-64 (testimony of Lucretia McClure for the Medical Library Association and the Association of Academic Health Science Library Directors); *Public Hearing at University of Chicago Before the Information Infrastructure Task Force Working Group on Intellectual Property Rights*, Sept. 14, 1994, at 5-9 (testimony of Edward J. Valauskas for the American Library Association); Sept. 16, 1994, *IITF Hearing, supra* note 3, at 32-36 (testimony of Gloria Werner for the Association of Research Libraries); ASSOCIATION OF RESEARCH LIBRARIES, AMERICAN ASSOC. OF LAW LIBRARIES, AMERICAN LIBRARY ASSOC., ASSOC. OF ACADEMIC HEALTH SCIENCES LIBRARY DIRECTORS, MEDICAL LIBRARY ASSOC., SPECIAL LIBRARIES ASSOC. AND ART LIBRARIES SOCIETY OF NORTH AMERICA, *Fair Use in the Electronic Age: Serving the Public Interest* (Jan 18, 1995) <<http://arl.cni.org/scomm/copyright/uses/html>>; see also DIGITAL FUTURE COALITION, *Organization Biographies* (visited Feb. 15, 1997) <<http://www.ari.net/dfc/member.htm>>.

43. See, e.g., ELECTRONIC FRONTIER FOUNDATION, *What's Hot in Intellectual Property & Fair Use Bulletins* (visited Feb. 21, 1997) <[http://www.eff.org/pub/Intellectual\\_property/HTML/hot.html](http://www.eff.org/pub/Intellectual_property/HTML/hot.html)>; DIGITAL FUTURE COALITION, *supra* note 42 (Alliance for Public Technology, Consumer Project of Technology, Electronic Privacy Information Center, People for the American Way).

44. See, e.g., DIGITAL FUTURE COALITION, *supra* note 43 (Conference on College Composition and Communication; Modern Language Association, National Council of Teachers of English, National School Boards Assoc., National Education Association); Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299 (1996).

45. See, e.g., THE NATIONAL INFORMATION INFRASTRUCTURE (visited Feb. 15, 1997) <http://www.acm.org/usacm/nii.html>) (ACM); see also Pamela Samuelson & Jerome Reichman, *Intellectual Property Rights in Data: An Assault on the Worldwide Public Interest in Research and Development*, 50 VAND. L. REV. 51 (1997).

46. See, e.g., *Copyrights, Clinton WIPO Treaty Proposals Meet with Significant Opposition*, Daily Rep.

sented in the debate,<sup>47</sup> are perceived as code phrases, disguising unreasoned and implacable opposition; that may be the reason that the most prominent supporter of the agenda has been drawn into making particularly unfortunate analogies to military action in Iran or Bosnia.<sup>48</sup>

Perhaps the bitterest aspect of the debate is the hair-pulling contest over which side has the better of the argument that its version of traditional copyright law is the true one.<sup>49</sup> That dispute, I suspect, is incapable of resolution. Although some of the characterizations of established copyright doctrine have surely been more fanciful than others,<sup>50</sup> there's enough law out there to support a wide variety of stories about the nature of copyright law's essential balance.<sup>51</sup> There are a number of politically expedient reasons why opposing parties would claim to be the heir of copyright's past,<sup>52</sup> but we really ought not to take that class of arguments too seriously. Without regard to who has the more legitimate claim to the mantle of long copyright tradition, we ought to be evaluating the proposals on the table from vantage points other than that one. If the best that can be said of a plan is that it accords with the policies that appealed to the Congress of 1790, the plan seems to me to be ripe for reevaluation.

It is difficult to characterize the probable impact of the White Paper's proposals, however, without some baseline with which to compare it. Let me try to sketch out such a baseline with the hope that it is essentially uncontrovers-

for Executives (BNA) 183 (Sept. 20, 1996); Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, 37 COMMUNICATIONS OF THE ACM, Dec. 1994, at 21; Samuelson, *supra* note 34.

47. See Samuelson, *supra* note 34; Jessica Litman, *Copyright Noncompliance (or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. (forthcoming 1997).

48. See *Copyrights, Clinton WIPO Treaty Proposals Meet with Significant Opposition*, Daily Rep. for Executives (BNA) 183 (Sept. 20, 1996).

49. See Jessica Litman, *New Copyright Paradigms*, in GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION AND SOCIETY (Laura N. Gassaway, ed. forthcoming 1997).

50. I stand by my previously published assertions that the White Paper's exegesis of the Supreme Court's fair use cases and its analysis of RAM copying are irresponsibly fanciful. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 40-43 (1994); see also Samuelson, *supra* note 46; James Boyle, *Intellectual Property Online: A Young Person's Guide*, 10 HARV. J. L. & TECH. 47 (1997).

51. See, e.g., Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 998 (1990).

52. See Litman, *supra* note 49:

Most of the proposals that have been introduced under the aegis of mere clarification and extension, however, have been nothing of the sort: Rather, they have been attempts to expand current stakeholders' preserves by annexing territory that seems not yet claimed. The characterization of those proposals as maintaining or restoring the preexisting balance is mere rhetorical flourish.

If what we sought were merely to extend the preexisting balance, doing so would be straightforward. I don't think that's what anyone actually wants; rather, the status quo stands in here as a way to argue for what is really an improvement in one's position, and as a fall-back, compromise position to which one is willing to retreat. It seems likely that a critical mass of stakeholders will ultimately find themselves agreeing that they could live with something not too distant from the current balance. Something that at least seems akin to the present balance, then, is more likely to emerge from the political process than proposals that diverge further from current law. As of this writing, interest groups affected by copyright from all points along the spectrum are expending enormous reserves of energy to make the case that the proposals they support are the ones that most nearly capture the spirit of the status quo.

(citation omitted).

sial: First, copyright has never given copyright owners control over all uses of their works. Some uses are within the ambit of the copyright owner's exclusive rights, while others are beyond them. Thus, the current statute gives copyright owners control over most public performances but not over private performances,<sup>53</sup> over the creation of fixed reproductions<sup>53</sup> but not the creation of ephemeral reproductions,<sup>54</sup> over the first distribution of a particular authorized copy but not over most subsequent distributions of that copy.<sup>55</sup> There is nothing graven in stone about this divide; earlier statutes parsed it differently. As originally enacted, for example, the 1909 statute gave the owners of copyright in plays a public performance right, but gave no comparable right to the owners of copyright in stories or lectures, and recognized no public display right whatsoever.<sup>56</sup> Nonetheless, all copyright statutes since the Statute of Anne<sup>57</sup> have reserved some uses of copyright-protected works to the copyright holder, and left others to members of the public. The current debate has expended many gallons of hot air over the legitimacy of ripping control over particular uses from the copyright owner's bosom on the one hand<sup>58</sup> (as if God herself had consigned all possible uses to the copyright owner's particular control), or removing long-held use rights from members of the public<sup>59</sup> (as if the 10th commandment really read "Thou shalt not pay for reading"). Discussions may be more civil if we can agree that who controls what uses of what works and when are questions with many possible answers, none of them required by love for God and Country.

Different distributions of control over works will, of course, advance different goals more or less expeditiously. Although we seem to be unable to generate the empirical data to prove it, many of us believe as an article of faith that copyright, at least sometimes, acts as an incentive that encourages the creation and dissemination of more works to a wider audience than would be the case without it. Although we've never tried to quantify it, we seem to agree that some authorship would transpire in the absence of any copyright incentive;<sup>60</sup> most of us believe that at least some of it would be of high

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53. See 17 U.S.C. §§ 101, 106(4) (1994).

54. See 17 U.S.C. §§ 101, 106(1).

55. See 17 U.S.C. §§ 106(3), 109.

56. See Copyright Act of March 4, 1909, § 1, 35 Stat. 1075 (1909).

57. 8 Anne C. 21 (1709).

58. Thus the White Paper characterizes calls to permit even modest uncompensated access to digital works over the Internet as attempts to tax copyright owners "apart from all others—to facilitate the legitimate goal of 'universal access.'" WHITE PAPER, *supra* note 5, at 84.

59. See Richard Stallman, *Reevaluating Copyright: The Public Must Prevail*, 75 OR. L. REV. 291 (1996); see also Ann Okerson, *Who Owns Digital Works?*, SCI. AM. (July 1, 1996) <<http://www.sciam.com/WEB/0796issue/0796okerson.html>>.

60. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

quality.<sup>61</sup> Absent idiosyncratic market failures,<sup>62</sup> moreover, most of us assume that the more expansive the rights held by the copyright owner, the more money the copyright owner will be able to realize from exploiting a particular work, and the more restricted the rights held by the copyright owner, the more people will be able to read, see, listen to, or use a particular work.<sup>63</sup> Finally, most of us agree that both enabling copyright owners to earn money from exploiting works and enabling members of the public to gain broad access to extant works are independent goods, most of us agree that at some point those two goods can come into conflict, and most of us agree that some adjustment in both may sometimes be appropriate to enable us to achieve a desirable balance between them.<sup>64</sup>

With that as my baseline, I want to go back to being controversial. The proposals advanced in the White Paper, and embodied in legislation introduced in Congress<sup>65</sup> and in the draft treaty language advanced by the United States for adoption by members of the World Intellectual Property Organization,<sup>66</sup> enhance copyright owners' control over access to their works and use of the contents. In ways that I will detail in the next section of the article, the new possibilities served up by digital technology and the increased control for copyright owners promised by the bills (and echoed in the treaty proposals) add up to something more than the sum of their parts. The proposals offer

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61. Consider for example, WILLIAM SHAKESPEARE, *THE TEMPEST* (1611).

62. See 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); see also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

63. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988).

64. See, e.g., Leslie A. Kurtz, *Copyright and the National Information Infrastructure in the United States*, 18 EUR. INTELL. PROP. REV. 120, 121 (1996).

65. See H.R. 3531, 104th Cong., 2d Sess. (1996); S. 1284, 104th Cong., 1st Sess. (1995); H.R. 2441, 104th Cong., 1st Sess. (1995).

66. In December, 1996, the member nations of the World Intellectual Property Organization (WIPO) convened a diplomatic conference in Geneva to consider proposed treaties to supply international answers to vexing copyright and neighboring rights questions served up by new technology. Prior to the actual conference, a series of meetings among national delegations and non-governmental organizations had produced three draft treaties, heavily influenced by the United States and embodying most of the United States proposals. See *Patent Office Opens International Copyright Reform to Public Debate*, 16 INFORMATION L. ALERT, Oct. 25, 1996, at 10; *Lehman's Lament: Patent Commissioner Trying to Solve Liability Issue He Helped Create at the Same Time He Faces Controversy over International Negotiations*, 4 INFORMATION L. ALERT, Sept. 27, 1996, at 2; *Intrigue in Geneva: Who Will Back Down on the Way to the Copyright Conference*, 4 INFORMATION L. ALERT, Oct. 11, 1996, at 1. After three weeks, the conference adopted two of the three treaties in significantly changed form and rescheduled consideration of the remaining proposed treaty for the following year. See *WIPO Press Release No. 106* (Dec. 20, 1996) <<http://www.wipo.org/eng/diplconf/distrib/press106.htm>>. The language of all three proposed treaties is available online at the WIPO World Wide Web site <<http://www.wipo.int/eng/diplconf/index.htm>> and reprinted in 43 J. COPYRIGHT SOC'Y 372 (1996). Copies of documents distributed during the diplomatic conference are available at <<http://www.wipo.int/eng/diploconf/distrib/index.htm>>. Copies of the two treaties as finally adopted by the diplomatic conference can be found at <<http://www.org/eng/diploconf/distrib/treaty01.html>> (WIPO Copyright Treaty) and <<http://www.org/eng/diploconf/distrib/treaty02.html>> (WIPO Performances and Phonograms Treaty). Seth Greenstein's entertaining and informative day-by-day account of the diplomatic conference negotiations is posted at *News from the WIPO Diplomatic Conference* (visited May 6, 1997) <<http://www.hrcc.org/wiponews.html>>.

comprehensive answers to many of the questions at the core of our information policy: who is entitled to access to information moving through the global information infrastructure, and on what terms; who is entitled to set limits on the uses to which individuals will put the ideas and information that they see or hear; what sorts of information may be appropriated from the public domain by private actors; what sorts of penalties might be levied for failing to treat that information in the way its claimants direct; whether subsidized access to any material is appropriate for users who are students, or disabled, or poor; what sorts of restrictions proprietors may place on the dissemination of content; who is entitled to claim a cognizable interest in preventing that dissemination or in preventing the sale of devices or services that seek to get around proprietary restrictions; what sort of actions should subject what sort of actors to liability for reading, or being the conduit of, information that proprietors attempt to restrict.

The risk that copyright rules will, by supplying copyright answers to all of these questions, swallow up much of our information law has not escaped notice.<sup>67</sup> A number of authors have suggested that copyright law itself must be reformulated to incorporate the political value judgments that inform democratic information policy.<sup>68</sup> Supporters of the proposals argue that, just as strong copyright laws have led to burgeoning free expression in the past, enhancing the strength of copyright protection can only enhance the vitality of free expression in the digital age.<sup>69</sup> For that reason, they argue, it would be a mistake to accept the arguments of libraries, schools, Internet and online service providers, hardware and software manufacturers, and others, that the answers that copyright rules give to these questions devote insufficient attention to important societal goals and can not simply be transplanted to digital media without consideration of other, competing policies.<sup>70</sup>

Even if there were no dispute that augmented copyright protection would enrich our marketplace of ideas, the argument that therefore other policy considerations should not displace copyright principles would deserve to be considered on its merits. But, the inference that strong copyright advances First Amendment values turns out to be based on some hidden assumptions that may not prove true in the digital age—at least not if the proposed digital agenda is adopted.

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67. See, e.g., Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L.J.* 215 (1996); see also *supra* note 50.

68. See, e.g., Elkin-Koren, *supra* note 67. But see Netanel, *supra* note 12, at 341-363 (arguing that copyright law already reflects features that enhance the democratic character of civil society).

69. See, e.g., CREATIVE INCENTIVE COALITION, *The American Town Square* (visited Feb. 21, 1997) <<http://www.cic.org/townsq.html>>.

70. See, e.g., Feb. 7, 1996, *House Hearing*, *supra* note 4, at 21-25 (testimony of Jack Valenti, Motion Picture Association of America; *id.* (testimony of Edward P. Murphy, National Music Publishers Association); *id.* (testimony of Barbara Munder, McGraw Hill, on behalf of the Information Industry Association).

## II. COPYRIGHT AS THE ENGINE OF FREE EXPRESSION

*Harper and Row Publishing, Inc. v. Nation Enterprises*<sup>71</sup> represents the Supreme Court's most careful consideration of a claim that the First Amendment imposed implicit limitations on liability for copyright infringement. Not so, ruled the Court. The First Amendment protections already embodied in copyright doctrine suffice; no further limitations are needed.<sup>72</sup> Most importantly, the copyright law's distinction between ideas and expression strikes a definitional balance between the First Amendment and the Copyright Act: it permits free communication of facts and ideas while protecting an author's expression. "[N]o author may copyright his ideas or the facts he narrates."<sup>73</sup> Since copyright leaves facts, ideas, systems, processes, methods of operation, principles and discoveries wholly unprotected, it leaves others free to communicate the ideas embodied in protected works, so long as they do not appropriate the form in which those ideas were expressed. There is thus no collision between freedom of expression and copyright's exclusive rights.

Implicit in this analysis is that copyright prohibits replication and redistribution of copyrighted works; it does not speak, except indirectly, to consumption.<sup>74</sup> One can communicate the ideas and facts embodied in a work without replicating their form, but only if one has read them, seen them or heard them. While copyright law does nothing to guarantee a particular individual access to a particular work whose owner declines to disseminate it, it does impose significant restrictions on copyright holders' control over access.

One such restriction is the first sale doctrine, which permits the owner of an authorized copy to dispose of it without bothering to secure the copyright owner's consent. The copyright owner can authorize the first distribution of a particular copy or phonorecord to the public, but the recipient of that copy is entitled to reuse it, resell it, loan it, display it, or give it away.<sup>75</sup> Copies of most copyrighted works may be rented, for profit, again and again, without the copyright holder's consent.<sup>76</sup> All of these uses could generate revenue for copyright owners were they entitled to demand it, although that revenue would come at a significant reduction in access for consumers who are unable or unwilling to buy it at the market price for new copies. Despite repeated efforts

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71. 471 U.S. 539 (1985).

72. *See id.* at 560.

73. *Id.* at 547.

74. *Cf. Twentieth Century Music v. Aiken*, 422 U.S. 151 (1975) (1909 Act); *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974) (same); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (same).

75. *See* 17 U.S.C. § 109 (1994). The first sale doctrine is a judge-made limitation on the copyright owner's distribution right. Its initial justification probably had more to do with judicial distrust of attempts to restrict the alienability of tangible personal property than with promoting public access to copyrighted works, but it has furthered important access concerns. *See* Jessica Litman, *Copyright and Technological Change*, 68 OR. L. REV. 275, 338-40 (1989); Litman, *supra* note 22, at 188-89, 208.

76. Except for copies or phonorecords that embody computer programs or sound recordings, *see* 17 U.S.C. § 109(b), the owner of any copy of a protected work is free to rent it commercially.

to nibble away at the first sale doctrine, however, Congress has thus far been willing to narrow it only when persuaded that commercial rental will facilitate widespread illegal copying, and only so far as required to meet that particular threat.<sup>77</sup>

An analogous limitation confines copyright owners' performance and display rights to performances and displays that are public. Copyright owners are entitled to control the public broadcast of their works, but have no direct right to prohibit their private reception. If NBC beams an episode of *Star Trek* into my living room without Paramount's permission, it has violated section 106. Even so, by watching the pirated episode, I do nothing illegal.

The upshot of these limits is that while consumers can't claim affirmative rights to secure access to copyrighted material, copyright owners are not entitled to control consumers' receiving, reading, viewing, listening to and using their works except by proxy: they need to exercise their control at the reproduction, distribution, and public dissemination level.

One might draw from these limitations the kernel of a public access entitlement to at least such works as have been publicly exploited.<sup>78</sup> I won't do that, though. I want to use these restrictions to make a far less problematic argument: a large part of the reason that there has seemed (until recently) to be little risk of an important collision between copyright law's exclusive rights and First Amendment values is that these limitations have preserved the public's access to the ideas, facts, concepts, systems, processes and methods, which, although embodied in protected works, belong from the moment of their creation to the public domain. That robust access to the public domain has made copyright's potential encroachment upon freedom of expression seem incidental.

Moreover, these legal restrictions have, until recently, been enhanced by technological limitations on the control that could be exercised over copies of works once those copies leave their distributors' hands. Until very recently, a copyright holder had no means to instruct a book that it should sprout wings and fly back to its publisher after it had been read *N* times, crumble into unusability on a date certain, or reveal only indecipherable script until a designated reader shouted, "Open sesame!" In the absence of effective enforcement mechanisms, copyright holders have not yet engaged in widespread attempts to annul the legal copyright limits by investing in strategies that purport to contract around them.<sup>79</sup> Thus, a combination of legal and

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77. See generally Litman, *supra* note 22.

78. See, e.g., L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 52-55, 192-200 (1991).

79. The most common such strategy today is the shrink-wrap license. Efforts to enforce such agreements have fared unevenly in the courts. Compare *Step-Saver Data Systems v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) and *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988) with *ProCD v. Zeindenberg*, 86 F.3d 1447 (7th Cir. 1996). See generally Dennis Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, U. DAYTON L. REV. 511 (1997); Mark Lemley, *Intellectual Property and*

practical constraints on copyright owners' control over access to the contents of their works has buttressed the perception that copyright does not pose a significant threat to freedom of expression.

As it happens, technology has marched us on to a place where that access suddenly seems less robust, because important practical limitations on the copyright owners' bundles of rights seem easily invented around. At the same time, some of the proposals emanating from the Information Infrastructure Task Force Working Group on Intellectual Property profoundly threaten the legal limitations on the copyright owners' bundle of rights.<sup>80</sup> One might claim on that basis that the Working Group's proposals, if enacted in their current form, would be defenseless in the face of a serious constitutional challenge.<sup>81</sup> I won't do that either. (Or, in any event, I won't do it now, or here.)<sup>82</sup> If the reasons that copyright has functioned so well as the engine of free expression are as much due to the breadth of its limitations as to its incentive structure, however, then its continued effectiveness if these limitations are significantly weakened is called into doubt. If copyright—the newfangled, digital version, that is—indeed raises conflicts with important values embodied in our information policy, we will need to decide how to proceed. Our information law incorporates a variety of policies that we would not lightly give up, and copyright law is completely unsuited to accommodate them.

### III. LEAVING EYE TRACKS

#### *A. The Idea/Expression Distinction, Merger, and Digital Technology*

A fundamental premise of the copyright system is that it is possible to protect expression from copying while privileging the copying of all ideas (and any procedures, processes, systems, methods of operation, concepts, principles or discoveries) therein expressed.<sup>83</sup> Ideas (etc.), no matter how creative, are deemed to belong to the public domain from their inception, and to be immune from copyright protection. The law recognizes in the doctrine of merger that it will sometimes be nearly impossible to separate protected expression from unprotected idea (etc.), and resolves that dilemma by permitting the copying of expression whenever genuinely necessary in order to copy the unprotected ideas (etc.),<sup>84</sup> but merger is meant to cover the unusual case.

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*Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995).

80. See e.g., James Boyle, *Is Congress Turning the Internet into an Information Toll Road?*, INSIGHT, Jan. 15, 1996, at 24; Kurtz, *supra* note 64, at 124-25.

81. See *Feist Publications v. Rural Telephone Co.*, 499 U.S. 340 (1991). But see Ginsburg, *supra* note 3, at 367-87.

82. See, e.g., L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* (forthcoming 1997) (on file with author); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996).

83. 17 U.S.C. § 102(b) (1994).

84. See, e.g., *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir.), *cert. denied*,

The extension of copyright to computer programs has required us to begin to recognize that, in a world dominated by digital technology, the unusual case is no longer so unusual. Courts have engaged in baroque mental gymnastics to devise workable tests to pare unprotected idea from protected expression in digital works.<sup>85</sup> The fundamental distinction between protectible expression and unprotectible idea, procedure, process, system, method of operation, concept, principle or discovery has turned out to be essentially illusory when applied to computer programs. Straightforward application of the merger doctrine would require courts to accord computer programs either far too little protection or far too much of it.<sup>86</sup> If one cannot reproduce any of the ideas in the work without reproducing all of its expression, the idea/expression distinction and the merger doctrine would appear to permit the reproduction.<sup>87</sup> There seems to be no obvious ways to protect the expression without giving *de facto* protection to ideas.<sup>88</sup>

Until recently, the particular merger problems posed by computer programs seemed *sui generis*. Recent interpretations of the copyright law expanding the scope of the exclusive right to reproduce a work in copies to encompass any appearance in ephemeral computer memory,<sup>89</sup> however, threaten to extend these problems to works of all sorts as soon as they are encapsulated digitally. The IITF Working Group Report endorses these constructions as indisputably correct.<sup>90</sup> Increasingly, works of all sorts are being created and disseminated in digital form. If reading or viewing these works violates the reproduction right, then we need to be concerned about preserving the free access to ideas and other unprotected material that lies at the heart of our copyright system. I didn't find much in the Working Group Report directed towards ensuring that free access, but I did see a recommendation to facilitate electronic copy protection of material by prohibiting members of the public from hacking around copy protection systems.<sup>91</sup> The language proposed by the United States for the WIPO Treaty went further. It defined the copyright holder's control over reproductions to include "direct and indirect reproduction of their works, whether permanent or temporary, in any manner

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111 S. Ct. 374 (1990).

85. See generally Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994); Julie E. Cohen, *Reverse Engineering and the Rise of Electronic Vigilantism: Intellectual Property Implications of "Lock-out" Programs*, 68 S. CAL. L. REV. 1091, 1144-52 (1995).

86. See, e.g., Symposium, *Copyright Protection of Computer Software: Has Look and Feel Crashed?*, 11 CARDOZO ARTS & ENT. L.J. 721 (1993).

87. See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd*, 116 S. Ct. 804 (1996).

88. See *id.* at 819 (Boudin, J., concurring).

89. See *Triad Sys. Corp. v. Southeastern Exp. Co.*, 64 F.3d 1330 (9th Cir. 1995); *MAI Sys. Corp. v. Peake Computers, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Advanced Computer Servs. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994).

90. See WHITE PAPER, *supra* note 5, at 64-66.

91. See WHITE PAPER, *supra* note 5, at 230-32; see also S. 1284, 104th Cong., 1st Sess. § 1201 (1995).

or form,” and limited the permissible exceptions to “cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.”<sup>92</sup> The proposed treaty draft further required signatory countries to prohibit “importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect.”<sup>93</sup> Nothing in the implementing legislation, or the proposed WIPO treaty provisions, incorporated express exceptions to privilege unauthorized access to ideas and other uncopyrighted material.<sup>94</sup> Indeed, the most enthusiastic supporters of these additional measures of protection appeared to envision a brave new world in which “unauthorized access to information and content [w]ould be a crime.”<sup>95</sup>

The idea/expression distinction permits copyright to act as the engine of free expression, by ensuring that facts and ideas can circulate freely while permitting copyright owners to earn economic advantage by controlling distribution of the particular expressive envelope that contains those facts and ideas. So long as one can separate the contents from their envelopes, and take one while leaving the other, copyright can promote learning and communication. We have, accordingly, made choices about what sort of treatment of the

92. See Proposed WIPO Treaty, *supra* note 34, art. 7; see also *id.* art. 12. The language quoted in the text failed to secure the support of the majority of the delegates and was struck from the final text of the Treaty; see *supra* note 66. At the insistence of the United States delegation, however, the members remaining at the very end of the diplomatic conference adopted, by majority vote, an agreed statement intended to substantiate claims that the Treaty language had been approved subject to the understanding that transient RAM reproductions were already actionable under the Berne Convention for the Protection of Literary and Artistic Works:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form.

It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

See WIPO, *Agreed Statements Concerning the WIPO Copyright Treaty* (Dec. 20, 1996) <<http://www.wipo.int/eng/diploconf/distrib/96dc.htm>>; *Correction*, Info. Pol'y & L. Rep. (BNA) 105 (Jan. 24, 1997). The persuasiveness of the agreed statement on that point is dubious, however. A number of delegations voting in favor of the agreed statement did so on the explicit ground that the language quoted above was ambiguous and could be read to exclude transient reproductions. See Seth Greenstein, *News from WIPO* (December 20, 1996) <[http://www.hrrc.org/wr\\_12-20.html](http://www.hrrc.org/wr_12-20.html)>. In addition, a number of delegates apparently voiced their understanding that a statement adopted by a majority of delegates present, rather than by consensus, could not be an Agreed Statement within the meaning of the Vienna Convention on the Interpretation of Treaty Instruments. See *id.*

93. Proposed WIPO Treaty, *supra* note 34, art. 13. This provision was substantially watered down in the version ultimately adopted. See WIPO Copyright Treaty, *supra* note 66, at art. 11; HOME RECORDING RIGHTS COALITION, *Success at the WIPO Diplomatic Conference!* (visited Feb. 21, 1997) <<http://www.hrrc.org/newswipo.html>>.

94. In the wake of the rejection of some of its more expansive proposals by the delegates at the WIPO diplomatic conference, the Administration was reported to be deliberating whether to reintroduce those proposals as domestic legislation attached to, or distinct from, the treaty ratification process. See *Intellectual Property 1996 Review and 1997 Outlook*, 53 PAT., TRADEMARK & COPYRIGHT J. 283 (1997).

95. Emery Simon, *Submission to Working Group on Intellectual Property, Interoperability and Standards* (Sept. 25, 1996) <<http://ksgwww.harvard.edu/iip/simon.html>>.

envelopes needs to be beyond the scope of the copyright owners' control in order to promote the free exchange of ideas contained within them. Two obvious limitations that enhance access are the first sale doctrine and the relatively stingy boundaries confining the copyright owners' performance and display rights. Another, more fundamental one has been that the reproduction right has not been thought to extend to mere consumption. Leaving eye-tracks on a text has not hitherto been actionable.

Once we insist, however, that the reproduction right extends not only to replication but to consumption, there is no way to guard the expression from copying while ensuring access to the ideas it expresses. In order to gain access to the unprotected material embodied in digital form, we must use a machine to translate the material into human-readable form by reading it into volatile computer memory. The copy is ephemeral, but could be fixed at any time (and, depending on the computers and software used, may be fixed in a disk cache in any event). The current prevailing interpretation of the scope of the reproduction right tells us that we invade the copyright owners' reproduction rights when we use a computer to read such a text without authorization.<sup>96</sup> Professor James Boyle articulates the problem this way:

Copyright marks the attempt to achieve for texts and other works, a kind of balance in which the assumption of the system is *that widespread use is possible without copying*. The relative bundles of rights of the user and the owner are set based on a set of economic and technical assumptions about the meaning of normal use. It is possible for someone to do a great deal with a book without copying it—she can borrow it from a library, browse it in a bookstore, purchase it, lend it, quote aloud from it, re-sell it; the relatively expansive rights of the copyright holder are thus confined in practice to those occasions and uses for which copying would be necessary. But on the Net transmission *means* the generation of lots of temporary, unstable “copies.” That’s what transmission *is*. Thus if one labels each of these temporary and evanescent “copies” as copies for the purposes of copyright, one has dramatically shifted the balance of power from users and future creators, to current rights holders, and done so solely on the basis of a technological accident.<sup>97</sup>

If the law requires that we obtain a license whenever we wish to read protected text and thus discover the ideas it expresses (so that we can express these ideas in our own, different, form), it encourages copyright owners to restrict the availability of licenses whenever it makes economic sense for them to do so. That, in turn, makes access to the ideas (etc.) contingent on copyright holders' marketing plans, and threatens to limit the supply of competing works expressing or debunking those ideas. If we are truly determined to permit future authors to view protected works in order to learn the ideas therein

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96. The interpretation has been widely criticized, see sources cited *supra* notes 6 and 50, but has been endorsed by the Register of Copyrights as a correct reading of the statute. REGISTER OF COPYRIGHTS OF THE U.S., *Written Testimony on the NII Copyright Protection Act* (Feb. 15, 1997) <<ftp://ftp.loc.gov/pub/copyright/cpypub/niistat.html>>.

97. See Boyle, *supra* note 50, at 55-56.

expressed, we might invoke the merger doctrine to deny protection to the work in its entirety. (Fat chance.) Or, perhaps, these all too common situations will be among the instances that will fall within the privilege of fair use.<sup>98</sup> More on fair use later.

### B. Newfangled Enforcement Possibilities

It has become commonplace to assert that the Internet has made widespread catastrophic piracy of protected works far easier than ever before. For whatever reason, few people seem to be trumpeting the ways that the Internet has made it simpler to prevent, detect and avenge unauthorized copying.<sup>99</sup> Finding unauthorized copies on the Internet is incomparably easier than finding them in the workplace, in people's homes, or even in stores.<sup>100</sup> A copyright proprietor can run periodic global searches for distinctive character strings to find illicit copies on the World Wide Web, and those searches are nearly cost-free. Infringement, once detected, is far easier to prove, since the ephemeral copies involved in the unauthorized transmission of protected material leave incriminating electron trails. Finally, illicit copying of digital material is not especially easy to disguise. Perhaps those are some of the reasons that the Software Publishers Association (SPA) recently announced a number of civil lawsuits filed against penny-ante individual copyright infringers and the Internet service providers that carry their subscriptions.<sup>101</sup> The pressure against service providers, moreover, persuaded at least some of them to act as copyright police on the SPA's behalf.<sup>102</sup> Meanwhile, research into methods of electronic copy protection that will *prevent* unauthorized access to works (rather than merely prohibiting it) continues. It is too early, of course, to have a handle on whether the additional ease of enforcing copyrights will eclipse or be eclipsed by the increased ease with which unauthorized copies can be made and distributed. We should not assume too easily, however, that radical constriction in public access to ideas and information is a regrettable but necessary response to infringers' new technological advantage.

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98. See REGISTER OF COPYRIGHTS, *supra* note 96: "The term 'browsing,' however is an ambiguous term, and could involve various types of conduct. Depending on the circumstances, some types of 'browsing' may qualify as fair use." *Id.*

99. *But see* Peter Huber, *Tangled Wire*, *Slate* (visited Feb. 21, 1997) <<http://www.slate.Features/TangledWires/TangledWires.asp>>.

100. See SOFTWARE PUBLISHERS' ASSOC., *Seven Warning Signs of Piracy: How ISPs Can Protect Themselves* (visited Feb 15, 1997) <<http://www.spa.org/piracy/seven.html>>.

101. See SPA Files *Copyright Suits Against ISPs and End Users: Internet Anti-Piracy Campaign Launched* (Oct. 10, 1996) <<http://www.spa.org/piracy/releases/netpir.htm>>; *see also* <http://www.spa.org/piracy/iapc.htm>>; *Copyrights: Software Companies Claim Contributory Infringement Against ISP, Home Page Owner*, 1 INFO. POL'Y & L. REP. 674 (Oct. 18, 1996).

102. See David Loundy, *Getting Tough on Piracy—Without Targeting Pirates*, CHICAGO DAILY L. BULL., at 6 (October 10, 1996) <[http://www.leepfrog.com/E-Law/CDLB/SPA\\_v\\_ISPs.html](http://www.leepfrog.com/E-Law/CDLB/SPA_v_ISPs.html)>; *Didn't You Notice?—The Software Publishers' Internet Strategy Is Off to a Rocky Start*, 4 INFORMATION L. ALERT 18, Nov. 8, 1996, at 2, 3-4.

It seems likely that if we don't pay careful attention, we will narrow public access to the public domain at precisely the time that technological advances enable copyright owners to protect their rights more effectively than ever before.

### C. Exhaustion in Cyberspace

An expansively interpreted reproduction right poses significant threats to an information policy that has been based primarily on unfettered exchange of ideas. Supporters of this agenda, however, have insisted that this generous construction of a copyright owner's control would come into play only with respect to unauthorized uses of works. "[N]ot all transmissions will involve copyrighted works, or works that a copyright owner *chooses* to protect," explains one organization in support of the legislation.<sup>103</sup> "In the case of e-mail, many use the Internet as a way to communicate ideas and to share information. There is nothing in the legislation that prevents users from doing so, as long as they don't violate the property rights of others."<sup>104</sup> That particular formulation is ambiguous. The "property rights of others" could be interpreted to cover a wide range of uses currently believed to be beyond the copyright owner's reach. It is unsurprising, then, that skeptics might seek assurance that the analogues of uses that are uncontroversially legal today would remain legal for works embodied in digital form. The Working Group's response to such queries has been less than confidence-inspiring. Its initial position seemed to be that copyright owners should be able to control uses over digital networks that were beyond their control in analog media, and that the copyright statute should be amended to ensure that.<sup>105</sup> After heated criticism of a knee-jerk bias favoring aggrandizement of owner interests, the Working Group retreated to its fall-back position that the copyright law, without amendment, uncontroversially secured to copyright owners control over digital uses that were beyond their control in the analog world.<sup>106</sup>

When the draft Working Group Report came out with a recommendation that the first sale doctrine should be modified to ensure that it did not apply to transmissions,<sup>107</sup> for example, the suggestion drew widespread expressions of

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103. CREATIVE INCENTIVE COALITION, *supra* note 7.

104. *Id.*

105. See Litman, *supra* note 50, at 30-34, 39-44; see also *infra* note 106.

106. See Jessica Litman, *Revising Copyright for the Information Age*, 75 OR. L. REV. 19, 20 n.4 (1996).

107. See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 124 (1994):

It seems clear that the first sale model—in which the copyright owner parts company with a tangible copy—should not apply with respect to distribution by transmission, because under current applications of technology, a transmission involves both the reproduction of the work and the distribution of the reproduction. In the case of transmissions, the owner of a particular copy of a work does not "dispose of the possession of that copy or phonorecord." A copy of the work remains

dismay. In the final White Paper Report, therefore, the Working Group replaced the proposal to amend section 109 with a discussion explaining that no amendment was required to clarify that section 109, as currently written, did not apply to transmissions.<sup>108</sup> A variety of interests have proposed amendments that would fashion an analogous exhaustion right for cyberspace that might preserve the secondary market in access to copyrighted works that the first sale doctrine has enabled.<sup>109</sup> Those proposals don't seem to have been taken very seriously by any interests other than the ones making the proposals. That suggests that the prognosis for their enactment is poor.

Earlier, I discussed why the idea/expression distinction (which has gotten all the credit for forestalling a collision between copyright and the First Amendment) may not, without significant reformulation, be up to the task of ensuring ready access to facts and ideas embodied in digital works. The first sale doctrine is another limitation in the copyright act that has promoted low cost access to the contents of copyrighted works. It seems, at least under the IITF's proposed formulation, to have no application to works transmitted over the Internet. The trends, here, would make anyone but a copyright lawyer uncomfortable. Let's keep going.

#### *D. More Expansive Propensities*

I mentioned another limitation earlier: the restriction of the performance and display rights, under the current copyright statute, to public performances and displays.<sup>110</sup> If I watch an unauthorized broadcast of *Star Trek XLV* (or use my VCR to view an unauthorized copy of the *Star Trek XLV* videotape) on the television in my living room, I am not infringing Paramount's copyright

with the first owner and the recipient of the transmission receives a reproduction of the work. Therefore, to make clear that the first sale doctrine does not apply to transmissions, the Working Group recommends that Section 109 of the Copyright Act be amended to read as follows:

(a)(1) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(2) This subsection does not apply to the sale or other disposal of the possession of that copy or phonorecord by transmission.

*Id.*

108. See WHITE PAPER, *supra* note 5, at 92-94; see also Nov. 15, 1995, *Joint Hearing*, *supra* note 1, (testimony of Bruce Lehman, Commissioner of Patents):

I think, initially, when we first had the initial Report, I think there was a legitimate criticism of us that we had focused too much on the commercial market. . . . But it was very quickly brought to our attention. People said, well, you're focusing too much on that; you need to come back and look at the users, and we did; and we did, and we made absolutely—we made substantive changes in our Report. We took out any references to changes in the First Sale Doctrine, where people thought that was going too far.

*Id.*

109. See, e.g., May 7, 1996, *Senate Hearing*, *supra* note 4 (testimony of Robert L. Oakley, Digital Future Coalition).

110. See *supra* text accompanying note 78.

because my performance is a private one. One might expect an analogous result if I used my World Wide Web browser to view an unauthorized and infringing *Star Trek* fan page. Under the White Paper's analysis, however, I infringe Paramount's copyright by looking at the page, because my computer makes a copy of it in RAM memory in order to permit me to see it. In addition, the proposed legislation would add a provision securing to the copyright owner an exclusive right to distribute copies or phonorecords to the public by transmission.<sup>111</sup> Since it is completely unclear whether the person who ought properly to be said to be committing the distribution by transmission is the creator of the web page, the creator's service provider, me, my service provider, or all of the above,<sup>112</sup> we might all be liable for the distribution. Further, while the line between private and public performances and displays is defined in the current statute to ensure that a significant realm of performances and displays remains private, no comparable definition appears for public distribution,<sup>113</sup> and the judge-made law on the question is unhelpful.<sup>114</sup> The bottom line: whether we characterize the change as a closed loophole, a new right, or an additional incident of liability, viewing a transmission from the privacy of one's home is not infringing if one is relying on analog technology, but becomes infringing if one uses digital technology.<sup>115</sup>

I've already opened myself up to a charge that I'm piling on, but I want to mention, briefly, one additional piece of the digital intellectual property agenda, being pursued simultaneously in Congress and Geneva. Copyright doesn't protect facts. The Supreme Court tells us that it never has; the Constitution forbids it.<sup>116</sup> With Commissioner Lehman's support, the United States has been pursuing a treaty<sup>117</sup> that would oblige us to offer un-copyright protection to the contents of databases, broadly defined, and Congressman

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111. See S. 1284, 104th Cong., 1st Sess. § 2 (1995).

112. See Lemley, *supra* note 11, at 556.

113. See 17 U.S.C. § 101 (1994).

114. Without getting into any detail on this point, let me assert only that the most nearly relevant decisional law on distribution to the public is the hopelessly contradictory precedent on limited versus general publication under the 1909 Act.

115. And, in that connection, compare the recently enacted 17 U.S.C. § 106(6).

116. See *Feist Publications v. Rural Tel. Co.*, 499 U.S. 340 (1991).

117. See WORLD INTELLECTUAL PROPERTY ORGANIZATION DIPLOMATIC CONFERENCE, *Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases* (Aug. 30, 1996) <[http://www.wipo.int/eng/diplconf/6dc\\_sta.htm](http://www.wipo.int/eng/diplconf/6dc_sta.htm)>; also available on U.S. COPYRIGHT OFFICE HOMEPAGE (Aug. 30, 1996) <<http://lcweb.loc.gov/copyright/wipo6.html>>, reprinted in 43 J. COPYRIGHT SOC'Y 516 (1996). The U.S., with the support of the European Union, proposed that this treaty be adopted at the WIPO diplomatic conference in December, 1996. The proposal failed to garner international support, and the diplomatic conference put off its consideration for another day. *WIPO Press Release No. 106* (Dec. 20, 1996) <<http://www.wipo.org/eng/diploconf/distrib/press106.htm>>; *WIPO Delegates Agree on Two Treaties*, 53 Pat. Trademark & Copyright J. (BNA) 145 (Jan. 2, 1997). The United States is currently insisting that another WIPO committee of experts should be convened in the near future to pursue database protection. *Clinton Administration Is Undecided on Implementing Steps for WIPO Treaties*, 53 Pat., Trademark & Copyright J. (BNA) 241 (Jan. 23, 1997). Commissioner Lehman has announced that the administration plans to hold public hearings on the issues soon. *Id.*

Moorhead introduced a bill to enact such protection in the 104th Congress.<sup>118</sup> The sui generis protection is un-copyright-like both in the sense that it protects material that copyright deems unprotectable, and in the sense that it appears to be subject to none of the restrictions, limitations and privileges that copyright incorporates.<sup>119</sup> If copyright's non-protection of facts is central in any analysis of copyright/First Amendment harmony—and language in U.S. Supreme Court cases suggests that it is<sup>120</sup>—the proposed database protection should make even copyright lawyers uneasy.

### *E. The Ubiquity of the Internet*

What makes this all the more disturbing is the non-trivial possibility that today's Internet is even now evolving into the dominant communications medium of the developed world. In an astonishingly brief time, it has become a viable substitute for the telephone, the telegram, the fax, the newspaper, and magazine.<sup>121</sup> Electronic mail has become so popular that we have needed a new term to describe what used to go by the simple name of "mail" and is now termed, variously, surface mail, U.S. Postal Service mail, and "snail mail." We don't yet have Internet television (although I am not at all sure that we won't by the time this symposium is printed),<sup>122</sup> but we do have World Wide Web bookstores, record stores, mail order catalogs, and travel agents. Usenet news has for a number of years now offered us the virtual equivalent of the town square. There are also some early indications that the Internet could be a particularly effective medium for the sort of political discourse that First Amendment jurisprudence tells us is central to our democratic system.<sup>123</sup> (It remains to be seen whether that characteristic can scale up.) So, when we talk about making the current copyright rules the rules of the road for the informa-

118. H.R. 3531, 104th Cong., 2d Sess. (1996). See generally Samuelson & Reichman, *supra* note 45.

119. See Samuelson & Reichman, *supra* note 45; Peter Jaszi & Prue Adler, *Some Public Interest Considerations Relating to H.R. 3531 Database Investment and Intellectual Property AntiPiracy Act of 1996* (Aug. 1996) <<http://arl.cni.org/info/fm/fmcopy.html>>.

120. See *Feist Publications*, 499 U.S. at 345; *Harper & Row Publications, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

121. Consider this conference as one example. Back in 1991, I attended a conference at the University of Dayton with some of the same participants. Bob Kreiss made the initial contacts by phone and issued the formal invitation by mail; he advertised it by flyer. This time, he made the initial contacts by posting a general query to relevant subject-specific electronic mailing lists, made more personal contacts by e-mail, set up an e-mail alias to permit an electronic debate, and, after a few phone calls, issued the invitations and hashed out the details by e-mail. A confirming letter followed via surface mail, but it only repeated the details we all knew, and most of us who needed to reply to it used e-mail. He did send out flyers (fewer, this time) but most of the recipients already knew about the conference from electronic sources.

122. See Peter H. Lewis, *TV Screen Opens onto Internet*, N.Y. TIMES, Oct. 22, 1996, at C4.

123. See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 877-82 (E.D. Pa. 1996) (Dalzell, J., concurring); Tim Golden, *Though Evidence Thin: Tale of C.I.A. and Drugs Has Life of Its Own*, N.Y. TIMES, Oct. 21, 1996, at A14 (describing material at <<http://www.sjmercury.com/drugs/>>); Cohen, *supra* note 82, at 1003-1019; Elkin-Koren, *supra* note 67; see also Jonathan Vankin & John Whalen, *How a Quack Becomes a Canard*, N. Y. TIMES, Nov. 17, 1996, at 56.

tion superhighway, we really may be talking about using these rules to govern the next century's analogues of the telephone, telegram, fax, newspaper, mail, magazine, television, bookstore, record store, mail order catalog, travel agent, and town square.<sup>124</sup> Our current copyright rules simply weren't designed to do that.

#### F. Fair Use and the First Amendment

Isn't this analysis just a tad hysterical? None of the proposals for domestic legislation have included any amendment to the statutory privilege of fair use, after all, which will continue to be available to privilege otherwise unlawful uses in appropriate cases.<sup>125</sup> None of the proposed treaty language on WIPO's agenda would have repealed the article of the Berne Convention that permits signatory nations to allow unauthorized reproduction "in certain special cases [provided that such reproduction] does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."<sup>126</sup> Won't fair use simply expand to fill the gaps left by the shrinking idea/expression distinction, the disappearing first sale doctrine, and the growing irrelevance of traditional limitations on the scope of the copyright owners' bundle of rights?

For a variety of reasons, that scenario seems unlikely. Those who nominate fair use as the surviving savior of information-have-nots-seeking-free-access have been careful to remind their audiences that fair use is a limited privilege that applies in particular cases only after a searching, fact-specific inquiry.<sup>127</sup> Barbara Munder, testifying before Congress on behalf of the Information Industry Association, put it this way:

No one—least of all those of us in the business of providing information—wants our society to devolve into segmented classes of information “haves” and “have-nots.” However, ensuring that those who cannot afford to pay for information nevertheless have access to it is a broader societal responsibility, not one that should be borne primarily—let alone exclusively—by copyright owners.

In IIA's view, the current, vociferous push toward expanding fair use is little more than an attempt to create a new set of “user rights” that would place the burden of facilitating universal access to information resources solely on the shoulders of copyright owners. The fair use doctrine was never designed to carry this burden.<sup>128</sup>

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124. For one picture of what the Internet of the future could look like, see Jeff Johnson, *Scenarios of People Using the NII* (visited Feb. 15, 1997) <<http://www.cpsr.org/cpsr/nii/niiscen.html>>.

125. See REGISTER OF COPYRIGHTS, *supra* note 96; CREATIVE INCENTIVE COALITION, *supra* note 7.

126. Berne Convention for the Protection of Literary and Artistic Works, Paris Text 1971, art. 9(2) & (3). It is this article, along with the more specific provisions in article 10, which are commonly cited as authorizing and circumscribing the United States' fair use privilege. See Jane C. Ginsburg, *Reproduction of Protected Works for University Research or Teaching*, 39 J. COPYRIGHT SOC'Y OF THE U.S. 181 (1992).

127. See, e.g., WHITE PAPER, *supra* note 5, at 73-84.

128. Feb. 7, 1996, *House Hearing*, *supra* note 4, at 75 (testimony of Barbara Munder, McGraw Hill, on behalf of the Information Industry Association).

Fair use is a popular privilege. Everyone agrees that fair use strikes the appropriate balance between lawful unauthorized use and unlawful appropriation. They disagree sharply, however, on where that balance point lies.<sup>129</sup> The Supreme Court tells us that “[t]he task [of determining whether a use is fair] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”<sup>130</sup> The invitation for particularized examination gives fair use its flexibility, and permits it to seem to be all things to all people. Cases that appear to come out the right way are rightly decided; cases that seem to have gone astray can be minimized or ignored on the ground that the particular facts in the case led the court to some unfortunate, over-broad language that surely won’t govern the next case to arise on similar facts. Fair use is an exceedingly subtle doctrine, the argument goes, so it’s no wonder that the courts sometimes get it wrong.

Precisely because it requires case-by-case analysis, however, fair use is a troublesome safe harbor for First Amendment rights. This is not the place for a refresher course on First Amendment case law, but courts have articulated general principles that guide them in defining when, how and why the government can regulate protected expression.<sup>131</sup> Fair use is problematic from the standpoint of most of them. Standard First Amendment jurisprudence, for example, teaches that the government should not discriminate among speakers or speeches on the basis of content.<sup>132</sup> A fair use determination may well require a court to consider issues of content and style, and assess the merit of both the speaker and the message. Black-letter First Amendment law insists that government discretion over protected expression should be bounded by “neutral, mechanical, and objective criteria.”<sup>133</sup> Judicial discretion under section 107, however, is not significantly constrained: the exercise of discretion, after all, is the *point* of a fair use inquiry. Classic free speech thinking reminds us that in evaluating laws under the First Amendment, we need to consider the likelihood that particular rules will prompt self-censorship.<sup>134</sup> The potential chilling effect of having to go through hundreds of thousands of dollars in attorneys’ fees in order to prevail after a trial on the

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129. Compare ASSOCIATION OF AMERICAN PUBLISHERS, *Statement of the AAP on Document Delivery* (April 13, 1994) <<http://www.publishers.org/copyright/statement.html>> and ASSOCIATION OF AMERICAN PUBLISHERS, *An AAP Position Paper on Scanning* (visited Feb. 15, 1997) <<http://www.publishers.org/copyright/scanning.html>> with AMERICAN ASSOCIATION OF LAW LIBRARIES ET AL., *Fair Use in the Electronic Age: Serving the Public Interest* (Jan. 18, 1995) <<http://arl.cni.org/scomm/copyright/uses.html>>.

130. *Campbell v. Acuff-Rose*, 510 U.S. 569, 577 (1994) (citing *Harper & Row Nation Enters.*, 471 U.S. 539, 566 (1985)).

131. Occasionally, one hears the argument that a court can freely enjoin protected expression in a copyright infringement case because the First Amendment doesn’t constrain the courts from granting remedies in lawsuits between private parties based on invasions of private interests. Copyright seems to me to be indistinguishable from defamation on this point, and defamation litigation is subject to a host of First Amendment limitations. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

132. See Weinberg, *supra* note 13, at 1112-13.

133. *Id.* at 1113.

134. See Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L. J. 221, 225 (1996).

merits can be substantial. It may be that we could design a fair-use-like privilege that provides would-be fair users with reasonable certainty, was indifferent to content, and relied on hard-edged, clear rules, mechanically applied. Once we were done, though, the privilege wouldn't be very fair-use-like.<sup>135</sup>

Supporters of the proposed legislation insist that fair use will remain unaffected by it. Those statements, though, should not be taken as assurances that uses now perceived to be beyond the copyright owners' control will remain so in cyberspace. On the contrary, they seem to reflect an intention to explore just how many additional uses can be brought within the copyright owners' control, and a resistance to adding any blanket exceptions or privileges for any users or uses.<sup>136</sup> I don't mean to paint this as nefarious; it is what copyright counsel is retained to achieve. I simply want to argue that its ambitions are necessarily limited. Copyright lawyers are understandably seeking rules that will give their copyright clients copyright advantages. Nothing wrong with that; but it is a far cry from the basis for a global information policy.

So long as we are confident that other limitations on copyright owners' rights will ensure the public's access to the ideas, facts, concepts, systems, processes, methods and other uncopyrightable material expressed in protected works, fair use serves us well enough as a backup. If we insist on relying on fair use to do more than that, we must either resign ourselves to transforming it into something it currently is not, or accept that it is going to do a terrible job.

#### IV. BEYOND THE FIRST AMENDMENT

Information policy is complicated. It needs to take account of a host of competing concerns.<sup>137</sup> Copyright is simple in comparison. The actual rules on the books may be unworkably technical and arcane, but the reason for that is that our system has encouraged affected parties to craft the rules among

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135. There is a significant possibility that something of the sort will happen as a result of litigation. When we ask fair use to do too much, it sometimes gets stretched out of shape. That is one of the lessons we could draw from the *Sony* case. See *Sony v. Universal Studios*, 464 U.S. 417 (1984). The same lesson seems to stare out at us from the decisions in *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995); and *Sega Enters. Ltd. v. Accolade*, 977 F.2d 1510 (9th Cir. 1993). Because fair use is drawn as a fact-specific, equitable rule of reason, it an imperfect tool for evaluating entire realms of customary conduct. That doesn't mean, however, that one can easily confine the analysis in *Sony* (if one dislikes it) to the particular facts actually considered by the Court. Rather it should serve as a caution to those who would prefer that all new uses of copyright works be within the copyright owner's exclusive control unless they qualify as fair use. See Litman, *supra* note 75, at 346-54.

136. See, e.g., Feb. 7, 1996, *House Hearing*, *supra* note 4, at 69-79 (testimony of Barbara Munder, McGraw Hill, for the Information Industry Association).

137. See, e.g., GERALD W. BROCK & GREGORY L. ROSSTON, *THE INTERNET AND TELECOMMUNICATIONS POLICY 1-9* (1996); A. Michael Froomkin, *Regulating & Computing & Information Policy: Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395 (1996).

themselves and to specify particulars according to their individual needs.<sup>138</sup> All of the rules are directed towards balancing the claims of copyright owners, authors, and users, to ensure that authors have opportunities to create and the public has opportunities to learn from their creations. United States information law begins with the First Amendment, but incorporates a wide range of potentially conflicting policies to respond to a broader array of concerns. In the previous section, I discussed why copyright law's harmony with freedom of speech law owes more to the limits on copyright owners' control over access to their works than to any inherent congruence between the two bodies of law. I suggested that, if copyright's limitations cease to ensure meaningful public access to uncopyrightable facts and ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, a significant collision between copyright and the First Amendment seems certain to follow. I concluded, finally, that fair use would be an inadequate steam valve for free expression.

As unready as copyright law may be to respond to First Amendment concerns, it is even less well-adapted to accommodate other strands in our information policy skein. Copyright has nothing to say about the protection of children or the defense of our national security. What it has to say about the fairness of elections seems to be limited to whether, e.g., the owner of the copyright in "Soul Man" can prevent Bob Dole from using "I'm a Dole Man" as his campaign anthem.<sup>139</sup> U.S. copyright law speaks to injured reputations only when the victims are authors of works of visual art,<sup>140</sup> and does that not very well.<sup>141</sup> A copyright-centric view of the world might counsel that those other concerns are subsidiary ones, unimportant when compared with the integrity of intellectual property. Not everyone would endorse that view. The clearest illustration of copyright's inadequacy as a blueprint for our information policy arises when we examine the issues surrounding privacy and the Internet.

### A. Copyright and Privacy

Privacy is a hot-button issue.<sup>142</sup> Many people go ballistic when they learn that a variety of commercial concerns are collecting, compiling and selling identifying information about them. Lexis/Nexis ran into a storm of protest

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138. See generally Litman, *supra* note 75.

139. See *Dole Campaign Agrees to Change Its Tune*, N. Y. TIMES, Sept. 14, 1996, at 9; see also Michael Wines, *Just Don't Say It*, N. Y. TIMES, Sept. 20, 1996, at A28 (Nike objects to Mr. Dole's "Just Don't Do It" slogan).

140. See 17 U.S.C. § 106A (1994).

141. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

142. See *Privacy: Ease of Gathering Personal Data on Internet Triggers Advent of Privacy Approved Sites*, 1 Info. Pol'y & L. Rep. (BNA) 621 (Oct. 10, 1996); *Marketing Practices: Marketers Launch Privacy Campaign: Pledge Guidelines for Online Practices*, 1 Info. Pol'y & L. Rep. (BNA) 741 (Nov. 8, 1996); see generally ELECTRONIC PRIVACY INFORMATION CENTER HOME PAGE (visited Feb. 21, 1997) <<http://epic.org>>.

when it publicized its not-very-unusual P-Trak database.<sup>143</sup> Notwithstanding the importance many people assign to matters of privacy, however, the area is only lightly regulated. There is no comprehensive federal privacy law and most state privacy enactments treat very narrow privacy-related issues.<sup>144</sup>

Online communications are far from private.<sup>145</sup> Although people have been talking for some time about a National Information Infrastructure that would dole out access to electronic documents in return for small credit card payments or electronic money,<sup>146</sup> the dominant form of transaction occurring over today's World Wide Web seems to be information barter. I get to look at the *New York Times on the Web*;<sup>147</sup> in return, the *Times* gets to look at me looking at it, and gets to put a cookie<sup>148</sup> on my hard disk that it can check for next time I come back.<sup>149</sup> To my knowledge, there is no rule in any United States jurisdiction that requires the *Times* to let me know that it is doing this, or what it is doing it for. The Web browser I use graciously permits me to adjust it to let me know before a cookie is set, and even refuse to accept one. The *Times* responds by refusing to let me look at its electronic page.<sup>150</sup> If there are any settings that would allow me to see and affect what information the sites I visit collect about me as I breeze by, I haven't found them.

Most people appear not to know this; they appear to assume that viewing stuff through computer screens in the privacy of their homes is as secure as viewing stuff on their television screens in the privacy of their homes—at least, if they don't e-mail their credit card numbers. Proprietors of mailing lists and other commercially valuable data have sometimes argued that people don't

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143. See LEXIS-NEXIS, *Statement on the P-TRAK File from LEXIS-NEXIS* (visited Feb. 21, 1997) <<http://www.lexis-nexis.com/inc/p-trak/p-trak.html>>; CENTER FOR DEMOCRACY AND TECHNOLOGY, *FTC Recommends Changes to Protect Personal Information* (Nov. 5, 1996) <[http://www.cdt.org/privacy/960920\\_Lexis.html](http://www.cdt.org/privacy/960920_Lexis.html)>.

144. See generally Cohen, *supra* note 82, at 1032-34; UNIVERSITY OF SAN DIEGO CENTER FOR PUBLIC INTEREST LAW PRIVACY RIGHTS CLEARINGHOUSE, *Privacy in Cyberspace: Rules of the Road for the Information* (March 1997) <<http://www.privacyrights.org/fs/fs18-cyb.html>>.

145. See, e.g., PRIVACY RIGHTS CLEARINGHOUSE, *supra* note 143; COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, *Electronic Privacy Principles* (visited Feb. 21, 1997) <<http://www.cpsr.org/dox/program/privacy/privacy8.htm>>; CENTER FOR DEMOCRACY AND TECHNOLOGY, *Privacy Demonstration Page* (visited May 5, 1997) <<http://www.13x.com/cgi-bin/cdt/snoop.pl>>; *Magellan Internet Guide Search Voyeur* (visited Feb. 13, 1997) <<http://voyeur.mckinley.com/voyeur.cgi>>.

146. See, e.g., Denise Caruso, *Digital Commerce: Maybe It's Time to See the Internet As a What's-in-it-for-me Pipeline*, N. Y. TIMES, Oct. 21, 1996, at C5.

147. See <<http://www.nytimes.com/>>.

148. See NETSCAPE, *Persistent Client State HTTP Cookies* (visited Feb. 20, 1997) <[http://home.netscape.com/newsref/std/cookie\\_spec.html](http://home.netscape.com/newsref/std/cookie_spec.html)>.

149. Although there are a few web-based publications that charge subscription fees, see, e.g., THE WALL STREET JOURNAL INTERACTIVE EDITION, *Subscription Information* (visited Feb. 15, 1997) <<http://interactive.wsj.com/subinfo.html>>, most World Wide Web publications that announced an intention to charge subscribers eventually, including the *New York Times*, appear to have delayed their plans to impose fees, perhaps indefinitely.

150. The *New York Times on the Web* is available free of charge to subscribers who register at the *Times* web site. In order to view any part of the *Times* beyond the WWW front page, one must "sign in" and accept a cookie.

mind when their personal identifying information is collected and sold—that, in fact, they positively relish getting all those offers of low-annual-fee credit cards in the mail.<sup>151</sup> They nonetheless have resisted calls to emulate European privacy protection rules<sup>152</sup> or to require subjects to give permission to have their data collected and sold.<sup>153</sup> They have, moreover, made it fiendishly difficult for a subject to opt out of a database and request that her identifying information be wiped from their files.

Meanwhile, the sensitivity of information traveling through the Internet makes e-mailing credit card numbers look trivial. A huge number of important advances in health care could flow from putting everyone's medical records on the Internet, at a significant cost to their security from prying eyes.<sup>154</sup> A variety of encryption methods have been devised; the effective ones have generated government opposition because of the specter of terrorists, drug dealers and other criminals encrypting their scurrilous communications out of range of a phone tap.<sup>155</sup> Copyright management systems are unlikely to work without something keeping a record somehow, somewhere of what readers are reading.<sup>156</sup> I don't much want anyone generating and selling a record of what I've been reading lately. How about you?

It seems obvious that these very difficult problems require serious solutions, and that it will take a great deal of careful thought to devise them. Copyright law can't solve the dilemma—copyright can't even see the nature of the competing interests. Under the copyright way of looking at the world, the person who has the most compelling interest in the collection and dissemination of the information is not an interested copyright party, and has no cognizable stake. The proprietor of the data is the company that collected them and claims the right to sell them; the consumers of the data claim access (and sometimes claim the ability to exclude other users). The data are not original to their subject and she has no claim to influence their disposition. Indeed, it's not at all clear that copyright recognizes any important policy that

151. EXPERIAN, INC., *Mailing Lists and Preapproved Credit Offers* (visited May 6, 1997) <<http://www.experian.com/customer/faqlists.html>>.

152. See, e.g., Lisa Fickensher, *News Analysis: Information Industry Keeping Its Cool About Talk of a Federal "Privacy Czar,"* THE AM. BANKER, Oct. 15, 1995, at 1; see generally EUROPEAN COMMISSION LEGAL ADVISORY BOARD, *Data Protection (Privacy)* (visited Feb. 21 1997) <<http://www2.echo.lu/legal/en/dataprot/dataprot.html>>.

153. See, e.g., Robert Gellman, *The Questions Industry Doesn't Want to Answer*, DM NEWS, June 17, 1996, at 44.

154. See EPIC, *Medical Record Privacy* (visited Feb. 15, 1997) <<http://www.epic.org/privacy/medical>>. The recently enacted Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 §§ 262, 264 (1996) includes provisions that may cause some concern along these lines; see also John Schwartz, *Health Insurance Reform Bill May Undermine Privacy of Patients' Records*, WASH. POST, August 4, 1996, at A23.

155. See INTERNET PRIVACY COALITION HOMEPAGE (visited Feb. 21, 1997) <<http://www.privacy.org/ipc/>>; ELECTRONIC FRONTIER FOUNDATION (visited Feb. 21, 1997) <<http://www EFF.org/pub/Privacy/HTML/hot.html>>.

156. See generally Cohen, *supra* note 82.

would support her insisting on seeing what data about her are being sold to the rest of the world.

Copyright, in short, is a very bad tool for balancing privacy issues. It deals with privacy claims only if, and only to the extent that, it can assimilate privacy interests to authorship interests.<sup>157</sup> Most of the time, they aren't akin.

### B. Copyright and Equality

Copyright law has also avoided any serious concern with distributional issues. There are exceptions to the public performance right in section 110 of the statute that arguably incorporate distributional considerations. Schools, churches, agricultural fairs and veterans' organizations get a break,<sup>158</sup> along with record stores<sup>159</sup> and small shops and restaurants.<sup>160</sup> The distributional policy decisions reflected in the statute, however, derive not from copyright policy but from the political clout gained from policy determinations made in other arenas.<sup>161</sup> Veterans' and fraternal organizations, for example, obtained a Section 110 privilege in 1982, shortly after they discovered that public performance of music might subject them to copyright liability. They got their exemption because they insisted on it, and because they had the influence with Congress to dissuade composers and music publishers from using their own leverage to prevent its enactment so long as the privilege was narrowly limited.<sup>162</sup> The privileges in the statute for educational and library uses, similarly, emerged from a process of negotiation among copyright owner representatives, library representatives and educational representatives and reflect some combination of the parties' respective bargaining power and the public appeal of a claim for increased free use or enhanced control in view of the politics of the time.<sup>163</sup> The decisions about who is entitled to deal with copyright on special terms, in other words, get made either because of sheer bargaining power or because of exogenous political determinations made in connection with unrelated issues.

That's how the legislative side of copyright policy gets made, as often as not, and we're used to it. We tend to assume that the best approach to perceived unfairness is to invite more people to the bargaining table.<sup>164</sup> That's surely preferable to continuing to exclude them, but it won't do anything to solve distributional or equality issues that stem from the outside, non-copyright

157. See, e.g., *Sallinger v. Random House*, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987).

158. 17 U.S.C. §§ 110 (1), (2), (3), (6) & (10) (1994).

159. 17 U.S.C. § 110(7).

160. See 17 U.S.C. § 110(5).

161. See Litman, *Copyright & Technological Change*, supra note 75, at 317-32.

162. See Pub. L. No. 97-366, 96 Stat. 1759 (codified at 17 U.S.C. § 110(10)); see also H.R. Rep. No. 494, 97th Cong., 2d Sess. (1982).

163. See generally Litman, *Copyright & Technological Change*, supra note 75.

164. See generally *id.*

world; it will just perpetuate them. Of course, why should copyright law take on the thankless task of addressing distributional issues? That certainly isn't its purpose.

Which is precisely my point. Copyright would address such issues badly, because they are for the most part alien to copyright's rationale. The copyright system leaves most distributional issues to the marketplace. If poor schoolchildren need cheap books, some publisher will, we trust, perceive the market and roll some undervalued out-of-print-but-still-in-copyright texts out of retirement to reprint in cheap editions. If underfunded community theaters need cheap plays to put on, there are some great bargains available from Samuel French and Dramatists Play Service for small non-profit houses who choose to produce less commercial plays. Besides, there's always Shakespeare.

I wouldn't suggest for a minute that copyright be revised to incorporate a need-based sliding scale. We do need to recognize, though, that copyright law has the luxury of not worrying about such issues because other actors on the information policy stage have made it their business to think about them, and think hard. Telephone and television are different media today than they might have been if the Federal Communications Commission hadn't spent a bunch of time worrying about universal service, universal access, and the health of the market in signals broadcast over the airways for free.<sup>165</sup> The Internet would be a different marketplace if the NSF had not imposed restrictions for many years on commercial use.<sup>166</sup> It is completely understandable that copyright owners and copyright lawyers would resist distorting copyright law by increasing its sensitivity to equity issues. They may perceive (I think correctly) that copyright law would respond poorly to such pressures. But, while it may be wise to insist that copyright law keep its hands off issues of equality of access and ability to pay, it would be foolish to insist that since copyright doesn't address these issues, other legal institutions should permit copyright's approach to these problems to go unchallenged. If copyright law can't solve distributional inequities from within the four corners of copyright doctrine, it should not be surprised when others endeavor to impose solutions upon it. Questions of access and opportunity are part of what we have information policymakers *for*.<sup>167</sup> There seems to be no good reason why copyright's equity-blindness should prevail over the alternatives.

## V. CONCLUSION

In evaluating proposals to make copyright rules the rules of the road on the information superhighway, we have given too much attention to what I

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165. See generally Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFF. L. REV. 615 (1991) (television).

166. See, e.g., ED KROL, *THE WHOLE INTERNET USER'S GUIDE & CATALOG* 35-48, 495-96 (2d ed. 1994).

167. See, e.g., Steve Lohr, *A Nation Ponders Its Growing Digital Divide*, N.Y. TIMES, Oct. 21, 1996, at C5.

would argue are the wrong questions. We've been relying on the maxim that copyright and the First Amendment complement rather than conflict with each other to relieve us of any need to consider what kind of information policy might result if copyright rules really became the rules of the road. But the harmony between the First Amendment and copyright doesn't inhere in their essential nature; rather, it derives from accommodations and restrictions we have built into copyright to enhance its role as an engine of free expression. If we dispose of those limitations, or technology renders them irrelevant, then nothing prevents copyright and the First Amendment from operating at cross purposes.

Meanwhile the assumption that copyright rules accord with freedom of expression policies has encouraged a strategy under which more copyright protection (and more un-copyright<sup>168</sup> protection) is always better. That reasoning, in turn, has obscured the importance of limits on the scope and exercise of copyright rights. Proposals to suggest copyright answers as the solutions for myriad questions posed by digital technology for our information policy, in that environment, seemed entirely appropriate. Objections to the agenda have been deflected into increasingly bitter arguments about whether the proposals accorded with or varied from long copyright tradition. The success of the American marketplace of ideas, where copyright has coexisted almost comfortably with free speech law for 200 years, has been tendered as evidence that a digital network governed by strong copyright law principles would best promote the worldwide development both of commerce and of free expression. That rhetoric, however, neglects the greatly enhanced role that copyright rules are being asked to play. They aren't up to it.

If we build the information law of the Internet, and its progeny, around the copyright paradigm, we may be able to stretch and scrunch and bend copyright law out of any recognizable shape to permit it to manage all of the interests it has hitherto viewed as unimportant. If we can't, I think it's clear that the information space it encourages will be one that few of us will like very much.

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168. See *supra* notes 115-19 and accompanying text.

