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The Digital Dilemma — Intellectual Property in the Information Age

by Sarah E. Sully

Before I read *The Digital Dilemma* I thought, “yeah, yeah, another government report.” I was ready to rip it apart. Instead I found myself writing “yes! yes!” all over the margins. Being asked to comment on this report is a humbling experience. The collective brainpower that went into it is formidable. Anyone with an interest in things digital should check it out.

Part of the reason *The Digital Dilemma* is so good has to be the people on the committees involved in producing it. Not only is the list a who’s who of those giving deep thought to the issues presented by the digital era, but the organizers of this project also had the foresight to call on people from a wide divergence of interest groups. It’s the first time I’ve seen such strong representation on anything from the publisher groups, the academic groups, the programmers, content owners, authors, practicing licensing attorneys, librarians—the strong copyright ownership side as well as the fair use/user side of the equation. Gaining consensus among many diverse groups is the challenge of the digital era, and indeed of our country! The fact that consensus was reached among all these people is a testament to the importance of the work that resulted.

The subjects addressed in the *Report* are wide ranging, and the breadth of the issues tackled makes taking the time to read the *Report* worthwhile. The thorough overview of the area, the sensitivity to the important issues on all sides of the table, the fearless framing of the fair use debate, and the useful assessment of things from a business model point of view, all contribute to the *Report*’s heft and value. The archiving recommendations are the farthest-reaching I’ve seen. And the inserted boxes that explain things in sidebar fashion are really helpful!

There are recommendations contained throughout the *Report* that are critically important, and that must be addressed. One example: “The concept of publication should be re-evaluated and clarified (or reconceptualized) by the various stakeholder groups in response to the fundamental changes caused by the information infrastructure. The public policy implications of a new concept of publication should also be determined.” YES! This has been a problem for practicing copyright lawyers for the longest time. Try deciding whether to register an online database as a published or unpublished work! Your decision will also have implications for the resulting term of copyright protection, and the requirements regarding seeking statutory damages in the event one brings an infringement claim.

Here’s an interesting conclusion drawn in the early sections of the *Report*: “Providing additional statutory limitations on copyright and/or additional statutory protection may be necessary over time to adapt copyright appropriately to the digital environment.” Wow! Which stakeholders on the committees voted for this one?! This argument is being voiced on listservs across the land, and the time may indeed be ripe to address it. Can you fight the inherent trend of cyberspace? What are going to be the consequences of trying to? Of not trying to?

I only have two beefs with the *Report*, one scary note to add, and one announcement that might be helpful.

Beef #1: Reference is made in the *Report* to “the view, held by many economists, that the propensity to adhere to IP rights is a function of the degree of development of a country. This view is based on the observation that poor countries are generally consumers of knowledge but not significant producers. [Professor Oksenberg] suggested that this may be true for European offshoot countries (e.g., Latin America), but not Asia. His alternative view is that as a poorer country becomes richer, Western countries have a greater incentive to enforce their IP rights, and put more pressure on the emerging country to comply, and it is this pressure that leads to increased compliance.”² Oh please! When are westerners going to get over these egocentric notions of superiority! The debates that ensued at WIPO, and that are ongoing, concerning the protection of cultural artifacts are real! Until we can listen with our hearts, not just our rational minds (and our pocketbooks), and until we can achieve consensus over IP law on a global level, we relegate ourselves to narrow, protectionist solutions that are doomed to fail. Do we really want to repeat the Seattle WTO demonstrations every time we gather to discuss global trade? Or are we indeed interested in achieving “international legal consistency”?³

Beef #2: Lawyers are not as simple-minded as the following would imply: “A lawyer would ask whether the action conforms to the law as it is currently written. ... the focus is on the law as it exists, rather than what it might or ought to say.” No way! Lawyers are very worried about the policies behind the law, and how their everyday practices may or may not be furthering those policies!

Scary note: One of the major understatements of the *Report* is that “The discussion of the exceptions in copyright law for public access is important because there is reason to

believe that the change to digital distribution could make a number of those exceptions less applicable and less effective.”⁴ In one of the first cases to interpret the technological protection sections of the **Digital Millennium Copyright Act**, now codified at 17 U.S.C. Chapter 12, it was held that *fair use is not a defense to claims of circumvention*.⁵ Scholars warned of this effect were the Act to pass,⁶ and Congress passed it anyway. The Court states in its opinion: “[D]efendants claim that they are engaged in a fair use under Section 107 of the Copyright Act. They are mistaken. Section 107 of the Act provides in critical part that certain uses of copyrighted works that otherwise would be wrongful are “not ... infringement[s] of copyright.” Defendants, however, are not here sued for copyright infringement. They are sued for offering to the public and providing technology primarily designed to circumvent technological measures that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act. If Congress had meant the fair use defense to apply to such actions, it would have said so.”

The implications of this outcome won’t be lost on the drafters of the *Report*, who wrote, “control of reproduction is a means, not the goal. ...”⁷ The Universal City holding, which just issued in January, if it withstands appeal, means that fair use can be completely trumped by placing a technological black box around software or information.

Possibly helpful announcement: The *Report* calls for educational initiatives to help the public get a grip on the increasing invasion of copyright law into their everyday lives. Just such an initiative has been started! It’s called FAÖE (Friends of Active Copyright Education). It’s a project of the Copyright Society of the U.S.A., its goal is to be even-handed in addressing the important issues, its URL is face-copyright.org, and we’re looking for volunteers to help!

Perhaps the most important point in the whole *Report*, although there are many and it’s difficult to single out one, is the following forward-looking and optimistic call to the table: “Representatives from government, rightsholders, publishers, libraries and other cultural heritage institutions, the public, and technology providers should convene to begin a discussion of models for public access to information that are mutually workable in the context of the widespread use of licensing and technical protection ser-

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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/

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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.

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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*.