COPYRIGHT NONCOMPLIANCE (OR WHY WE CAN'T "JUST SAY YES" TO LICENSING)

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Suddenly, we are paying a lot of attention to the claim that individual end users do not observe copyright rules in their daily behavior. The phenomenon is not new. It has captured so much recent attention because networked digital communications threaten and promise to revolutionize the way people interact with information and works of authorship in ways that make the behavior of individual end users far more crucial than it has been in the past. Our copyright laws have, until now, focused primarily on the relationships among those who write works of authorship and disseminate those works to the public. The threat and promise of networked digital technology is that every individual with access to a computer will be able to perform the 21st century equivalent of printing, reprinting, publishing, and vending.[1] If the vast majority of them do not comply with the copyright law, then the copyright law is in danger of becoming irrelevant.

The White House Information Infrastructure Task Force[2]

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1. The first U.S. copyright statute, the Act of May 31, 1790, ch. 15, sec. 1, 1 Stat. 124 (repealed 1802), gave copyright owners the "sole right and liberty of printing, reprinting, publishing and vending."

2. President Clinton appointed the Information Infrastructure Task Force [IITF] in 1993, and asked Commerce Secretary Ronald Brown to serve as its chair. The IITF is charged with coming up with "comprehensive telecommunications and information policies aimed at articulating and implementing the Administration's vision for" what the administration named the "National Information Infrastructure," or "NII." The IITF set up a Working Group on Intellectual Property Rights, chaired by Commissioner of Patents and Trademarks Bruce Lehman, to assess the intellectual property implications of the NII. *See* 58 Fed. Reg. 53,917 (1993).

has addressed this problem in its White Paper Report[3] in different ways. First, if the root of the problem is that individual end users don't bother with extant copyright rules because they believe that the copyright rules in the statute don't apply to them, the White Paper offers a solution: It advances an interpretation of the current statute under which all of the current rules apply with full force to individual end users.[4] Second, if the reason that individual end users don't bother with extant copyright rules is that they realize that those rules are difficult to enforce against them, the White Paper suggests a variety of measures to beef up enforcement.[5] Finally, if individual end users don't bother with extant copyright rules because they don't understand them, the White Paper argues that an ambitious education program modeled around the theme "just say *yes*" (to licensing) will bring the American public around.[6]

Whether those proposals are likely to work depends on why it is that the public believes that extant copyright rules don't apply to individual end users; why it might be that the public thinks the rules are, or should be, unenforceable; why the public might have some trouble understanding the way the current rules work. The answers to those questions must influence the determination of whether the good old rules should be the rules we devise to govern the behavior of individual end users, or whether we ought instead to try to fashion a legal regime that the general public finds more hospitable.

I have complained more than once over the past few years that the copyright law is complicated, arcane, and counterintuitive; and that the upshot of that is that people don't believe that the copyright law says what it does say. People do seem to buy into copyright norms, but they don't translate those norms into the rules that the copyright statute does; they find it very hard to believe that there's really a law out there that says the

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3. BRUCE A. LEHMAN, DEPARTMENT OF PATENTS AND TRADEMARKS, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter WHITE PAPER].

4. *See* WHITE PAPER, *supra* note 3, at 64-72; *see also, e.g.*, James Boyle, *Overregulating the Internet*, WASH. TIMES, Nov. 14, 1995, at A17; Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134.

5. *See* WHITE PAPER, *supra* note 3, at 213-36.

6. *See* WHITE PAPER, *supra* note 3, at 203-10.

stuff the copyright law says.[7]

Of course we have many laws that people don't seem to believe in. Think of the laws prohibiting consensual sodomy, for instance.[8] When I was a child and my father told me about those laws, I had a tough time believing that he wasn't making it up. Or, think about the national fifty-five-miles-per-hour speed limit law.[9] Or the laws that say that minors can't buy cigarettes.[10] These are all laws that people don't believe say what they say. And, since they don't think that familiar sexual activities, or driving at seventy miles per hour, or buying a pack of Marlboros from the cigarette machine in the cafeteria, are really against the law, they don't refrain from doing those things just because some law on the books says they can't.

People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can steal if they think they can get away with it. Most people try to comply, at least substantially, with what they believe the law to say. If they don't believe the law says what it in fact says, though, they won't obey it—not because they are protesting its provisions, but because it doesn't stick in their heads. Governments stop enforcing laws that people don't believe in. Laws that people don't obey and that governments don't enforce get repealed, even if they are good laws in some other sense of the word. The national fifty-five-miles-per-hour speed limit, for instance, (had it been followed) would have conserved fuel and saved lives, but it wasn't, so it didn't, and now it's history; Congress finally repealed it.[11]

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7. *See* Jessica Litman, *Essay: Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991); *see also* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994).

8. *See, e.g.*, ARK. CODE ANN. sec. 5-14-122 (Michie 1995); KY. REV. STAT. ANN. sec. 510.00 (Michie 1995).

9. *See* Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, sec. 114(a), 88 Stat. 2281 (1974) (formerly codified as amended at 23 U.S.C. sec. 154, repealed by National Highway System Designation Act of 1995, Pub. L. No. 104-59, tit. 2, sec. 205(d)(1)(B), 109 Stat. 568 (1995)).

10. *See, e.g.*, GA. CODE ANN. sec. 16-12-171 (1995); LA. REV. STAT. ANN. sec. 14.91.8 (West 1995); *see also* ARK. CODE ANN. sec. 5-27-227 (Michie 1995).

11. National Highway System Designation Act of 1995, Pub. L. No. 104-59, tit. 2, sec. 205(d)(1)(B), 109 Stat. 568 (1995).

Another example is provided by the law that requires household employers to pay Social Security taxes for baby-sitters, housekeepers, and other

People are nonetheless attached to the symbolic significance of some of these laws. "They're good," people say, "because they make a statement. They express the norms of civilized society." You hear that sort of thing often when you are talking about the war on drugs;[12] many people agree that the laws against drugs aren't working; indeed, are doing as much harm as good, but they are unwilling to give up the symbolic force of the prohibitions. That's one good reason to keep a law around even though nobody seems to be obeying it. It can be very expensive to cling to a law that is unenforced and unenforceable, but sometimes, with some laws, some people feel that it is worth the price for the symbolism. Certainly, you hear a lot of that in support of laws that legislate morality.

But laws that we keep around for their symbolic power can only exercise that power to the extent that people know what the laws say. If nobody knew that we had a law against selling cocaine, it wouldn't be serving much of a symbolic function. (To go back to the laws against consensual sodomy for a moment, they stopped performing whatever symbolic function they were supposed to perform once people stopped believing that there were real laws out there that made things like *that* illegal.) So, the answer to the question "*Why* is it a problem that people don't believe in the copyright law?" depends on the reason they don't believe in it. The reason people don't believe in the copyright law, I would argue, is that people persist in believing that laws make sense, and the copyright laws don't seem to them to make sense, because they

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in-home employees. Until 1994, the law required Social Security taxes to be paid on behalf of any employee who earned more than $50 in any quarter of the year, and was apparently widely ignored. In 1992, President Bill Clinton's first nominee for the office of Attorney General disclosed that she had failed to pay taxes for her son's baby-sitter; her nomination was withdrawn. An official White House policy requiring nominees to have complied with the law soon foundered when it turned out that a significant number of nominees had failed to pay the required FICA taxes. *See* Ruth Morris, *Clinton Delays Announcement on Court Choice; Breyer Tax Issue Disclosed*, WASH. POST, June 13, 1993, at A1. The White House settled on a modified policy requiring high-level appointees to tender back taxes and penalties to the IRS and say they were sorry. *See Again the Social Security Taxes*, WASH. POST, Dec. 22, 1993, at A20. Two years later, Congress amended the law to ease its requirements. *See Nanny Tax Change, Not Repeal*, WASH. POST, Oct. 8, 1994, at A18.

12. *See, e.g.*, Dan Quayle, *High Tide: Push to Legalize Drugs Drowns Out Moral Issues*, ARIZ. REPUBLIC, Feb. 6, 1996, at B5.

don't make sense, especially from the vantage point of the individual end user.[13]

Copyright law is horribly complicated. Sometime around the turn of the century, we in the United States reached the collective judgment that copyright was too complicated for mere mortals (or indeed for mere senators) to appreciate, and we settled on an approach whereby we assembled all of the copyright experts—that is, the entities whose businesses involved printing, reprinting, publishing and vending—and assigned them the task of sorting out the relationships among them.[14] So, whenever we need a major revision of the copyright law, it has become traditional to assemble all of the current stakeholders in informal negotiations and present whatever they agree on to Congress.[15]

That, today, is common ground. The laws that come out of such a process have both strengths and weaknesses. At least in the short term, they tend to be laws the relevant industries can live with, because the relevant industries wrote them.[16] Those laws can solve the problems posed by different entities' different needs by specifying, so that, e.g., video games can be treated differently from video tapes,[17] or cable television can be treated differently from broadcast television, which can be treated still differently from satellite television.[18] For that rea-

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13. *See* Litman, *The Exclusive Right to Read*, *supra* note 7, at 48-52.

14. *See* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 282-304 (1989); ABE GOLDMAN, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954, *reprinted in* STAFF OF SUBCOMM. ON PATENTS, COPYRIGHTS AND TRADEMARKS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION XI (Comm. Print. 1960).

15. *See* Litman, *supra* note 14; *see also* Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987); Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y 109 (1989). That is also the common approach when the amendments are more minor, except that in those cases, fewer stakeholders need to be invited to the table. *See, e.g.*, AUDIO HOME RECORDING ACT OF 1991: HEARING BEFORE THE SUBCOMM. ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION OF THE HOUSE COMM. ON THE JUDICIARY, 102d Cong. (1992).

16. They are usually less hospitable to nascent upstart industries that were not around to send representatives to the bargaining table. *See* Litman, *supra* note 14, at 302-04, 342-46.

17. *See* 17 U.S.C. sec. 109(e) (1995).

18. *Compare* 17 U.S.C. sec. 111 (1995) *with* 17 U.S.C. sec. 119 (1995); *see also* 17 U.S.C. sec. 110 (1995).

son, though, the differences in treatment may not have much logical appeal. In addition, the negotiating process tends to divide users into discrete interests. Businesses and institutions who are at the bargaining table request and receive specific privileges, and nobody ends up being a proxy for the general public.[19]

The current crisis has been precipitated by the widespread adoption of new digital technology, which enables members of the general public to print, reprint, publish, vend, and communicate with a vast audience without resorting to the traditional intermediaries. Estimates peg the number of current U.S. users of on-line services at anywhere between ten and twenty-four million people, and those numbers are growing all the time.[20] Current stakeholders, who are accustomed to the current rules, would of course prefer that the rules that apply to the general public engaging in these activities be the current rules, or ones that work as much like them as possible.[21] They have been seeking ways to maintain what they see as the appropriate balance in the law, by reinvigorating and extending their version of the current rules.

The White House Information Infrastructure Task Force White Paper is an ambitious package that reinterprets and reconfigures copyright law to preserve the current relationships among printers, reprinters, publishers and vendors, and their clientele. Unfortunately, under the copyright law described in the White Paper, much of the activity of individual end users who are fueling the explosive growth in the Internet is already prima facie illegal, and the White Paper recommends that copyright owners' control be further enhanced

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19. *See, e.g.*, Litman, *supra* note 14, at 312-14, 351-52; *Public Hearing at Andrew Mellon Auditorium Before the Information Infrastructure Task Force Working Group on Intellectual Property Rights*, Sept. 22, 1994, at 66-67 (testimony of Jessica Litman) (transcript on file with author); *see generally* Litman, *The Exclusive Right to Read*, *supra* note 7.

20. *See, e.g., CommerceNet/Nielsen Press Release* (visited Feb. 5, 1997) <http://www.commerce.net/work/pilot/ nielsen_96/press.html>; *Nielsen Media Research Interactive Services* (visited Feb. 5, 1997) <http://www.nielsenmedia.com/news/ cnet-pr.html>.

21. *See, e.g., Copyright Protection on the Internet: Hearing Before the Courts and Intellectual Property Subcomm. of the House Comm. on the Judiciary*, 104th Cong., at 21-22 (1996) (testimony of Jack Valenti, Motion Picture Association of America); *id.* at 84-85, 87-91 (testimony of Gary McDaniels, Software Publishers Association).

with both technological and criminal enforcement mechanisms.[22] Despite criticism,[23] some of it strident (I count mine[24] as some of the strident stuff), this package has wide support among many current stakeholders,[25] and is being pitched on the ground that it preserves or restores the preexisting copyright balance.[26] Much of the criticism (again, mine belongs here) attacks the package on the ground that it radically alters the preexisting copyright balance.[27] All of us are seeking to characterize ourselves as the defenders of the old copyright balance.

Now, I would surely argue that my claim to defend the old balance is the more genuine one. But, the truth is, we *all* need to give it up. That balance is gone. Whatever way we go, we will need to find a different balance. The new players that we are trying to account for—millions of consumers of networked digital technology who dwarf the current stakeholders on the basis of numbers alone—are too big an elephant to travel the

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22. *See* WHITE PAPER, *supra* note 3.

23. *See, e.g.*, Boyle, *supra* note 4; Leslie A. Kurtz, *Copyright and the National Information Infrastructure in The United States*, 3 E.I.P.R. 120 (1996); Pamela Samuelson, *Technological Protection for Copyrighted Works*, 45 EMORY L.J. ___ (forthcoming 1997); Samuelson, *supra* note 4.

24. *See* Jessica Litman, *Revising Copyright for the Information Age*, 75 OR. L. REV. 19 (1996); Litman, *The Exclusive Right to Read*, *supra* note 7.

25. *See, e.g.*, Creative Incentive Coalition, *A Message From the CIC Executive Director* (visited Feb. 5, 1997) <http://www.cic.org/message.html>; Software Publishers Association, *SPA Testifies Before Congress on National Information Infrastructure Copyright Act* (visited Feb. 5, 1997) <http://www.spa.org/gvmnt/releases/niijh.htm>; *Copyright Protection on the Internet*, *supra* note 21 (testimony of Jack Valenti, Motion Picture Association of America and Gary McDaniels, Software Publishers Association).

26. *See, e.g., Joint Hearing on S. 1284 and H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary and the Senate Comm. on the Judiciary*, 104th Cong., at 33 (1995) (statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks); *Copyright Protection on the Internet*, *supra* note 21, at 84 (testimony of Gary McDaniels, Software Publishers Association); The Creative Incentive Coalition, *Ten Myths About the NII Copyright Protection Act* (visited Feb. 5, 1997) <http://www.cic.org/myths.html>.

27. *See, e.g., Copyright Protection on the Internet*, *supra* note 21, at 79 (testimony of Gary Shapiro, Home Recording Rights Coalition); *see* Boyle, *supra* note 4; Samuelson, *supra* note 4; *see also NII Copyright Protection Act of 1995, Hearing Before the Courts and Intellectual Property Subcomm. of the House Comm. on the Judiciary*, 104th Cong., at 218 (1996) (testimony of Cornelius Pings, President, Association of American Universities).

length of a boa constrictor without permanently distorting its shape.[28]

In a spectrum of possible strategies, the solution suggested by the White Paper is at one extreme: let's first interpret the current statute to define as an actionable copy every appearance of a work in the temporary memory of any computer anywhere. Then, let's make the good old rules (as interpreted) apply with full force to these ten or twenty million new printers, reprinters, publishers and vendors, essentially by fiat. We'll simply say it does, and then we'll try to ensure that *they* see it that way by teaching them to "just say yes" in elementary school,[29] by encouraging the widespread use of technological controls that compel them to comply with whatever terms copyright holders elect to impose,[30] and by pursuing a subtle but decided shift towards criminal enforcement of extant copyright rules.[31]

The trouble with the plan is that the only people who appear to actually believe that the current copyright rules apply as writ to every person on the planet are members of the copyright bar.[32] Representatives of current stakeholders, talking

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28. *See* ANTOINE DE SAINT-EXUPERY, THE LITTLE PRINCE (1943).

The current market leaders in established copyright-affected industries appear to have figured that out. They seem to be using such clout as they have to try to ensure that the balance struck by copyright laws in the future favors them as compared with either end users or the not-yet-established copyright-affected industries of the future. They certainly seem to be in a hurry to make sure the recommendations made by the White Paper are passed in this session of Congress, whether or not the consensus of affected industries and consumers has been secured. *See, e.g., Copyright Protection on the Internet, supra* note 21, at 21-24 (testimony of Jack Valenti, Motion Picture Association of America); *id.* at 56-57 (testimony of Robert Holleyman II, Business Software Alliance). Since many of them have conceded that the technology is too new to know precisely how piracy problems are likely to manifest themselves. *See generally id.; NII Copyright Protection Act of 1995, supra* note 27, the rush is unlikely to be due to a pressing need for legal solutions to as yet incipient problems.

29. WHITE PAPER, *supra* note 3, at 203-08.

30. *See* WHITE PAPER, *supra* note 3, at 177-200, 230-36.

31. *See* WHITE PAPER, *supra* note 4, at 228-36; Boyle, *supra* note 4; *see also Copyright Protection on the Internet, supra* note 21, at 22 (testimony of Jack Valenti, Motion Picture Association of America).

32. I mean to include here copyright lawyers in government and academia as well as those in private practice and in corporate positions. My argument is that we who live with and interpret copyright rules every day have simply forgotten how counterintuitive those rules are to people who

among themselves, have persuaded one another that it must be true, but that's a far cry from persuading the ten or twenty million new printers and reprinters. The good old rules were not written with the millions of new digital publishers in mind, and they don't fit very well with the way end users interact with copyrighted works. If you say to an end user, "you either need permission or a statutory privilege for each appearance, however fleeting, of any work you look at in any computer anywhere," she'll say "There can't really be a law that says that. That would be silly." Even copyright lawyers, who have invested years in getting used to the ways the copyright law seems arbitrary, have had to engage in several pretzels-worth of logical contortions to articulate how the good old rules do and should apply to end users without any further exemptions or privileges.[33]

Instead, though, of polling the old guard for its version of good rules to constrain the individual end users who, after all, are now threatening to compete as well as consume, and then foisting those on the public in a "just say yes—to licensing" campaign, it might be worthwhile to step back a step.

I take it that a law that folks complied with voluntarily would be superior on many counts to one that required reeducation campaigns, that depended on technological agents to be our copyright police, and that relied on felony convictions to be our deterrents.[34] Nobody has proposed a law that might meet this description because the members of the copyright bar have all looked around and concluded that consumers will not voluntarily comply with the current collection of copyright

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don't. We frequently neglect to factor that aspect of reality into our constructions of the meaning of copyright rules.

33. Thus, Commissioner Bruce Lehman, in his presentation to the Engelberg Center conference, suggested that the vast majority of material on the Internet should be treated as if it were in the public domain, and therefore essentially immune from both the copyright law rules described in his Working Group's White Paper and the amendments the White Paper proposed, although he acknowledged that the provisions of U.S. copyright law, 17 U.S.C. secs. 102, 401, 408 (1995), and the Berne Convention, *Berne Convention for the Protection of Literary and Artistic Works* art. 5.2 (Paris Act 1971) U.K.T.S. No. 63 (1990), pose formidable legal obstacles to such an approach. *See also Joint Hearing, supra* note 26, at 30-33 (testimony of Commissioner Bruce Lehman).

34. *See* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996).

rules. Stop and think about that for a minute. We can't rely on voluntary compliance because the great mass of mankind will not comply voluntarily with the current rules.

Well, why not? Is it that consumers are lawless, or ignorant? Is it, in other words, the consumers' fault? Or might there instead be some defect in the current rules—at least from the consumers' standpoint? To recast the question, can we look at the dilemma from the opposite direction? Are there rules that we believe consumers would comply with voluntarily? Do those rules potentially supply sufficient incentives to authors and their printers, publishers, and vendors to create new works and put them on the global information infrastructure, and, if not, can we tweak them so that they do?

When I've made this suggestion, recently, some people have said, "Oh, well, that would be very nice in theory, but it wouldn't supply big enough incentives to induce people to create new works and put them on the Net." As generous as the current copyright rules are (and they are plenty generous), some people fear that they don't give copyright holders enough control to inspire them to create and distribute works of authorship, given the threats posed by networked digital technology.[35]

The problem of supplying incentives sufficient to permit the global information infrastructure to reach what Commissioner Bruce Lehman has called "its full potential"[36] tends to look different, depending on whether one views the current Internet as a glass that's half-full or one that's half-empty. A number of people—many but not all of them pretty innocent of Internet experience—have repeated to me the conventional wisdom that the content that is available today on the Internet—much of it created by amateurs—is so low in quality as to have little value except to its author. It follows, these people tell me, that the copyright regime of the future will need to provide enhanced incentives so that we will see the amateur content replaced with content of the professional sort. Most importantly, the argument continues, we need to ensure that the authors of the future have control over the

35. *See, e.g.*, Doreen Carvajal, *Book Publishers Worry About Threat of Internet*, N.Y. TIMES, Mar. 18, 1996, at A1, C2.

36. *Joint Hearing*, *supra* note 26, at 35 (testimony of Commissioner Bruce Lehman).

uses of their creations, so that they will feel secure in distributing their works over the information infrastructure—that's why so much of the stuff that's there now is stuff nobody would want to steal.[37]

I am the last person to suggest that authors should not get paid. I write stuff; I get paid for some of it; money is important to me. But I have to say that my own impression of what I've seen on the Internet doesn't match conventional wisdom. Sure, much of what's there is junk; but much of what comes through the cable to my television is junk. I have been enormously impressed by how much of it is not junk.

First of all, there is plenty of professionally created and formatted commercial content out there on the World Wide Web. The *New York Times* has a hypertext version of the newspaper.[38] CNN and NPR have both opened web sites that allow browsers to read material that they broadcast earlier.[39] It isn't clear to me how the *Times* and CNN will end up making money from their sites, but it seems evident that they think there's a good possibility that they will figure out a way to do so. Still, the fact that there are some daring entrepreneurs who are willing to take big risks in the interest of gaining market share now, on the theory that they will worry about making a profit later, is not necessarily news. That's our history: it happened with radio, television, and cable television;[40] why not the Internet? No, what I'm impressed by is the extraordinary variety and innovativeness of all the expression that's available over the Net that isn't professionally created and formatted commercial content, but that explores some of the new possibilities of the medium.

A second year law student put together a six-part

37. *See, e.g., Copyright Protection on the Internet, supra* note 21, at 70-71 (testimony of Barbara A. Munder, McGraw Hill Co., for the Information Industry Association); *see also* Bruce A. Lehman, Copyright Fair Use and the National Information Infrastructure, Address at George Mason University (Feb. 23, 1996).

38. *See The New York Times on the Web* (visited Feb. 5, 1997) <http://www.nytimes.com>; *see also, e.g., Epicurious Food* (visited Feb. 5, 1997) <http://www.epicurious.com> (website including *Gourmet* and *Bon Appetit* magazines).

39. *See CNN Interactive* (visited Feb. 5, 1997) <http://www.cnn.com>; *National Public Radio Online* (visited Feb. 5, 1997) <http://www.npr.org>.

40. See Litman, *supra* note 24, at 27-31, and sources cited therein.

"F.A.Q."[41] about copyright law that was superior to all study aids I've seen and to most of the copyright treatises.[42] I suggested to the author that he publish it—for money—but he wasn't interested. I recommend it to my students—and it's free.

A software design professor I ran into amused himself for a time by writing reviews of classic science fiction books and posting them to Usenet news.[43] Now, I would buy a book of such reviews just to have it on my shelf. They are elegantly written, perceptive, clever, and worth reading in their own right. I'm embarrassed to admit that early in our electronic acquaintance, I suggested that he apply for a job writing such reviews for a magazine. Silly me—after all, he's a software design professor who was doing this because it's fun.[44]

But these are just two examples of work that, in my judgment, is of better quality than I already pay cash for in stores. In addition to that kind of material, there is the whole-is-greater-than-the-sum-of-its-parts stuff—the works that have enormous value precisely because they're collaborative. As a first-time, middle-aged parent, I feel as if I have recently acquired a lot of expertise on the usefulness of many of the sources of "how-to-be-a-parent" advice out there. All my friends gave me their favorite parenting books, and I've spent a bunch of time in the childcare sections of a large number of bookstores. Perhaps the most useful collection of parenting advice I've ever run into, though, is a series of assemblages, without evaluative editorial comment, of wisdom on any parenting topic you could name from subscribers to the Usenet newsgroup *misc.kids*.[45] It isn't that any of the individual posters to *misc.kids* is so wise a parent, as that the online

41. "F.A.Q." stands for "answers to Frequently Asked Questions" and is a common format for reference works disseminated through Usenet news or over the World Wide Web.

42. *See* Terry Carroll, *Copyright F.A.Q.* (visited Feb. 5, 1997) <http://www.aimnet.com/~carroll/copyright/ faq-home.html>.

43. *See* Dani Zweig, *Belated Reviews* (visited Feb. 5, 1997) <http://sf.www.lysator.liu. se/sf_archive/sub/belated.html>.

44. *See also, e.g.*, Scott Hollifield, *Scott Hollifield's ER Episode Summaries/ Reviews* (visited Feb. 5, 1997) <http://www.cris.com/~scotth/ersum.html> (Scott Hollifield's television reviews).

45. *See, e.g., Family Web* (visited Feb. 5, 1997) <http://www.familyweb.com/faqs/> (a collection of child-rearing and related reference material assembled from original contributions by *misc.kids* subscribers).

dialogue among many parents (and some of their children) allows a great deal of common wisdom to emerge.

Another whole realm is represented by works that explore the features of the new media in ways that lead to works of authorship that are different from conventional works in fundamental ways. Authors have only begun to explore the ways in which hypertext linking can transform how people write and how they read.[46] The variety of hypertext-enhanced compilations on the World Wide Web is mind-boggling.[47] Hypertext fiction challenges conventional notions of plot progression.[48] Hypertext markup language makes possible new species of visual puns.[49]

I mention these particular works as some evidence that the current array of incentives—whatever they are—suffices to inspire the creation and distribution of enormous amounts of valuable stuff, some of which, for one reason or another, seems more worthwhile (at least to some consumers) than works sold for value through conventional channels.

When one thinks about it, that shouldn't really surprise us. Of course, many authors write much of what they write because they will get paid for it. If payment were the most important consideration, though, most of them would probably not write anything at all—they'd be doing something more remunerative with their talents and their time. We have always needed copyright, nonetheless, because *publishers* and *distributors* get into publishing and distributing to make money, and we have needed the copyright incentive to bribe publishers to invest in finding the authors, and their works, and printing, reprinting, publishing, and vending that work to end users.

But, one of the miracles of modern technology is that

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46. *See generally, e.g.*, ETHAN KATSCH, LAW IN A DIGITAL WORLD 133-71, 195-211 (1995); Pamela Samuelson, *Essay: Some New Kinds of Authorship Made Possible by Computers and Some Intellectual Property Problems They Raise*, 53 U. PITT. L. REV. 685 (1992).

47. *See, e.g.*, sources cited *infra* note 50 and sources cited therein.

48. I am not personally a connoisseur of hypertext fiction. Simon Brooke's selective guide to some works in the genre may be found at Simon Brooke, *Hypertext Fiction* (visited Feb. 5, 1997) <http://caleddon.intelligent.co.uk/~simon/ bookshelf/hyper/hyperfiction.html>.

49. *See, e.g.*, *Bob Dole for President* (visited Nov. 6, 1995) <http://www.dole96.org/> (parody); *Microsoft: Who Do You Have to Blow Today?* (visited Feb. 6, 1997) <http://micros0ft.paranoia.com/> (parody).

publishing over a digital network needn't be expensive. The ease of copying that poses the threat to copyright also makes it possible for works to be widely distributed at very small cost. So people who have created, or wish to create, works that for one reason or another would not be likely to find a conventional publisher, are able to make those works available very cheaply, and less incentive is needed to inspire such distributions, since the cost and trouble involved in distributing is nominal.[50]

What conclusions do I draw from that? For one thing, there is already a wealth of incentives that seem to suffice for the production and distribution of a great deal of authorship over the Internet. I find some of that authorship to be of extraordinary quality. Lots and lots of it is stuff I would pay cash for in stores if I could find it in stores. That suggests that even without any improvement in the incentives for authors or the

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50. A number of people have suggested that the Internet has engendered a particularly acute need for publishers to perform selection and winnowing tasks. Because the Net has made it possible for the editorial aspects of publishing to be performed completely independently of the distribution function, though, there is no reason why tomorrow's selectors and winnowers would need to assert exclusive rights over the works they select. Instead, publishers could market their selection, review and winnowing services separately from the distribution of selected works, which could then have the opportunity to be selected by multiple publishers. Something of that sort happens today on the Internet. *Compare, e.g., Netscape: What's Cool* (visited Feb. 5, 1997) <http://home.netscape.com/home/ whats-cool.html>, *with BitStreet Internet: Cool Sites* (visited Feb. 5, 1997) <http://www.bitstreet.com/ cool.html>, *with Cool Site of the Day* (visited Feb. 6, 1997) <http://cool.infi. net>, *and with Cool Sites: When They Tell You What's Cool* (visited Feb. 6, 1997) <http://www.planet.net.au/ innovations/coolist.html>.

The most fascinating item offered by the *New York Times* World Wide Web version may well be what it calls its "CyberTimes Navigator." This is a web page containing the *Times*'s collection of interesting links, initially assembled as the home page for *New York Times* journalists on their forays onto the Internet. *See The New York Times Navigator* (visited Feb. 5, 1997) <http:// www.nytimes.com/ library/cyber/reference/cynavi.html>. The *Times* asserts no proprietary interest in the sites it links to, and any of them can be reached without going through the CyberTimes Navigator. The *Times* nonetheless restricts access to CyberTimes Navigator to subscribers to its *New York Times on the Web.* (As of this writing, subscriptions are free, but require both a non-trivial process of registration and disclosure and electronic assent to one of the more overreaching subscriber agreements in cyberspace. I know at least one Internet user who subscribed solely to be able to use CyberTimes Navigator as his World Wide Web home page.)

control authors have over their works, there will be lots and lots of interesting things available over the information infrastructure—but that those things may not come to us from the entities who have been supplying content to the conventional media. That last fact, while of crucial importance to the folks who have been supplying content to the conventional media, is not really a problem for the rest of us. Indeed, it may be a positive good from our perspective. The new players who are entering the game now are exploring the possibilities and idiosyncrasies of the new digital medium and inventing new sorts of copyrightable authorship leading to works not currently available in stores.

Indeed, the narrow focus on threats to copyright owners' control of their works can lose sight of the potential value, to authors as well as to readers, of a digital network permitting high speed transmission of a variety of material with few constraints. That network can both encourage creation and dissemination by reducing the costs associated with it, and can enhance the value of material made available over the network because of the ease with which it can be linked to other valuable material.[51]

The most exciting possibilities offered by networked digital technology aren't its potential to allow the instant distribution of books, music and movies, but rather its capacity to generate new classes of *un*books, *un*music, and *un*movies. If we try to restructure this market to impose the pattern that has worked so well for the purveyors of current books, music, and movies, we risk driving the new *un*books out. And that would be a terrible loss.

The other conclusion I draw is this: more than ever before, our copyright policy is becoming our information policy. As technology has transformed the nature of copyright so that it now applies to everybody's everyday behavior, it has become more important, not less, that our copyright rules embody a deal that the public would assent to. The most important reason why we devised and continued to rely on a copyright legislative process whereby the copyright rules were devised by representatives of affected industries to govern interactions among them is that it produced rules that those industries could live with. Now that it is no longer merely the

51. *See* Kurtz, *supra* note 23.

eight major movie studios, or the four television networks, or the 6,000 radio stations, or the 200-some book publishers, or the 57,000 libraries in this country[52] that need to concern themselves with whether what they are doing will result in the creation of a "material object . . . in which a work is fixed by any method,"[53] but rather millions of ordinary citizens, it is crucial that the rules governing what counts as such an object, and what the implications are of making one, be rules that those citizens can live with.

The White Paper suggests that we invest in citizen reeducation to persuade everyone that the current copyright rules are right, true, and just. I am less distressed by this suggestion than I might be if I thought it were likely to work. There's something profoundly un-American about the campaign, at least as the White Paper describes it.[54] But, instead of trying to change the minds of millions of people, instead of trying to persuade them that a long, complicated, counterintuitive, and often arbitrary code written by a bunch of copyright lawyers is sensible and fair, why don't we just replace this code with a set of new rules that more people than not think *are* sensible and fair?

Of course, that approach would force us to confront the knotty question of how we figure out what set of rules more people than not would think were sensible and fair. I don't

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52. The sources of the numbers in text are World Wide Web pages published by industry trade association. The number of major movie studios comes from the Motion Picture Association of America; *see MPAA Website* (visited Feb. 5, 1997) <http://www.mpaa.org>. The book publishers count comes from the Association of American Publishers; *see Association of American Publishers Website* (visited Feb. 5, 1997) <http://www.publishers.org>. The number of radio stations comes from the web page of the National Association of Broadcasters; *see National Association of Broadcasters Website* <http://www.smpte.org/sustain/NAB.html>. The number of libraries is derived from the web page of the American Library Association; *see American Library Association Website* (visited Feb. 5, 1997) <http://www.ala.org>.

53. 17 U.S.C. sec. 101 (1995) (definition of "copies").

54. The White Paper outlines a "Copyright Awareness Campaign", *see* WHITE PAPER, *supra* note 3, at 201-10, that emphasizes the excellence of intellectual property ownership at every opportunity and leaves no room for contradiction. It is reminiscent of nothing so much as the sort of educational propaganda campaigns one can read about in older science fiction novels about totalitarian states. *Cf.* ALDOUS HUXLEY, BRAVE NEW WORLD 18 (Bantam Classic 1958) ("I'm *so* glad I'm a Beta.") (emphasis in original).

want to minimize the difficulties of that problem,[55] but let me suggest that a plausible first step might be to ask them. There is very little survey evidence to tell us what the general public thinks about copyright matters, but the survey evidence that's out there is pretty intriguing.[56] It accords with anecdotal evidence: members of the general public seem to attach quite a bit of significance to intellectual property, but they also seem to believe very firmly in what Professor Marci Hamilton has called a "free use" zone,[57] or an area of use for which individual users don't need to ask permission. That makes a great deal of sense, even to copyright lawyers, since U.S. copyright law has always had fairly substantial "free use" zones. On the other hand, it's less easy to account for this: according to more than one study conducted for the Office of Technology Assessment (back when we still had an Office of Technology Assessment), most people seem to believe that the copyright law draws a distinction between exploitation of a work for commercial purposes and consumption of a work for personal purposes, and makes the first actionable and the second privileged.[58] People believe this despite the fact that that's never been the law, and despite eighty years of concerted educational efforts by the American Society of Composers, Authors, and Publishers [ASCAP], and a somewhat shorter, if more intense, educational campaign by the Software Publishers Association.

It may be that we can come up with a copyright law that incorporates that principle without doing too much damage to

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55. For a discussion of some of the problems, *see* Litman, *supra* note 24; *see also* Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219 (1997).

56. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COPYRIGHT & HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 163-65 (1989); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 121-23, 208-09 (1986).

57. *See* Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 615 (1996).

58. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COPYRIGHT & HOME COPYING, *supra* note 55, at 163-65; OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION, *supra* note 55, at 121-23, 208-09; The Policy Planning Group, Yankelovich, Skelly & White, Inc., *Public Perceptions of the "Intellectual Property Rights" Issue* (1985) (OTA Contractor Report).

copyright incentives. I think we could,[59] but I know there are a lot of people out there who disagree.[60] If we are committed to the course of applying a single set of rules to both commercial film studios and high school students, though, we can't assess the feasibility of doing so merely by asking what the commercial film studios think of the idea—there are, after all, far more high school students than film studios out there.

With all of the pollsters pounding the streets these days to try to find out who the American public wants to elect as its next president, it's difficult to argue that asking the public what *it* thinks is infeasible. We just haven't committed the resources to it before, because the answers to the questions didn't strike many people as very important. Let me suggest that, today, they are very important.

59. *See* Litman, *supra* note 24.

60. *See, e.g., Joint Hearing, supra* note 26 (testimony of Commissioner Bruce Lehman); Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1477-79 (1995).