

The Future of Creative Control in the Digital Age

Introductory Remarks By David Bollier

Artists, Technology & the Ownership of Creative Content

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A good friend of mine is a copyright attorney, a rock-ribbed defender of intellectual property rights, a strict constructionist, in fact. He works for a large law firm and spends a great deal of his life defending the intellectual property rights of major rock star clients, lyricists, and trademark owners.

Recently, to get my goat, my friend sent me a cartoon that showed a dozen raggedy musicians on a stage under a banner that read, "Concert to Save Napster." The emcee tells the audience, "Listen up, people. The good news is we've sold out. The bad news is, nobody paid."

The cartoon is pretty funny, I must admit, but what I also thought amusing was how my friend had emailed that cartoon to me after receiving it from someone else, somewhere in cyberspace, who had scanned the original print version into a computer. Who knows how wide an electronic circuit the cartoon had traveled? Dare we call this dastardly act of sharing....*piracy*?

My point is not revel in hypocrisy, although that can be a lot of fun, but to suggest that our legitimate concerns for protecting intellectual property must be seen in a more holistic way.

We need to be start by asking some larger questions, such as: What levels of copyright protection are truly needed, as an empirical matter, to reward artists sufficiently to assure a steady supply of their work? And just who do we mean by "artists" anyway? Just the familiar stars who make the big bucks -- or the far larger cohort of talented individuals who are trying to make a living from their creativity -- or the corporations that buy, own and market this creativity?

As part of this inquiry, we also need to begin to revisit the "cultural bargain" that constitutes copyright. If the public, through its representatives in Congress, is going to be in the business of granting exclusive property rights, what is it getting in return? How can we assure that ordinary people can have access and use of copyrighted works through the kind of "information commons" that any democratic society needs?

One of the preeminent challenges in the digital age, I believe, is to address such questions. We need to re-think and reinvent the legal principles and social institutions that enable the market and the information commons to coexist and work together in constructive ways. We need to re-negotiate the meaning of fair use and the public

domain for our digital culture. But that, I'm afraid, for the foreseeable future, is a highly contentious political matter.

In the old days, before the Internet, natural frictions in the physical world prevented copyright owners from exerting absolute control over their content and its subsequent uses. This made the idea of fair use and the public domain feasible. Content was locked onto the printed page, music was embedded in a vinyl disk, and the use of content was more constrained by geography. Now that digital technologies are allowing content to be ripped from its physical vessels, translated into ones and zeros, and sent around the globe with the click of a mouse, the political economy of creative content is being blown wide open.

At the first Hackers' Conference, in 1984, Stewart Brand put his finger on a central paradox about digital information that is causing us so much trouble today. "On the one hand," Brand said, "information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other."¹

The phenomenal growth of the Internet has greatly intensified the force of this paradox. Copyright owners want to strictly control their creative and informational works -- in all markets, on all media platforms, and even in how people can use copyrighted products. This is propelling an unprecedented expansion in the scope and duration of intellectual property protection -- as well as more intrusive kinds of enforcement.

We're seeing attempts to make Internet Service Providers serve as copyright police. We're seeing bold attempts by everyone from Microsoft, the Scientologists and the *Washington Post* to use copyright law to thwart criticism, parody and other fair uses of creative work on the Internet. The Better Business Bureau is trying to prohibit unauthorized hyperlinks to its Web site, and companies are using trademark law to shut down sites like "walmartsucks.com." Content-owners are inventing alarming new kinds of corporate surveillance of people's web-surfing and reading habits, all of it hoarded away on computers. Film studios trying to shut down Web sites that openly talk about DVD encryption technologies, prompting computer programmers to post the code on t-shirts as a symbol of their endangered free speech rights.

At the same time that copyright law is reaching into new nooks and crannies, a powerful force in the opposite direction is gaining momentum. Millions of individuals are learning that you don't necessarily *need* the market or copyright to create valuable kinds of economic and social value. You don't necessarily *need* the "Big Content" industries -- the leading book, film, music, news and information corporations -- to find an audience for your great song or insightful essay or to engage in collaborative creativity. In fact, it may well be more convenient and cost-efficient to bypass the traditional market gatekeepers entirely...or avoid them for the time being in order to amass name-recognition and an audience...or find innovative *indirect* ways for getting paid for one's creativity.

¹ See transcript of conference in *Whole Earth Review*, May 1985, p. 49. Also, "Information Wants to Be Free" Web site, <http://www.anu.edu.au/people/Roger.Clarke/II/IwtbF.html>.

It is a heretical thought, and perhaps the greatest open secret of the Internet, but the Internet can be seen as a massive “existence proof” that some fundamental premises of neoclassical economics and copyright theory are *wrong*. That is to say, they are operationally inaccurate in many circumstances.²

For example, economists assert that nothing of real value will be created without strong financial rewards and copyright protection. On the Internet, this simply is not true. Sure, there’s lots of junk out there, but one person’s garbage is another person’s treasure. The real point is that concentrated markets sometimes choose not to facilitate certain kinds of value-creating transactions that the “gift economy” of the Internet – and the open markets of the Internet – are ready, able and willing to serve.

A gift economy is a community of people who share among themselves without any monetary *quid pro quos*, a social arrangement that allows needs to be met without a marketplace.³ Gift economies are so fascinating because on the Internet they are sometimes eclipsing the market as the ultimate arbiter of what kinds of creative material can reach large audiences.

Meanwhile, dozens of businesses with brand franchises have straight-out capitulated to the topsy-turvy economic logic – or perceived logic -- of the Internet. The *Encyclopedia Britannica*, prestigious medical journals, and scores of the nation’s daily newspapers are voluntarily putting their content online, for free, choosing to reap value from branding, advertising, customer goodwill and Web site traffic rather than from direct consumer payments.

The new peer-to-peer file-sharing software is another intriguing experiment in harnessing the power of free information-sharing. This innovation goes far beyond the illicit uses of copyrighted works, and has enormous implications for libraries, classroom learning, and the auctioning and exchange of goods. Lest we get too squeamish about Napster, we would do well to remember that the first adopters and popularizers of some of the most important new electronic technologies – the VCR, the Web, video-streaming, are more -- were pornographers.

With each passing week, the tension between strict proprietary control of content through copyright and information-sharing through the Internet commons is intensifying. New technologies and business models are plunging us further into unknown territory. The unresolved conflicts are making the intellectual foundations of copyright law feel like an M.C. Escher drawing. You follow one line of reasoning along one perspective only to find it turn back on itself and morph it into a radically contradictory perspective. Sort of like my Napster-hating friend who couldn’t help sharing someone else’s copyrighted editorial cartoon. Sort of like cyber-libertarians who declare that property rights are bourgeois anachronisms while enjoying the fruits of intellectual property regimes in so many other areas of their lives.

² See, e.g., James Boyle, *Shamans, Software and Spleens: Law and the Construction of Information Society* (Cambridge, Mass.: Harvard University Press, 1996).

³ David Bollier, *Public Assets, Private Profits: Reclaiming the Information Commons in an Age of Market Enclosure* (Washington, D.C.: New America Foundation, 2001), Chapter 2.

We seem to be locked into a polarizing war between Information-Wants-to-be-Free advocates who traffic in a gift economy of digital content, and Copyright Traditionalists who want to lock up every nugget of marketable creativity and information.

I believe neither side can prevail as much as they'd like. The problem is, at this point it is hard to imagine a sustainable and feasible hybrid. Online social practices are still in great flux. The viability of new business models remain highly uncertain, especially since the dot-com crash. The technology is being advanced by both proprietarians trying to perfect digital watermarks, encryption and other mechanisms to lock up all creative content to within an inch of its life, and by the open-source guerillas and irregulars in the hardware and software business determined to liberate all content and thwart the rise of a copyright police state.

To make matters even more confusing, no one really knows how the general public will ultimately check in. Now that Napster has educated at least 62 million people that intellectual property law actually affects them personally, it's clear that public sentiment is on the move. IP will no longer be an obscure backwater of the law. It's fast-becoming a populist battleground. Indeed, it may be one of the preeminent political arenas in the emerging Knowledge Economy.

No wonder a new political consensus on how to treat creative content has not been forged! The politics and philosophies of creative production are in turmoil. Each faction thinks it can win the war on its own terms. And who's to say it can't? So everyone fights on, determined to secure their "fair advantage" through stronger copyright laws, or court litigation, or ingenious digital rights management schemes, or new open source software programs, or novel business models that disintermediate the major industry players to empower the little guy. It resembles a massive rugby scrum.

The fairly stable consensus that once kept copyright law in the shadows -- with inter-industry disputes quietly brokered with little public input and then ratified by Congress -- is no longer possible. There are too many industries with conflicting interests, too many new technologies roiling the marketplace, and too many consumer and citizen constituencies with a vital stake in intellectual property policies.

It is useful, amidst this confusion, to focus on artists because it helps us re-connect with first principles. After all, copyright, as originally set forth in the U.S. Constitution, is intended as a tool to reward individual *authors* and so to advance the public interest. "The constitutional purpose of copyright," declared Congress in implementing the Berne Convention, "is to facilitate the flow of ideas in the interest of learning...The primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors."⁴

Copyright, in short, is not a plenary, absolute right of authors and their assignees -- media corporations -- to control a creative work in every future market and circumstance. It is an instrumental mechanism that aims to generate a diverse, plentiful supply of creative and informational works for the public. Copyright has historically been

⁴ House report on the Berne Convention Implementation Act of 1988, H.R. Report 609, 100 Cong., 2d Session, 23, cited in L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (Athens, Ga.: University of Georgia Press, 1991), p. 49.

considered a *limited right* counterbalanced with public responsibilities, such as stipulated public rights of access, use and reproduction.

The trick – made much harder by today’s technologies and markets, not to mention politics -- is finding an equitable, sustainable balance to this important cultural bargain. The economic interests of various copyright industries are quite relevant, of course. But we should remember that they are not authors, the intended beneficiaries of copyright protection. They are intermediaries – gatekeepers – marketing and distribution systems – means to an end.

The divergent interests of authors and Big Content are becoming increasingly evident. In January, the newly organized Future of Music Coalition held its first conference on behalf of independent recording artists. Shortly thereafter, Courtney Love filed her potentially explosive lawsuit against her record company, trying to strike down standard contract terms she considers “unconscionable” and tantamount to “sharecropping.”⁵ The fissures between artists and the industry are also growing after the industry quietly tried to slip a four-word copyright amendment through Congress, without hearings. The industry’s power play, which provoked great resentment among many artists, would have given the industry copyrights to songs that would otherwise revert to musicians after 35 years.⁶

Freelance writers, meanwhile, have their own beefs against Big Media, which they have now taken to the U.S. Supreme Court. The *Tasini v. The New York Times* case, argued three days ago, on March 28, alleges that publishers are re-selling freelancers’ articles to electronic database owners and CD-ROM publishers without permission or payment.⁷

In one sense, these cases present novel controversies, but in another sense they merely exemplify a recurring problem in the history of copyright law: how to reward authors without sanctioning exploitative control of authors by publishers. This problem lies at the heart of so many copyright battles today. And it is a theme that animates a number of the case studies we will discuss today.

The expansion of new copyright protection in the new Internet environment should give us pause because the “network effects” of the Internet can amplify monopoly rights far more quickly and completely than in the pre-Internet economy. Think Microsoft. In an economy that often exhibits winner-take-all dynamics, to lavish expansive IP rights on a single company or oligopoly is more likely to promote monopoly behavior.⁸ This is why many critics see the Digital Millennium Copyright Act as a key tool for the Big Guys to control new technologies and markets. It’s why Amazon.com sought (and won) a patent

⁵ Chuck Philips, “Courtney Love Seeks to Rock Record Labels’ Contract Policy,” *Los Angeles Times*, February 28, 2001, p. 1. See also Courtney Love, “Courtney Love Does the Math,” *Salon*, June 14, 2000, at <http://www.salon.com/tech/feature/2000/06/14/love>.

⁶ Eric Boehlert, “Four Little Words,” *Salon*, August 28, 2000, at http://www.salon.com/ent/music/feature/2000/08/28/work_for_hire.

⁷ Felicity Barringer and Ralph Blumenthal, “Big Media v. Freelancers: The Justices at the Digital Divide,” *The New York Times*, March 19, 2001, p. C1.

⁸ Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* (New York: The Free Press, 1995).

for “one-click shopping,” and why Priceline.com sought (and won) a patent for “name your own price” online auctions. Patenting of knowledge and basic functions, especially in software, is allowing the “first mover” to corner the market and monopolize any future creativity in that field.⁹

One reason that Big Content feels so beleaguered, I would suggest, is that both artists and the public are starting to rebel against leviathan market structures and inflexible business practices that are often bolstered through copyright law. Their gatekeeper prerogatives are being challenged. Suddenly, the Internet gives people attractive alternatives to closed, unresponsive markets and artificially limited choices. *Of course* we’re going to hear a lot of howls of protest and pain!

Why shouldn’t music lovers be able to use the Internet for sampling, acquiring and yes, even buying, recorded music? Why should a fan be forced to buy a \$17 CD bundled with other, unwanted songs when he or she only wants to buy a single song? Without spending a fortune, how else can a fan listen to old songs, obscure artists and niche market styles that radio stations just don’t play? Consumers gravitated to Napster not just because it was free – a big attraction, to be sure -- but also because it offered a more convenient, interesting listening experience than the five major record labels were prepared to offer.

Napster may yet prove to be a boon to the music industry, if a fair economic model for the service can be negotiated.¹⁰ It is quite possible, as Professor Larry Lessig has pointed out with respect to Napster, that “this model of distribution could well facilitate a greater diversity in copyrighted content and musical sources. It could also, in the view of many, facilitate a greater return to authors – the intended beneficiaries of the Constitution’s Copyright Clause.”¹¹ File-sharing technology may help develop new, more intimate and enduring relationships between artists and their audiences, and thereby invigorate the music industry. Jenny Toomey, the organizer of the recent Future of Music Coalition conference in Washington, D.C., explains: “The relationship between artists and fans has been intermediated for so long by promotion outlets and marketing companies that there’s a disconnect [with audiences].”¹²

My point is that the Internet is facilitating many new *kinds* of artist-audience relationships. Artists and audiences in all fields are learning that they can connect with each other directly, to each other’s mutual benefit. The expensive overhead of the star-making machinery – or the elite academic journals, or the TV networks, or the national press -- can be bypassed, or disintermediated. Fans can get cheaper, faster access to a

⁹ See John Gilmore, “What’s Wrong With Copyright Protection?” at <http://www.toad.com/gnu/whatswrong.html>.

¹⁰ Jon Pareles, “Envisaging the Industry as the Loser on Napster,” *The New York Times*, February 14, 2001, p. B1. See also Eben Moglen, “Liberation Musicology,” *The Nation*, March 12, 2001.

¹¹ Lawrence Lessig, *Expert Report of Professor Lawrence Lessig Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B)*, in *A&M Records Inc. v. Napster, Inc.*, and *Jerry Leiber v. Napster, Inc.*, U.S. District Court, Northern District of California, San Francisco Division.

¹² Ann Powers, “Artists Take a Serious Look at the Business of Music,” *New York Times*, January 16, 2001, p. B1.

more diverse roster of content. Citizens can choose from a richer variety of news sources. Scholars can share their research findings with a larger community of peers rapidly and cheaply.

If copyright law is chiefly about the promoting the flow of ideas and content, and so advancing public knowledge, it's hard to argue with any of these outcomes.

An urgent question, however, is whether intellectual property law will be used by dominant industry players to thwart this renaissance of artist-audience relationships and innovative, competitive markets. That is to say, will copyright be used as an instrument of market protectionism rather than as an instrument to invigorate the information commons? My hope, of course, is that copyright will instead be used to help structure more open, equitable marketplace structures and practices, which are far more likely to produce more copious and diversified supplies of creative content.

These issues are very much on the mind of Senator Orrin Hatch, himself a songwriter and no enemy of the market. Hatch has said:

I do not think it is any benefit for artists or fans to have all the new wide distribution channels controlled by those who have controlled the old, narrower ones...This is especially true if they achieve that control by leveraging their dominance in content or conduit space in an anticompetitive way to control the new, independent music services that are attempting to enhance the consumer's experience of music.¹³

There is affirmative value in allowing experimentation with new digital technologies before shutting them down or allowing existing media industries to dominate them. But it is also important, as this experimentation proceeds, that artists acquire greater control over their creativity, both through copyright and in their contractual relationships with industry gatekeepers. This conference offers us a wonderful opportunity to explore these complicated issues with a 360-degree perspective, with a diverse spectrum of participants.

Last year, the National Research Council issued a landmark study, *The Digital Dilemma: Intellectual Property in the Information Age*, that intelligently outlined the key challenges in adapting intellectual property law for our times. Many members of the committee urged that a task force on "the status of the author" be established to examine how technological change is affecting the individual creator.¹⁴ None has been created yet, but I like to think that today's gathering just might be a valuable dry run for that larger, more complicated endeavor.

¹³ See Orrin Hatch remarks to the Future of Music Coalition conference, Washington, D.C., January 11, 2001, <http://www.senate.gov/~hatch>.

¹⁴ National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (Washington, D.C.: National Academy Press, 2000), p. 233.