

Does Information Really Want to be Free?

Seminar on Intellectual Property and Movie Business in the Digital Era
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The lengthening of copyright term is a “tax on readers for the bounty of writers.” Thomas Macauley in a speech to Parliament, 1841 in *Speeches on Politics and Literature* 177 (1924), cited at fnt. 84 p. OV-15, Nimmer on Copyright. Vol 1 [August 2005]

“On the one hand 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.” Remarks of Stuart Brand at the first Hackers’ Conference in 1984, transcribed in the Whole Earth Review, May 1985, cited at http://en.wikipedia.org/wiki/Information_wants_to_be_free

“The economic philosophy behind the clause empowering Congress to grant patents and copyrights [Article 1, Section 8] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Accordingly ‘copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge The profit motive is the engine that ensures the progress of science.[Citation omitted]. Rewarding authors for their creative labor and ‘promoting Progress’ are thus complementary; as James Madison observed, in copyright ‘the public good fully coincides . . . with the claims of individuals’ copyright law serves public ends by providing individuals with an incentive to pursue private ones.” *Eldred v. Ashcroft*, 537 U.S. 186, 22 n. 18 (2003).

Comment on the Brand’s observation in Wikipedia, January 2006:

“In 1990, [Richard Stallman](#) put a [normative spin](#) on Brand's slogan:

‘I believe that all generally useful information should be free. By ‘free’ I am not referring to price, but rather to the freedom to copy the information and to adapt it to one’s own

uses."^[2] Denning explains: "By 'generally useful' he does not include confidential information about individuals or credit card information, for example.'

Brand's [eleutherian](#) attribution to an abstract human construct has been adopted within a branch of the [Cyberpunk](#) movement, whose members espouse a particular political ([Anarchist](#)) viewpoint. The construction of the statement takes its meaning beyond the simple observation, "Information should be free" by acknowledging that the internal force or [entelechy](#) of [information](#) and [knowledge](#) makes it essentially incompatible with [Capitalist](#) notions of [proprietary software](#), [copyrights](#), [patents](#), [subscription services](#), [private property](#), etc. Information is [dynamic](#), ever-growing and evolving and cannot be contained within (any) [ideological](#) structure.

For this reason, [hackers](#), [crackers](#), and [phreakers](#) are seen as liberators of information which is being held [hostage](#) by agents demanding money for its release. Other participants in this network include [Cypherpunks](#) who educate people to use [public-key cryptography](#) to protect the privacy of their messages from corporate or governmental snooping; [programmers](#) who write free software and [open source code](#) or low-cost recopiable [shareware](#) so people don't have to pay exorbitant prices for programs or "crack" them so they can be distributed. Still others create [Freenets](#) allowing users to gain access to computer resources for which they would otherwise need an account. They might also break copyright law etc. by [swapping .mp3s](#), movies, or other copyrighted materials over the [Internet](#) / [Undernet](#), etc.

At some level, the expression does carry the idea that "Information 'should' be free": the idea that access to information and knowledge should not necessitate a [class war](#), that such access is a basic [human right](#), and, as [technology](#) improves, the whole of [humanity](#) should be able to partake in its gifts and services [Bold and italics added.]

Article in the New York Times January 15, 2006: "[Hey, Baby Bells: Information Still Wants to be Free](#)".

I. [Introduction](#)

The legal construct for the protection of content has not changed in 300 years. The mother of all copyright laws, the Statute of Anne of 1709, is the precursor to today's copyright acts. Each colony in the developing nation of the United States protected copyrights. The Founding Fathers ensured the protection of patent and copyrights in the first Article of the U.S. Constitution, granting exclusive rights to Congress to further the progress of science and the useful arts by granting monopoly rights for limited times to authors and inventors. So the economic model was mercantile capitalist. The legal model followed, enshrined in the U.S. Constitution of 1789.

At the same time, the competing Constitutional principle, free speech, carved out exceptions to copyright law ownership. "Fair use" exempts from copyright infringement certain acts of copying. These "fair use" principles have been codified in the U.S. Copyright Act since 1978.

Before that, “fair use” was determined ad hoc, under common law principles.

So what we have today in terms of what copyright law allows is a balancing of the rights of authors (or other owners of copyrighted works) to profit from their endeavors, and the right of the public to have access to those works. This dichotomy has remained unchanged since copyright law was first recognized. Thomas Macauley from the mid-19th century has a perspective completely consistent with open-source guru Richard Stallman in the late 20th and early 21st century.

Not because copyright law is old is a reason to keep it. More importantly, it has not been shown that any other economic model works. It appears that private ownership of property, including “intellectual “property, and a laissez faire approach to such ownership, provides the most diversified products at the most diversified prices to the largest base of consumers. As in so much in the law, balancing the competing policy objectives of private ownership as promotion of greater production and access to information for the greater public good appears to be the key.

The key industry players are, on the behalf of content owners, the Recording Industry Association of America (RIAA), www.riaa.com and the Motion Picture Association of America (MPAA), www.mpaa.org. And, on behalf of free speech issues, Public Knowledge, www.publicknowledge.org, and the Electronic Frontier Foundation, www.erfff.org. Additionally, the consumer electronics creators’ interests in favor of open access are supported by the Consumer Electronics Association, www.cea.org, and its sister group, the Home Recording Rights Coalition, www.hrcc.org. There is increasingly overlap in the two camps. Sony Entertainment owns content and also manufactured the infamous Betamax – and today makes many consumer devices that put Sony in the CEA camp. Other alliances between content owners and device manufacturers – MSN NBC to name but one, reflect a complex overlapping of commercial interests.¹

I will talk briefly about the types of copyright products in motion pictures and music, how they are delivered to the consumer, and what today’s consumers want to do with these products.

¹ Article by Richard Sikos, Looking for the Proceeds in TV-on-Demand, December 5, 2005 in the New York Times, available online at www.nytimes.com.

I will then discuss the legal systems surrounding protection of this content. There are three: 1) copyright law; 2) copyright-like sui generis regulation, the WIPO Internet Treaties and the DMCA (“Digital Millennium Copyright Act”) and 3) the looming entrance of the F.C.C., the Federal Communications Commission, into regulation of content distribution.

II. What Do We Want and How Do We Want It

The greatest single window on what world consumers want, or what producers want them want, for the delivery of copyright content is the Consumer Electronics Show, held every January in Las Vegas, Nevada. The second is the MacWorld Conference, held the following week, in San Francisco, California.

CES showcases the latest technology to put copyright content in the hands of consumers. I will not differentiate the delivery of music as opposed to films, although the theatrical release of motion pictures has, at least up until now, played a quite different role in the economics of film than music concerts have in the economics of music. The product announcements at CES and MacWorld tell us where content access and delivery are heading, discussed below.

A. Film Distribution [Audiovisual works]

Historically – before the mid-1970’s - films reached the public only through theatrical release, or through broadcast on television stations. That changed with the advent of the video tape player and video tape recorder. The latter device enabled off the air taping of films broadcast over television sets. Armed with their own self-made copy of a film, the consumers could then watch the content at will on a television equipped with a video player. This sparked the famous Supreme Court case, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984), known as the Betamax case, after the brand name for the recorder and its famous (or infamous) fair use privilege called “time-shifting”.

Sony and others were marketing video players as well as recorders. Players enabled consumers to play at home feature films. At first, such video copies cost nearly \$100 and few titles were available. However, as the market for videos took off, motion picture producers

reduced the price, so more consumers could afford them, and more and more titles became available on video.

Along with this, a new industry – that of video rental stores - grew up, providing a further market for film studios' videotaped versions of films. Instead of outlawing the rental of videotapes, as occurred with the rental of records and the rental of software (note the Record Rental Amendment of 1974 which eliminated the first sale doctrine with respect to records and the later amendment to make rental of software illegal),² the industry embraced the new market.

Thus in the mid 1970's, film content was exploited by two main players: the television industry and the motion picture industry. The latter's primary income came from theatrical releases and their control, with secondary income from video rental and sales (this discussion excludes merchandising and tie-in deals). The motion picture studios, however, controlled every aspect of theatrical and video release. Video release used to lag after theatrical release by several months; it is now several weeks, except in unusual cases, and experiments are being made in the introduction of films simultaneously for theatrical release and home viewing.³ The economic model was to pay for admission to the movie, or to pay for a copy of the movie. The technology has changed a bit – the video format is in the process of being supplanted by the DVD format, which in turn is in the process of being supplanted by even better and easier to use technology. But the principle remains the same.

Television's economics began to shift in the 1970's also, but because of the advent of cable television. The economic model for television and cable both was that viewing was "free" – that is, consumers did not need to pay to see it – but it was subsidized by commercials. Television studios had, since the inception of television, made made-for-tv content such as the Ed Sullivan Show, Dick Clark's Dance Party or comedies or sitcoms such as "I Love Lucy" or "Amos n Andy" or the "Mickey Mouse Club".

The theory was: "broadcast it and they shall come." And advertisers will pay for access to those eyes and ears. The introduction of cable television began to crack the foundation of

² Software, record and video rental may be prohibited under a recent WIPO treaty – the WIPO Copyright Treaty of 1996, which entered into force in 2002, and to which the EC, Japan, Canada, the United States and others are among the 56 signatories.

³ See article "Missed It in the Theater Today? See It on DVD Tonight" by Sharon Waxman January 23, 2006 New York Times. Available on-line at www.nytimes.com

commercial broadcast t.v. Broader programming choices, the showing of theatrical films without commercial break and the creation of entirely new cable networks that created their own content in competition with traditional television studios disrupted the model of the television industry.

In the late 1990's TiVo, currently the most successful set-top off-the air recorder was introduced. This allowed consumers to tape the shows they wanted from their television sets and watch them later, to organize their viewing and to make intelligent choices about what programming to watch, after or before recording. Consumers were freed to watch what they wanted, when they wanted, and without commercials. Cable providers began providing the same capabilities to consumers over services such as DirectTV, allowing consumers more choices as to what they will watch, [out of the still limited offerings the television studios and cable providers deem to put in front of them] whether they will watch the content with commercials, where they will watch these products and when. Similarly, computer manufacturers including Apple who announced in 2006 a remote control with new iMacs that allows consumers to operate the computers as they would a television or DVD player,⁴ and Microsoft with its PC Media Center and TV My Way, also provide these capabilities.

“TiVo To Go” announced in 2005 and new services announced by cable providers at CES in January 2006 make possible the taping of content off of broadcast television, and the transmission of this content to a home computer, from where it can be viewed from any attached device in the home. Alternatively, copies of the content can be made through a device working off the TiVo “time shifted” copy, or through the computer that has received the content from TiVo, and placed in another viewing medium – say a laptop computer or portable DVD player.

“Television” meanwhile in the 1990's began to morph into a computer screen, and vice versa. The Internet or Worldwide Web burgeoned in the last half of the 1990s, and computing capability increased to the point until, by 2005, video became downloadable onto computers at speeds consumers will tolerate. In the first three months of service in 2005, Apple iTunes downloadable video sales reached 8 million. Yahoo, AOL, Microsoft and Google all announced

⁴ Article by Laurie J. Flynn and Vikas Bajaj, “Apple Beats The Calendar and the Street” in the New York Times January 11, 2006, announced at MacWorld, article available online at www.nytimes.com.

their own down-loadable video services at CES 2006.⁵ While the U.S. lags seriously behind countries like Sweden, with one-gigabit services, which is 1,300 times faster than U.S. company Verizon's entry level DSL services, and costs only \$120, and Japan, where 100-megabit services is available for \$25.00 a month,⁶ it is obvious that access to films will be increasingly through delivery of film content over the Internet.

The means of capture of this content transmitted over the Internet is becoming not just computers, but mobile phones, PDAs and any device with connection to the Internet. A focus of CES was how to get "televisions", now thin-paneled and wall hung, and eventually digitally formatted (the U.S. lags behind) in as many different forms as possible to consumers. The television screen and the computer screen are becoming interchangeable.

For example, Microsoft has rolled out its Media Center PC with its My TV and other features which allow consumers to access all forms of content through their computer – so that not only the Internet, but also broadcast and cable television are receivable over a home computer system. See www.microsoft.com. And Apple iMacs, as noted above, will have similar capabilities.

Consumers became used to watching films on video players. Now consumers want access to content and the ability to play that content on any device, at any time. From the movie industry standpoint, the question is how to corral those copies – since the model was to make money on each admission to the film, each purchase of each separate copy of a film on video or DVD, or each rental fee for a copy on video or DVD. Hence the restrictions on file sharing and copying, the DMCA anti-circumvention and anti-copy laws, and the proposal to get the FCC (Federal Communications Commission) into the picture by giving it power to mandate copy-protect mechanisms for any broadcast content. According to Bill Gates, the Microsoft Chairman, "The logjam that has prevented digital content delivery deals has been broken because the consumer electronics industry has now begun to reach so-called managed-content copyright protection agreements with Hollywood."⁷

⁵ Article by David Pogue, "Google Video: Trash Mixed With Treasure," January 19, 2006 in the New York Times, available on-line at www.nytimes.com. See, e.g. <http://video.google.com>

⁶ Article by Randall Stross, "Hey, Baby Bells: Information Still Wants to Be Free," January 15, 2006 in the New York Times, available on-line at www.nytimes.com

Meanwhile, the economic model of the Internet and television deserve closer attention. The largest players in the television industry were those that attracted the most viewers because of the desirability of their content. Advertisers paid the highest price to show their ads on programs that lots of viewers watched. Similarly, on the Internet, the largest players are those that can attract and keep “viewers.” These used to be separate categories of businesses - the Netscapes and AOLs were “Internet service providers” – portals. And the Googles and Yahoos of the world were “search engines.” But the value of the search engine overtook the value of the mere portal – so that capabilities of the Internet access point became the telling factor. As I speak, sites such as MySpace or Friendster or YouTube or Festoon could become the next Google or Yahoo. Microsoft, Apple, and every other player in the market of course bid to be The Point of Consumer Access and aim to make this access “stick”. Of course, consumers do not necessarily pay for this access – Google and Yahoo are free.

Like television, the economic model for websites that attract users, like Google and Yahoo, is to charge advertisers to appear on their sites where the eyes and ears of consumers are. Other value is extracted from selling data about what those eyes and ears do – what products they like and what products they purchase.

An entirely new revenue stream is arising from product placement. Product producers are increasingly “paying to place” products in films, television shows, and other content. In a New York Times, January 17, 2005 article, the author states: “Thus the extent to which ‘placement’ is valued because of the numbers of distribution, the price of access to the content may come down – even to free, or close to being “free”, in order to push the “advertising” revenue from product placement.”⁸

B. Music (Musical Compositions; Sound Recordings; Limited Performance Rights)

In a loose analogy to theatrical release of films, traditionally music companies orchestrate the

⁷ Article by John Markoff, “Coming Soon to TV Land, The Internet Actually” January 7, 2006 in the New York Times, available on-line at www.nytimes.com.

⁸ Article by Doreen Carvajal, “Placing the Product in the Dialogue, Too” January 17, 2006 in the New York Times, available on-line at www.nytimes.com.

release of albums of songs – collections determined by the artists or studios – that customers have to take or leave. A consumer has to buy all the songs on the album. This “bundling” of wanted and unwanted product enables producers to charge more than consumers may otherwise pay for the single or the several songs on an album they may really want. This practice of “bundling” practice arose out of what the medium allowed. 78 and 33 rpm records could only hold a certain number of songs. CDs could hold a lot more. But the size of the collection of songs on a CD is usually the same as on an old “record.” Interestingly, “single” 45s used to be commonplace, played on “record players”. The industry has forgotten that, or chosen to, and pretends to be up in arms over the single down-loads of songs over the Internet, which is becoming an important means of distributing music, completely outside the industry’s prior channels of distribution. It appears, however, that as album sales decline, digital sales may make up for the decline. Sales of digital tracks were up 150% in 2005 over the previous year. 19.9 million units were sold on-line in the last week of 2005.⁹

Another analogy is between music concerts and theatrical release. However this is probably less tenable, in that concerts traditionally have been viewed as a means to increased song purchase, to generate interest in the purchase of the music, which was the main economic event.

In the 1960s tape recorders began to shatter the model of payment for each copy of a record. Consumers could now buy a record and record it on tape, or buy a tape and record another copy on tape, passing the copies on to friends, or using the copies on other tape machines, in a car or whatever. To curb this practice, the rental of music was made illegal in 1974, so that consumers could not simply rent an album or tape and copy it. They had to buy at least one. Further to curb this practice, as a new technology, DATT recorders evolved, and the industry obtained legislation to tax each sale of a DATT recorder to allow for lost record sales. The DATT is history. But the concept of taxing the technology that makes the copying possible is an interesting one.

By the early 21st century, peer-to-peer file sharing networks allowed consumers to post music to an anonymous server and transmit music files freely, without copy-protect measures. These have been universally found to be illegal to date, from Napster to Grokster. “Time

⁹ Article by Jeff Leeds, “In a Reversal Album Sales Fall Again,” January 5, 2006 in the New York Times, available on-line at www.nytimes.com.

shifting”, the concept that legitimized off-the-air videotaping in the Betamax case, was held not to extend to file-sharing, at least from services where copyright infringement was the main advertised use of the product.

Alternatives to completely unregulated and unregulatable file-sharing quickly developed, with voluntary digital rights management tools. By 2006, songs have become readily available, one-by-one, through on-line purchase. Apple popularized the practice through iTunes, using a secure digital rights management (DRM) called Fairplay. Whole industries have developed around DRM, and it appears, as announced at CES early January 2006, that manufacturers and content providers have reached a détente, with voluntary agreements for “managed content.”¹⁰ How extensive the restrictions will be will no doubt vary from product to product. The marketplace is likely to shake out a standard practice.¹¹

Interestingly, music is starting to be distributed “free” to generate advertising income for a site, or placement fees for the song’s owners, or to increase music sales. Music can be licensed to a site – the payment is made to the song owner, but not by the consuming public. The increased traffic to the site drives advertising dollars to the site owner. Music is another “product” placed in films.¹² And the practice of Podcasting is another revenue source. Podcasting is a web feed of audio or video files placed on the Internet for anyone to subscribe to. The subscription feed of automatically delivered new content distinguishes a Podcast from a simple download or real-time streaming.¹³ Music licenses for Podcasting involve either a one-time fee, or a free license. This placement is to generate further sales of music.

C. Show Me the Money

Undoubtedly, traditional forms of distribution of films and music have been shattered. In each industry, there is still money being made using the traditional pay-to-own a copy or pay-to-

¹⁰ See ftnt. ____

¹¹ See the extensive policy article on DRM by Mike Godwin, Senior Technology Counsel, Public Knowledge, “What Every Citizen Should Know About DRM, a.k.a. “Digital Rights Management”, available on-line at www.publicknowledge.org and www.newamerica.net

¹² Article by Doreen Carvajal, “Placing the Product in the Dialogue, Too,” January 17, 2006 in the New York Times, available online at www.nytimes.com. Note that European Union is considering banning the practice of product placement.

¹³ See definition at www.wikipedia.com

view the performance model. Increasingly, however, access to both types of content is opening up, out of the control of the industries, and in the hands of consumers.

Paying “one up” for content that is downloaded or otherwise acquired off of a broadcast with the expectation that the copy thus acquired can be used on any machine, anytime, anywhere, is becoming the norm. Industry seems to be acknowledging this by using DRM that allows a certain number of copies, or use of copies on authorized machines, as opposed to crude copy-protect mechanisms, which allow no copies to be made.

At the same time, more content is being made available to consumers “free,” along the lines of the television model. That is, instead of paying to access the content, consumers are getting the content free, but in an environment with advertising and use of marketing tools to determine consumer preferences.

III. The Legal Framework

Three types of regulation are implicated in a discussion of film distribution: 1) copyright laws, 2) the DMCA and its sister acts in the WIPO Copyright Treaties of 1996 and FTA and RTA agreements post-TRIPS and 3) possible regulation in the U.S. by the Federal Communications Commission.

A. Copyright Law

U.S. Copyright law grants rights to owners of “original” “works of authorship” that are “fixed” in tangible mediums of expression. U.S. law is a private-rights based system. Peripheral “moral rights” are generally not recognized, except in very limited ways. Non-U.S. law does not require “fixation,” and also protects performance rights in these works, as well as moral rights.

Relevant to the issues discussed here, copyright protects the original expression in audiovisual works, musical compositions, and sound recordings. Nearly 150 countries of the world have minimum standards of copyright protection by virtue of their membership in the World Trade Organization. The agreement called Trade Related Aspects of Intellectual Property, or TRIPS, is one of the Agreements to which WTO members must accede as a condition of

membership. TRIPS incorporates most of the Berne Convention, the great late-19th convention that first set minimum standards of copyright protection in the world, and adds additional minimum standards that affect copyright rights.

For purposes of our discussion today, the issues raised by capture and reproduction of content off of broadcasts or over the Internet raise questions of permissible or impermissible copying, distribution and display of the audiovisual works. Further issues are raised about the web of responsibility for these acts. In the key cases that bear discussion, Betamax¹⁴ and Grokster¹⁵, the actual “copiers” or those who “distributed” the content were not accused of copyright infringement. Instead, the manufacturer of the video recorder, Sony, and the service that enabled individuals to file share, Grokster, were sought to be held liable under principles of vicarious infringement.

Put simply, it is a violation of copyright to make a copy of a work. This small fact may astonish consumers who have become used to copying. First by photocopiers, then by tape recorders, by telephone answering machines and faxes, then by videorecorders and finally by “cutting” and “pasting” on a computer or pressing “send”. Consumers are adept copiers. The fact that copying is easy and ubiquitous, however, does not lessen the infringement. Similarly, distributing content on a web site or a blog – a film clip or a piece of music – violates the distribution right of the copyright owner. Displaying audiovisual works on a web site or blog violates the display right of a copyright owner. So, if you make a copy of, or distribute, a piece of music or a film, that act is an infringement, unless the conduct is excused on public policy grounds, such as fair use.

Similarly, if you encourage an act of copying, make it possible, literally, by providing the means to do so, and profit from it, you are a contributory or vicarious infringer, and therefore also liable. Both of these acts – direct copying and contributory infringement – are the key issues in on-line copying and distribution of content as well as off-the-air copying and further use of content.

¹⁴ Sony Corp of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

¹⁵ Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).

Two Supreme Court cases, Betamax and Grokster, define the law and policy in the area. While these are of course only United States cases, the law in the U.S. has unusual effect because of the strength of the media industries in the U.S. and the pioneering role in interpreting copyright and technology that U.S. courts, at least until now, have taken.

1. Betamax – Sony v. Universal Studios – 1984

Sony began marketing the Betamax videocassette recorder in the mid-1970's to enable consumers to tape one show while watching another, or tape a show while they weren't home. Archived on a videotape, the t.v. show or movie could be viewed at a later time. In 1984 the Supreme Court concluded that sometimes taping was an infringement – when a consumer made a library of tapes, supplanting the purchase of the tape. However, when the consumer taped a program in order to view it at a later time, the Court found this “time-shifting” to be permissible under the doctrine of fair use. The “copy” wasn't really a “copy”; it was just a convenient way to watch the program at a time more convenient to the viewer. Since the broadcasters put the program on the air to begin with, the majority reasoned, this was logical. Moreover, the Court flinched at the thought that copyright law could control the viewing habits of consumers in their own homes.

Doctrinally, the Court found the basis for its ruling not in copyright law or the historic or statutory bases of fair use, but from patent law. Under the “staple article of commerce” doctrine, if a device has a “substantial, non-infringing use,” it does not violate a patent. The Court then found that plaintiff had not proved that copying a program for later viewing is *not* fair use where evidence showed that not all copyright owners objected to time-shifting and the industry had shown no harm to it from this practice. The “fair use” argument hinged on the lack of showing on the fourth fair use factor, “effect of the use upon the market for or value of the copyrighted work” in 17 U.S.C. 107 and the non-commercial, private nature of the copying.

The majority opinion strongly emphasized its belief that non-commercial “copying” held a special status, and expressed a strong bias against using copyright law if the effect was to curb new technologies. It also clung to the evidence that not all producers objected to home-taping of programs. Because of this also, the majority opinion was loath to assign contributory liability to the maker of equipment used to copy broadcast content if not all content owners objected. So

strong bias in favor of technology and against interference with popular consumer practices colored the outcome of the case.

The manufacturers of the Betamax recorder thus were not held contributorily liable. This was the defining case setting the guidelines for manufacturers of all kinds of equipment capable of making copies – digital audio recorders, digital cameras, computers, file-sharing software, MP3 players, iPods, peer-to-peer file sharing software, TiVo recorders, and so on.

No statute ever defined what products were legal, and still does not. Legislation to make such products illegal and to overturn Sony was no doubt desirable to the motion picture and recording industries. Desirable, but politically impossible. It was just too popular to access content by making “private” copies. Instead, the motion picture and recording industries shifted their focus, as we will see in the discussion of the WIPO Internet Treaties and the DMCA.

2. Grokster - 2005

Twenty years later, the Supreme Court revisited the Betamax doctrine, applying the principles of time-shifting and contributory infringement to the practice of peer-to-peer file sharing. Both the content industry and the consumer electronics industry found reason to be pleased with the decision in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005). In a true Battle of the Titans, 29 entertainment companies, headed by Metro-Goldwyn-Mayer Studios, were arrayed against Grokster and Streamcast (makers of Morpheus). The MPAA and RIAA sided with the plaintiff, while the CEA, and computer and technology giants such as Microsoft and Intel sided with the defendants. In addition, Grokster’s legal bills were supported by a private millionaire interested in the case.

The Court’s ruling left something for everyone. The Court did find that Grokster and Streamcast could be contributorily liable for providing their peer-to-peer file sharing which enabled infringing downloads of copyrighted content. The key, the Court found, was that the defendants distributed their devices “with the object of promoting [their] use to infringe copyright,” coupled with “steps taken to foster infringement.” In other words, the Court found that the defendants induced their customers to use their product illegally.

The practical effect of Grokster in the last six months or so has been that peer-to-peer file sharing services are either closing or using DRM and notices to alert their customers to copyright infringement issues. Furthermore, glib promises that copyrighted content could be infringed by using a site's capabilities are disappearing, at least from the sites of businesses that are subject to the jurisdiction of U.S. Courts.

To try to add stability to the issue, legislation was introduced before the Grokster decision, which would codify the Betamax fair use principles. H.R. 1201, the Digital Media Consumers Rights Act of 2005,¹⁶ would create a "safe harbor" provision that manufacturers could follow, and other provisions alerting consumers to inadequate labeling on copy-protected CDs and holding distributors liable for unfair competition if notices are inadequate.¹⁷ However, the powerful RIAA and MPAA oppose the legislation, which therefore has little likelihood of passage, particularly since Grokster did not, as was feared, eviscerate the Betamax fair use holding.

B. The WIPO Internet Treaties and the DMCA

In the decade after Sony, copyright industries sponsored a government initiative to determine what changes, if any, should be made to the Copyright Act to meet the issues faced by the "information superhighway." The eventual result was the enactment, in 1998, of the Digital Millennium Copyright Act, popularly called the DMCA, which prohibits the circumvention of copy-protect mechanisms and the interference with digital rights management.

The United States Trademark Office (not the Copyright Office) produced a draft "Green Paper" in 1994 and in September 1995 issued the "White Paper on Intellectual Property and the

¹⁶ Available through The Library of Congress THOMAS site, <http://thomas.loc.gov>, and commented upon by Public Knowledge at www.publicknowledge.org/issues/hr1201

¹⁷ The "Betamax" language is in Section 5. Fair Use Amendments: "(b) Fair Use Restoration – Section 1201(c) of title 17, United States Code, is amended - - . . . it is not a violation of this section to circumvent a technological measure in order to obtain access to the work for purposes of making noninfringing use of the work; and, (5) except in instances of direct infringement, it shall not be a violation of the Copyright Act to manufacture or distribute a hardware or software product capable of substantial noninfringing uses." The first part of Section 5 creates a "fair use" exception to the anti-circumvention provisions of the DMCA.

National Information Infrastructure.”¹⁸ First the draft Green Paper, then the final White Paper met with considerable criticism¹⁹. The “National Information Infrastructure Copyright Protection Act of 1995”, SB 1284 and the accompanying House Bill, HR 2441, were defeated. Proponents of fair use, from librarians to the Electronic Frontier Foundation, criticized the recommendations which included creation of an additional “transmission” right, electronic forwarding as “distribution” and, a recommendation which survived, using anti-circumvention rules in a way that could preclude legitimate reverse-engineering and protection of individual privacy rights.

In the face of the protest, the industry drive for “Internet copyright protection” went underground in the U.S. and surfaced in negotiations in a multi-lateral international forum. In 1995, the United States took the initiative before the World Intellectual Property Organization (“WIPO”) to conclude multilateral treaties that would address the White Paper’s concerns. This resulted in the so-called WIPO “Internet treaties,” the WIPO Producers and Phonograms Treaty of 1996²⁰ and the WIPO Copyright Treaty of 1996²¹, to which the U.S. acceded. The key features of the WIPO Internet Treaties are prohibitions on the alteration of copyright management information and prohibition of the circumvention of copy protect mechanisms²². Accession to these treaties then created the need for implementing legislation in the U.S. This resulted eventually in the Digital Millennium Copyright Act of 1998, or the DMCA²³.

The “DMCA” then, was first an international treaty obligation under WIPO. As of 2006, 55 countries have acceded to both WIPO Internet Treaties, including the U.S., European Community and its states, including the Scandinavian states of Denmark, Finland and Sweden, but not Norway. Canada and Japan are also contracting parties.

¹⁸ Available at www.thomas.loc.gov (FIX). Assistant Commerce Secretary and Commissioner of Patents and Trademarks, Bruce Lehman, had been a policy advisor to the Recording Industry of America, the RIAA.

¹⁹ See, e.g., Pamela Samuelson, “The Copyright Grab” Wired Magazine, January 1996 available at www.wired.com

²⁰ WPPT was adopted in Geneva on December 20, 1996. The treaty was open for signature December 31, 1997 and entered into force in 2002 after sufficient ratification. There are currently 55 contracting parties, including the U.S., the European Community, Canada, Japan and in Scandinavia, Denmark, Finland and Sweden (not Norway). The WPPT is not yet in force in Scandinavia.

²¹ The WCT was adopted in Geneva on December 20, 1996. The treaty was open for signature on December 31, 1997 and entered into force in 2002 after sufficient ratification. There are currently 56 contracting parties, including the U.S., the European Community, Canada, Japan and in Scandinavia, Denmark, Finland and Sweden (not Norway). The WCT is not yet in force in Scandinavia.

²² See text, following.

²³ Signed into law October 28, 1998. Other provisions of the DMCA address Internet service provider liability, which was not addressed in the WIPO Internet Treaties. Only the portions of the DMCA dealing with copyright management information, anti-circumvention and liability for inducement to infringe copyright emerged in the WIPO Internet Treaties, and only those provisions are discussed in this paper.

The European Union Copyright Directive of May 2001 has provisions similar to the DMCA. The relevant provisions of the WIPO Internet Treaties and the DMCA are set forth below.

1. WIPO Internet Treaties

Each of the treaties contains virtually identical language requiring member states to outlaw circumvention of technological measures used to prevent copying and prevent tampering with copyright management information. These create sui generis rights that are outside the scope of copyright, but in the U.S., at least, found in the same statute as the Copyright Act.

“Anti-circumvention” essentially prohibits unlocking copy-protect mechanisms. The prohibition on altering or removing “electronic rights management information” means that it is illegal to alter digital rights management software such as FairPlay used on the iPod, or to sell copies of works that have altered DRM.

a. WIPO Copyright Treaty

Article 11

Obligations concerning Technological Measures

Contracting Parties shall provide *adequate legal protection and effective legal remedies against the circumvention of effective technological measures* that are used by authors in connection with the exercise of their *rights under this Treaty or the Berne Convention and that restrict acts*, in respect of their works, *which are not authorized by the authors concerned or permitted by law*.

Article 12

Obligations concerning Rights Management Information²⁴

(1) Contracting Parties shall provide adequate and effective legal remedies against any person *knowingly performing* any of the following acts knowing, or with respect to civil remedies having *reasonable ground* to know, *that it will induce, enable, facilitate or conceal an infringement* of any right *covered by this Treaty* or the Berne Convention:

²⁴ (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

(i) to *remove or alter* any electronic rights *management information* without authority;

b. WIPO Performances and Phonograms Treaty

Article 18

Obligations concerning Technological Measures

Contracting Parties shall provide *adequate legal protection and effective legal remedies against the circumvention of effective technological measures* that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Article 19

Obligations concerning Rights Management Information²⁵

(1) Contracting Parties shall provide adequate and effective legal remedies against any person *knowingly performing any* of the following *acts knowingly, or* with respect to civil remedies *having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:*

(i) to *remove or alter any electronic rights management information* without authority

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights *management information has been removed or altered without authority.*

2. The Digital Millennium Copyright Act

Contrast the language in the above WIPO treaties with the language in the Digital Millennium Copyright Act, now part of the Copyright Act, 17 U.S.C. Sections 1201 and 1202. It is virtually identical, but goes farther. Section 1201 divides technological measures into those that prevent unauthorized access to a work and those that prevent unauthorized copying. It is illegal to circumvent technological measures that block access to a work.²⁶ There is no fair use of

²⁵ (2) As used in this Article, “*rights management information*” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public. [*Emphasis added.*]

“access,” under the DMCA. Services or devices that are 1) primarily designed or produced to circumvent or 2) have only limited commercially significant purpose or use other than to circumvent or 3) are marketed for use in circumventing are also illegal.

The second aspect deals with “copyright management information” and prohibits false CMI as well as removal or alteration of CMI, if done with the intent to induce, enable, facilitate, or conceal infringement.

The DMCA provides for civil actions to enforce violations, including injunctive and monetary relief and also makes willful violation of either section criminal, with penalties of \$500,000 to \$1,000,000 plus 5 to 10 years in jail.

§ 1201. Circumvention of copyright protection systems

(a) Violations Regarding Circumvention of Technological Measures. – (1)(A)

No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

§ 1202. Integrity of copyright management information

(a) False Copyright Management Information.²⁷ – No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement –

- (1) provide copyright management information that is false, or
- (2) distribute or import for distribution copyright management information that is false.

²⁶ See “The Digital Millennium Copyright Act of 1998 U.S. Copyright Office Summary, December, 1998, available on the Copyright Office website, www.loc.gov.

²⁷ **(c) Definition.** –As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

(2) The name of, and other identifying information about, the author of a work.

(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.

(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(6) Terms and conditions for use of the work.

(7) Identifying numbers or symbols referring to such information or links to such information.

(8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

- (b) Removal or Alteration of Copyright Management Information.** – No person shall, without the authority of the copyright owner or the law-
- (1) intentionally remove or alter any copyright management information,
 - (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
 - (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

Challenges to the constitutionality of the DMCA, including violations of free speech rights, have been uniformly rejected. See, e.g. Universal City Studios v. Reimerdes 111 F. Supp. 2d 346 (2d Cir. 2001) and Universal City Studios v. Corley, 243 F. 3d 429, (2d Cir. 2001). The DMCA stands as a strict liability offence, which legitimates the use of copy-protect and DRM software, without any fair use defense, although legislation has been introduced that would provide a “fair use” to circumvention. See H.R. 1201, the Digital Media Consumer Rights Act of 2005²⁸ .

DMCA-like provisions are also being inserted into the round of bi- and multilateral Free Trade Agreements that the United States is negotiating.²⁹

3. Inducing Infringement of Copyright Act of 2004, S. 2560³⁰

In 2004, further legislation was introduced to make unlawful the “inducement” to infringe, called the “Induce Act” .The Induce Act as first introduced, provided:

Section 2. Intentional Inducement of Copyright Infringement

²⁸ See discussion at footnote 14.

²⁹ See, e.g. the 2003 Free Trade Agreement with Singapore, Article 16, available through the U.S. Trade Representative website, www.ustr.org.

³⁰ Introduced by Senators Hatch, Leahy, Frist, Daschle, Graham and Boxer June 22, 2004

Section 501 of the title 17, United States Code, [relating to infringement] is amended by adding at the end the following:

“(g)(1) In this subsection the term ‘intentionally induces’ means intentionally aids, abets, induces, counsels, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.

(2) Whoever intentionally induces any violation identified in subsection (a) shall be liable as an infringer

(3) Nothing in this section shall enlarge or diminish the doctrines of vicarious or contributory liability for copyright infringement or require any court to unjustly withhold or impose any secondary liability for copyright infringement.”³¹

An interesting parallel between the WIPO Internet Treaties and the Induce Act is the concept of liability for “inducement” as a basis of liability. The language of “inducement” first appeared with respect to liability for altering the rights management information. Article 12 of the Copyright Treaty and Article 19 of WIPO Performances and Phonograms Treaty. To paraphrase Article 12, anyone who knowingly performs acts or has reasonable grounds to know that acts of removal or alteration of electronic rights management information will *induce* or conceal an infringement of the WIPO Copyright Treaty or the Berne Convention is liable. A parallel provision involves inducement to distribute works with altered or removed electronic rights management information.

The concept of “inducement” also found its way into the DMCA. To paraphrase Article 1202(a), 17 U.S.C. Section 1202(a), it is unlawful to provide false copyright management information or distribute false copyright management information knowingly *and* with the intent to *induce* or conceal infringement.

Thus in the WIPO Internet Treaties and the Section 1202 of the DMCA the liability for inducement to infringe is limited to infringement resulting from alteration of DRM. The Induce Act, however, opens up liability for inducement to infringe to any type of behavior – not just tampering with rights management information – that could lead to infringement. The Induce Act faced stiff opposition from the Consumer Electronics Association, retailers and individual consumer product manufacturers, including Microsoft and TiVo and has not been enacted.

³¹ Ibid.

C. Enter the F.C.C: Broadcast Flags and Compulsory Locks on Analog Conversions, and Other Curbs

The United States Federal Communications Commission, which has jurisdiction over broadcast radio and television (but notably not over satellite radio or Internet transmissions) attempted to assert jurisdiction over manufacturers to require recognition of “broadcast flags.” In 2005, the U.S. Court of Appeals for the District of Columbia in American Library Association v. F.C.C. (MPAA intervenors), 406 F.3d 689 (D.C. Cir. 2005) reversed a Federal Communications Commission order that required makers of consumer-electronics devices capable of receiving broadcast digital TV signals to recognize a “broadcast flag”, code that allows content owners to place limits on redistribution of digital content streams.³² The so-called “broadcast flag” has been voluntarily adopted by some manufactures of off-the-air recording devices in certain instances, to avoid liability.³³

In addition to the above, in September 2005, the Motion Picture Association of America (MPAA) and the Recording Industry Association of American (RIAA) proposed legislation that would empower the Federal Communications Commission to adopt regulations governing digital television devices “to control the indiscriminate redistribution of digital television broadcast content over digital networks.”³⁴

Further legislation was proposed by the RIAA, called the Digital Radio Copy Protection Proposal. Because Digital Audio Broadcasting (DAB) and satellite radio technology offer radio programming with higher fidelity and the technological ability to program and re-program according to customer preference, measures limiting this technology would discourage innovation. The specific language would require all content to be encrypted before being broadcast, which would severely restrict what digital radio receivers could do with content. Encrypting all content wipes out access even to non-copyright protected content, or access that is permitted under fair use.³⁵

In addition, in December 2005, legislation was introduced in the House of Representatives, H.R. 4569, The Digital Transition Content Security Act of 2005, which would require analog

³² Article “Broadcast Flag at Half-Mast” by Michael Grebb in the June 20, 2005 issue of Wired Magazine, available at www.wired.com/news.

³³ See discussion at www.wikipedia.com under the topic “TiVo”.

³⁴ See discussion at the website of Public Knowledge, which opposes the legislation, at www.publicknowledge.org/issues

³⁵ See discussion at the website of Public Knowledge, which opposes the legislation, at www.Publicknowledge.org.issues.

conversion devices to preserve digital content security measures.

Finally, cable providers are seeking the ability to charge preferential rates for fast Internet connections and the access to bandwidth sufficiently robust to handle streaming video content, hardly possible in the United States, but a reality elsewhere. This will play out on the regulatory front also, where opposition is already arising.³⁶

IV. The Effect of the Legal Structure On Distribution

Copyright law has proven itself for hundreds of years. It is a legal structure whose interpretation adapts to, not hinders, wider access to works and technological innovations. As stated at the outset, it appears that private ownership of property, including “intellectual property, and a laissez faire approach to such ownership, provides the most diversified products at the most diversified prices to the largest base of consumers. As in so much in the law, balancing the competing policy objectives of private ownership as promotion of greater production against access to information for the greater public good appears to be the key.

So the notion of “information wants to be free” means many things to many people. Increased access to content – in that sense information is more free than ever. However it appears indisputable that creative works cost money to create, and that creators should be rewarded for those efforts. What we do see is more ways in which that compensation can occur – consumers paying for “performances” in movie theaters or concert halls, paying for collections of songs on albums, paying one-up for songs or videos, with or without copy-protect mechanisms, or “paying” for “free” content by allowing themselves to be subject to advertising or marketing information mining.

Technology brings with it truly wonderful means of distribution. With the same companies – Sony the media company and Sony and recorder manufacturer – Microsoft the Internet access provider, broadcast capturer and content deliverer, and so on, deriving important revenue from both sides – we can expect the continued flexibility in means of distribution, access to content and increased demand for content. The dis-integration of traditional distribution models through the motion picture, television, and record industries is opening up more choice for artists and the consuming public.

³⁶ Article by Randall Stross, “Hey Baby Bells: Information Still Wants to be Free”, January 15, 2006 in the New York Times, available on-line at www.nytimes.com.

We have an African American folk hero in America called John Henry, the steel-driving man. Legend has it that he pitted himself with his sledgehammer against a steam-driven engine that drove railroad spikes as railroads expanded across the continent. He won, but in the process had a heart attack and died.

One person's hero is another person's Luddite. The motion picture, television, and record industries fight new models of distribution like John Henry fought the steam-powered drill. Like John Henry, if they do not adapt, they will die. The lesson? Re-tool, embrace new technology and means of distribution and flourish. Information does want to be, if not "free", freed.