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Legally Speaking

If It Moves, Copyright It

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What is the future of copyright? Confused, if a sampling of recent literature is any indication.

Industry experts and academics have been writing for some time about the future of copyright in the Electronic Age. For the most part, these writings have taken the form of speculation, for no one really knows how the information flow will develop in the coming years, much less how copyright will fit into that picture.

Recently, though, certain qualities have emerged from some of the published articles and papers which lead me to wonder if the future of copyright is not in fact taking shape before our eyes. As the debate comes to be dominated by dogmatic and confusing arguments, the future of copyright as a viable legal protection begins to look dim.

Take, for example, the contents of and reaction to the Draft Report on Intellectual Property and the National Information Infrastructure, from the NII Task Force Working Group on Intellectual Property Rights, also known as the "IITF Green Paper." The Report contains a number of recommended changes to copyright law to adapt it to the digital environment. These include:

1) placing electronic distribution within the exclusive distribution and performance rights of copyright, thus making unauthorized electronic distribution a form of copyright infringement; 2) making it illegal to import, manufacture, or distribute devices designed to circumvent copyright protection technologies; and 3) eliminating the "first sale" doctrine for works distributed electronically.

While these recommendations are characterized in the Report as "minor clarifications and changes," they would in fact represent a significant expansion of copyright protection. Professor **Jessica Litman** of Wayne State University Law School, one of the leading copyright scholars in the country, argues that the Report recommendations would add to copyright an "exclusive right to read" (See Jessica Litman, "The Exclusive Right to Read," 13 *Cardozo Arts & Ent. L.J.* 29 (1994)). Professor **Paula Samuelson**, another leading copyright expert, characterizes the enhanced protection as "an exclusive right to browse" (See Paula Samuelson, "Legally Speaking: The NII Intellectual Property Report," *Comm. ACM*, (Dec. 1994)).

What Litman and Samuelson are driving at is that electronic transmission of a work merely gives the recipient of the electronic transmission the right to read or browse the work. If I have a printed book, you can read or browse the book when you visit my house. As owner of that copy of the book, I can also sell it, lend it, or give it to you. That's the "first sale" doctrine. I cannot, unless covered by fair use or some other exception, copy the book for you without infringing the copyright.

But what have I done when I e-mail a digital version of the book to you? From one perspective, I have merely shared my copy with you, which you may read or browse on your computer. From another perspective, I have copied the book just as if I'd photocopied the printed book and mailed those pages to you. Reconciling these two perspectives, which is to attempt to reconcile the fundamental differences between printed and electronic works, is at the heart

"[An] attempt to reconcile the fundamental differences between printed and electronic works is at the heart of the debate over digital copyright protection."

of the debate over digital copyright protection.

Litman and Samuelson also argue that some of the changes sought by the NII Task Force are unnecessary, in that existing copyright law provides adequate protection, as in the case of the existing exclusive performance right. The members of the NII Task Force obviously disagree with this reading of current law.

And therein lies the ultimate difficulty: existing copyright law is an indecipherable mess. Copyright protection of software has proven so unmanageable that the current trend is towards software patenting. The fair use doctrine has been shifted and twisted over a number of court decisions, most recently *Texaco* and *Campbell v. Acuff-Rose* (the "Pretty Woman" case), to the point where the entire doctrine must be viewed as a moving target. The application of copyright law to new technologies has often been accomplished through tortured and counter-intuitive logic.

Copyright loyalists argue that copyright has been adapted to numerous new waves of technology this century and that it can

certainly be adapted to this latest wave. But perhaps we need to step back and take a look at the end product of all that adaptation. When the experts cannot agree on what the law says, when the court cases, such as *Texaco*, are decided first on one ground and then on another, and when enforcement is spotty, at best, we should ask ourselves just how successfully the law has been adapted up to now.

When a law is so convoluted and confusing that it cannot be understood by those to whom it is supposed to apply, how workable is it?

Whatever the state of copyright law today, how can we conclude that it can be adapted to the digital information age just because it has been adapted to previous technological advances? The development of online information networks is not directly analogous to the invention of the photocopier. And if the experience of the software industry is any indication, the application of copyright law to digital works is difficult, at best.

For this writer, the opinions of copyright critics like **John Perry Barlow**, whose writings in *Wired* magazine and elsewhere have shaken up the copyright world, gain credence with each round of the copyright debate. While the experts and scholars wrestle over the meaning of current copyright law and struggle to apply it, even theoretically, to the digital world, producers and other copyright holders might in fact look more to encryption and licensing schemes for protection.

And in the encrypted world, where digital information cannot be opened, except possibly for browsing purposes, without a digital key, whither fair use? Will producers and other holders of the digital keys develop an access scheme to resemble what we now know as fair use (whatever that is)? Or will such an environment turn quickly into 100% "pay per use?"

These are some of the questions which I think we need to begin asking ourselves. I am not declaring the death of copyright, but with each succeeding hair-splitting court decision and law review article, I hold out less hope for the continuing viability of copyright law as a means of protection. One cannot rely, as a producer or a user, on what one cannot understand.