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The Digital Dilemma: Intellectual Property in the Information Age: A Slightly Critical View

by **Bernard R. Sorkin** (Time Warner, Inc.)

The report of the **Committee on Intellectual Property Rights and the Emerging Information Infrastructure**, *The Digital Dilemma: Intellectual Property in the Information Age* (the *Report*), comes at a critical and exciting time in the history of copyright. This, however, is not the first such period in the annals of protection of works of authorship. In an address in 1966 (a time when much attention was given to proposals for revision of the United States Copyright Law which had been in existence since 1909 with few fundamental changes), An Unhurried View of Copyright, Professor, later Judge, **Benjamin Kaplan**, opened by saying "...it is almost obligatory for a speaker to begin by invoking the 'communication revolution' of our time, then to pronounce upon the inadequacies of the present copyright act..."

What **Judge Kaplan** was reflecting is the much remarked-on fact that we have gone through many technological revolutions in the intellectual property area starting with the development of papyrus and continuing with **Herr Gutenberg's** bombshell, photography, motion pictures, photocopying, cable and satellite transmission and video cassettes. With the arrival of digitization, we go some large and exciting steps further — so large and so different from what has gone before that we are truly in the midst of a "communication revolution."

One view of this development was perceptively stated some years ago by **Mr. Ralph Oman**, then the United States Register of Copyrights:

"every plugged-in consumer is a potential author, a potential publisher, and a potential infringer - all at once or at different times. Everyone will have the capacity to manufacture copies of works of perfect quality. For many literary works, sound recordings, films and television, this means demand, distribution and packaging become a matter of consumer choice."

What **Mr. Oman** encapsulated were the enormous benefits and the enormous dangers presented by the technological development we know as the digital revolution. The *Report* deals with those benefits and dangers but fails, in my view, to give adequate acknowledgment of the dangers and the need for greater protection against them.

The benefits of digitization are perhaps best known to educators who can provide courses and course materials to students in places far removed from the classroom and

to students who are unable to attend in the classroom. This "distance learning" offers the possibility of bringing education to people all over the world. Digitization also offers new ways of accessing and using information and entertainment: one can create or obtain multimedia works; encyclopedic materials can be easily stored and retrieved from many distant locations; one can easily and cheaply create quality sound recordings and create and edit one's own audio/visual works. All of the above and much more are the "silver lining." The "cloud" is, from the perspective of creators and owners of copyrighted works, ominous.

Digitization makes it very easy and inexpensive to reproduce copyrighted works in unlimited quantities with no degradation of quality even if copies are made from copies. Digitization makes it possible to distribute a copyrighted work worldwide with the press of a computer key. Digitization makes it possible easily and inexpensively to modify copyrighted works by, for example, substituting a picture of oneself for the star of a movie.

These problems, if unchecked, would render copyrighted works unprotectable throughout the world. In order for a copyright owner to successfully promote, package and distribute the copyrighted work (and to recoup the frequently huge and risky investment in that work plus, one hopes, a profit), the copyright owner is given by the Copyright Law certain exclusive rights, among them are the rights to reproduce the copyrighted work and distribute copies thereof. If such exclusivity is eliminated by, for example, reproduction and/or distribution of a copyrighted work without authority of the copyright owner, the copyright owner has lost the opportunity of successfully distributing the work. Moreover, in many cases, the public will have lost the availability of a well created, well packaged and well promoted work because, in the absence of exclusivity, few will be willing to make the necessary investment in those activities.

These problems led to a strong international consensus that extant law was not as clear as it should be in protecting works in the digital arena and this led to agreements in December 1996 under the aegis of the **World**

Intellectual Property Organization on two treaties intended to provide the foundation for greater protection of digitized works. In the United States effectuation of those treaties (subject, according to their terms, to ratification by 34 countries) led to the enactment of the **Digital Millennium Copyright Act (DMCA)**. This statute, the result of difficult negotiations among industries and persons with widely differing interests and viewpoints, continues to create a good deal of controversy some of which is reflected in the *Report*.

Among the provisions of the **DMCA** that create the most controversy are those that make it illegal to manufacture or traffic in any device or product that "is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner."¹

The concerns expressed with respect to the "anti-circumvention provisions" of the **DMCA** are predicated on the assumption that protecting against circumvention of technologies that control access to copyrighted works and protect the rights granted by the Copyright Law would inhibit or even completely prevent the exercise of legitimate uses and of fair use and keep copyrighted works from even going into the public domain.

As noted above, the *Report* gives insufficient attention to the dangers to copyright. The *Report* does, indeed, recognize the many problems faced by publishers and authors: "their nightmare is that" only one copy of a work will be sold if "networks make possible planet-wide access." The emphasis of the *Report*, however, is on what the Committee perceived as "the nightmare of consumers": "that the attempt to preserve the market places leads to technical and legal protections that sharply reduce access to society's intellectual and cultural heritage, the resource that Jefferson saw as crucial to democracy."

Much of the *Report* in tone and content is written from the perspective of this latter "nightmare." It is possible that some people, including some members of the Committee responsible for the *Report* suffer that "nightmare." Most people, however, do not share that "nightmare" as they continue enthusiastically to buy, borrow, listen to, watch and read all kinds of "works."² While the "nightmare" may sound frightening on paper, it is an unlikely vision of the future for at least two important reasons. First, most works are

continued on page 52

likely to continue to be available in non-digital formats. Secondly, and even more fundamentally, authors, publishers and distributors of copyrighted works will always owe their viability to continued broad dissemination of their works.

The other “nightmare,” however, that of the copyright owners, has already become a reality as is dramatically shown by two recent and widely publicized events, one involving DVDs and one involving television broadcasts.

DVDs are a well-known recently developed means of distributing motion pictures along with other entertainment and information. They are, of course, digital in format and, accordingly, subject to the various kinds of unauthorized uses mentioned above. They are encrypted by a process known as **Content Scrambling System (CSS)** in an effort to protect against destruction of the markets for DVDs (as well, indeed, as the markets for movies in other media). The DVDs can be played only on players equipped with keys that can decrypt the protective technology. Earlier this year, a Norwegian youth “hacked” the DVD encryption system and posted on the Internet a program dubbed DeCSS. The posting of DeCSS soon spread to hundreds of Websites and easily allowed anyone to find the DeCSS program and download it. DeCSS permits a user to make unauthorized copies of motion pictures contained on DVDs on the user’s computer hard drive and on recordable media. It also facilitates the unauthorized distribution of such motion pictures over the Internet. The young man in Norway won high praise from many who would like to see copyright protection weakened (including, sad to say, a number of American law professors) but not from the Norwegian police authorities and not from the United States District Court for the Southern District of New York. That court, **Judge Lewis A. Kaplan** presiding, in an action brought by a number of motion picture studios ruled that, “...the considerations supporting an injunction barring the posting of DeCSS pending the trial on the merits are very substantial indeed.” The court went on to say:

“Copyright and, more broadly, intellectual property piracy are endemic, as Congress repeatedly has found. The interest served by prohibiting means that facilitate such piracy — the protection of the monopoly granted to copyright owners by the Copyright Act — is of constitutional dimension. There is little room for doubting that broad dissemination of DeCSS would seriously injure or destroy plaintiffs’ ability to distribute their copy-

righted products on DVDs and, for that matter, undermine their ability to sell their products to the ‘home video’ market in other forms. The potential damages probably are incalculable, and these defendants surely would be in no position to compensate plaintiffs for them if plaintiffs were remitted only to post hoc damage suits.” (Footnote omitted)

That “nightmare” appeared also in a second guise: a Canadian entity operating under the name “**CraveTV**” engaged in the business of picking up broadcasts of Canadian and a few close-to-the-border US stations, digitized those programs and transmitted them over the Internet. That, of course, made those programs available throughout the world, thus making it unlikely, if not impossible, for the program owners to license them to anyone other than the broadcaster whose programming was picked up by **CraveTV**. Suit was brought by a number of program owners and broadcasters for copyright infringement and here, too, the court enjoined the activity.

Both of these legal actions aroused outcries of condemnation from those who saw their lights under the First Amendment and privileges under the Copyright law being trampled on by greedy copyright owners interested only in profits. Little attention was paid to the damage that would be done to authors and publishers as well as to all of the artisans and tradespeople whose livelihoods depend on a healthy and prosperous copyright industry.

To some extent, the *Report* approaches the question of copyright protection the same way.³

As an example of the dominant view of the *Report*, a section in Chapter 6 (Conclusions and Recommendations) starts at page 201 under the heading, *The Digital Dilemma: Implications for Public Access*, and continues for approximately 10 pages. That section does recognize (page 202) that “As one example of the difficulties digital information brings, a single online copy of a work available from a digital library could diminish the market for the work much more than the distribution of hard copies to traditional libraries.” This is a rather mild understatement of the potential effects of digitization. Moreover, the remainder of that section is devoted largely to the perceived negative impacts of protections, technological and otherwise, that might be developed to avoid the dangers created by digitization.

Copying of digitized works is, as stated above, easy and inexpensive and results in copies with no degradation of quality. Clearly

a legal “thou shalt not” is, by itself, not a sufficient protection — it never was in the analog context — but the consequences of illegal analog copying, damaging as they are, are dwarfed by the potential effects of digital piracy. Accordingly, what is needed are technological protections, electronic bank vaults so to speak, that would prevent unauthorized copying of protected works. But, as exemplified by the DeCSS case described above, technological protections alone are not sufficient to deter those who have an interest in overcoming copyright.⁴ Hence, the need for legal prohibitions against circumventing the technological protections.

Further, the *Report* deals at length with access to copyrighted works as “an important goal of copyright” and expresses concern that technological protections will diminish the public’s ability to obtain “access” to copyrighted works. The *Report*, however, does not consider that the owner of a work, whether protected by copyright or not, is not obliged to provide “access” to that work, and that, more practically, as stated above, content owners cannot stay in business if they do not allow access to their works.

As another example, the Committee expressed considerable doubt about the accuracy of the figures published by trade associations of content owners purporting to show the economic harm from the distribution of illegally copied works.

Here, too, some of the Committee members demonstrated an inclination to be unnecessarily critical of the copyright owners’ associations. The figures presented to the Committee by representatives of those trade associations are huge. (Some of them are set forth on page 187 of the *Report*). The trade association representatives described their respective methodologies by which those figures were derived. Nevertheless, “...some Committee members believe there are reasons to question the reliability of some of the data claiming to measure the size of the economic impact of piracy” (page 187). Although, the *Report* recognizes (pages 191 and 226) that “the volume and cost of illegal commercial copying are substantial,” the *Report* devotes considerable space (pages 187 - 192 and 226 - 227) to discussing the perceived deficiencies in the data. I think it reasonable to suggest that if it is understood that “the volume and cost of illegal commercial copying are substantial” there is no need to be critical of the accuracy of particular numbers nor any benefit to be derived from such criticism — except as fanning embers of anti-copyright positions might be seen as beneficial.

Having said all this, I do want to express my view that there is much value in the *Report*. My criticisms go largely to questions of emphasis. The digital revolution warrants the playing, as at Yorktown in 1781, of *The World Turned Upside Down*. The *Report* serves well to bring the problems and poten-

continued on page 54

Pondering the Digital Dilemma from page 50

in question. Libraries and scholarly publishers, for example, must come together to make the market in scholarly communication.

Now, contrast that with an “average” consumer purchasing a shrink-wrapped license for Microsoft Word. Imagine our consumer opening the software, reading the language of the tiny print generic license, and saying, “Well, gee, I don’t like this clause here that says I am not allowed to write documents critical of Microsoft,” (this is not in the Word license; I am simply illustrating) and ringing up Redmond, WA, and saying to Microsoft, “I’m really unhappy about this license. I’d like to talk to your attorney about negotiating an amendment.” I do not believe that kind of negotiation is likely to happen. That illustration characterizes part of the problem, i.e., the imbalance that in the consumer world is a real issue.

Laws that widely affect the public, but that the public does not understand and may not intuitively behave in sympathy with, represent problematic public policy; they raise the specters of widespread contempt for the law and of selective and discriminatory enforcement.

Some Specific Recommendations

Exhortation to legislative bodies not to act prematurely. We do not need, in the view of the committee, a tremendous amount of new legislation right now in the area of copyright. Our society has numerous technical, business, social, and political forces, all trying to help sort out intellectual property in the digital environment. Legislating in haste at this time, when we do not understand the implications of technological transformations, trying to “legislate every problem into submission,” as Randy liked to say, especially when the problems might be dealt with by technical or business solutions, is a great mistake that may both discourage innovative solutions and give rise to unexpected consequences.

DMCA; Archiving. That said, the report does call for some specific corrections to the Digital Millennium Copyright Act, particularly in the area of anti-circumvention issues. These are fairly technical. The report also calls strongly for action in the area of archiving, both through the removal of legal barriers to archiving and broad actions to engage all of the players about issues related to archiving in the digital world.

The role of the creator. A non-consensus recommendation, but one that a number of people on the committee felt strongly about, is the need to examine the status of the creator or author. That role and status is clearly changing in the digital world. For example, we hear a great deal of discussion about disintermediation, re-intermediation, and the restructuring of various industries. There is a tendency, particularly in consumer markets such as popular publishing and popular music, for some of the publishing community to claim to speak for the author. At

the same time, it is very clear that the interests of authors and publishers are not always parallel, and we need a better understanding of where these interests converge and diverge in the digital environment.

Gathering real data. One final point about the report’s findings and recommendations: There are amazingly few real datapoints about copyright, about what the public believes, about how the public acts in relationship to copyright, or about how the public formulates its beliefs in this area. There is very limited data about the economic implications of copyright law. If we truly believe that intellectual property is one of the key coins of the digital age, we are making public policy and business decisions on the basis of virtually no data, either snapshot or time series. That is a very important finding of the report, and one of the recommendations calls for a substantial program of research and data gathering so that future policy making can be informed by a solid base of data.

Control of the Copy. Let me raise one final item from the report. The traditional view of the law pertaining to copyright is about control of the copy. In the digital world, control of the copy is a very shaky model. The digital environment by definition means constant copying of materials: copying as materials move through the network, as users move materials from disk to main memory to video memory for display. Use and reading are inexorably copy-based procedures.

While numerous discussions attempt to define the “significance” or “permanence” of a digital copy, those definitions are an uneasy fit with the foundations of current copyright law. The report raises the question about whether we ought not to think about how to restructure the copyright regime, to focus on some other choke-point than that of the copy: perhaps it is time instead to think about the effect or purpose of copies and who makes them. This perspective is not much fleshed out in the report. Even as all of us on the committee recognized that the challenges of restructuring a well-established legal regime like copyright are formidable, we raised the matter as at least a philosophical and a research exploration deserving more extended consideration — if nothing else it should yield insights that help us steer the future evolution of the current system.

This is a very quick summary of a very rich, multi-hundred page report. I very much enjoyed and learned a tremendous amount from participating on the committee that produced it. The report contains a wealth of material that bears reflection and consideration. I urge you all to read it and to think about and discuss what it says, and particularly to consider the broad-based social changes it describes and the cultural and public policy issues it raises.

This National Academy of Sciences publication can be found at: http://books.nap.edu/html/question_balance/

A Slightly Critical View from page 52

tial consequences of that revolution to the public’s attention.

Endnotes

1. The effective date of a prohibition against a person circumventing technological measures that control access to works protected under copyright is delayed until October 28, 2000.
2. The DMCA requires the Librarian of Congress to determine whether persons who are users of copyrighted works are likely to be adversely affected by the prohibition against circumventing technological measures that control access, in their ability to make non-infringing uses of “a particular class of copyrighted works.” The Copyright Office has invited comments on that question. Approximately 230 comments were received and, although many of the comments expressed — sometimes very strongly — opposition to the prohibitions against circumvention, none could point to examples of such adverse effects.
3. I don’t wish to be understood as charging the Committee or any of its members with the same kind of outbursts that characterize much of the criticism leveled at those court actions as well as at the DMCA. The Committee was consistently scholarly and civil and I am proud to have been able to work with them despite some differences in point of view.
4. As is frequently the case, Shakespeare said it better than I: “How oft the sight of means to do ill deeds / Makes ill deeds done!” King John Act IV, Sc. 2.

Intellectual Property from page 53

vices.”²⁸ The *Report* also says that “[t]o the extent that the interests of the general public have been represented, the burden of advocacy has often fallen on libraries and universities.”²⁹ I hope that when the aforementioned representatives convene, having shouldered the responsibility of helping to discern the Constitutional balance set forth in the Copyright Clause, they will consider the following question: Will we, as a society, accept as fundamental the premise that all information that can be purchased must be available also to those who can’t afford to purchase it?

Endnotes

1. Page 6 of the *Report*.
2. Page 45 of the *Report*.
3. Page 55 of the *Report*.
4. Page 89 of the *Report*.
5. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000).
6. See, for example, Pamela Samuelson, “Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised,” 14 *Berkeley Technology Law Journal* 519 (1999).
7. Page 121 of the *Report*.
8. Page 7 of the *Report*.
9. Page 59 of the *Report*.