Digital Commerce in Copyrighted Works: Where is the World Going?

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The original concept of Professor Kitagawa's "Copymart" was stunning when it was first presented to me some years ago during my service as an Assistant Secretary of Commerce in the Clinton Administration. I understood the simple but elegant idea to be this: a global mechanism for tracking and identifying digital transmission and use of copyrighted works, combined with a clearing house for payment to rights holders. This concept was similar to that behind the work my colleagues and I undertook when we were asked by the President of the United States to develop policies for our own national information infrastructure. The report of our working group greatly influenced the 1996 WIPO Copyright[1] and Performers and Phonograms Treaties,[2] which in turn formed the basis for our Digital Millennium Copyright Act of 1998.[3]

I had imagined that with the rather limited modifications to the international copyright regime that were embodied in the WIPO treaties and their corresponding national laws, we would have set the stage by now – in the year 2002 – for the kind of rights management protocols envisioned in the Copymart concept. Unfortunately – from my personal point of view – that has not happened. It seems that we still do not know where we are going in the world of digital copyright.

I believe that the lack of clear direction in digital rights management today is the result of three factors. First and most important is the remarkable and disturbing emergence of a culture that does not respect authors' rights. Second, is the capacity of technology to outstrip copy

[1] WIPO Copyright Treaty, Dec. 20, 1996, *available at* http://www.wipo.int/clea/docs/en/wo/wo033en.htm.
[2] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, *available at* http://www.wipo.int/clea/docs/en/wo/wo034en.htm.
[3] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), codified in 17 U.S.C. 12, et al.

controls even before they are widely implemented. And, third, the failure of copyright based industries to timely agree on standardized practices for rights management, to invest in the infrastructure to support them, and to implement consumer friendly business models based on those rights management standards.

Lack of Respect for Copyright

A recent story in the *Washington Post* newspaper illustrates the breakdown of respect for copyright in American culture. *The Post's* article focused on one young American's use of the Internet through his home computer to make perfect digital copies of anything that can be found online.

> Todd Kluss, at 25, is blondish and stick-thin. He downloads bootleg copies of movies off the Internet. He's not in it for the money, he says, despite the fact that the bootleg market is a multibillion-dollar industry…. A self-described film buff with a full-time job and a master's degree, the clean-cut Kluss doesn't feel like an Internet bad boy…. Kluss admits he doesn't always buy the DVD. He calls much of his contraband "samplers." And how he has sampled. Kluss located, downloaded and burned onto compact discs "Star Wars: Episode II -- Attack of the Clones" a day prior to the theatrical release; he viewed with ambivalence M. Night Shyamalan's "Signs" a full week before reviewers had even caught a sniff of it; and he has opted to watch "Austin Powers in Goldmember," "Reign of Fire" and "Minority Report" in the privacy of his own home, and without spending the eight bucks per pop.[4]

The President of the Motion Picture Association of America (MPAA), Jack Valenti, observed that from his point of view Kluss was "simply … stealing." When the young Mr. Kluss was asked to respond, he told the *Washington Post* reporter that he believes he speaks for many when he says: "I don't think that's a valid argument. These are mostly people doing it for the love of film."[5]

The attitudes of Internet savy young people like Mr. Kluss were summed up by my successor in the current Administration, Undersecretary of Commerce for Intellectual Property Policy, James Rogan. He recently observed, "The scariest thing is that… we have an entire generation of people who don't shoplift DVDs, but have no qualms about downloading the same stuff."[6]

The ethical distinction between stealing online and stealing physical copies of works is not merely one made in the minds of cyber surfing youths. A growing chorus of intellectuals and academics has begun to argue that different rules apply online. For instance, organizations such as the Electronic Frontier Foundation (EFF,) with close links to academia, have attacked the WIPO treaties and implementing legislation. In response to the concerns of copyright advocates such as Jack Valenti, the EFF replies that "MPAA members make incredible claims of illegal

[4] Bret Schulte, *Pirates of the Hollywood Seas*, The Washington Post (Aug. 15, 2002) at C1.
[5] *Id*.
[6] Marc Graser, *H'wood Plots to Parry Pic Pirates*, Daily Variety (June 2, 2002) at 7.

circumvention of copy protection measures … basing these claims on *unconstitutional* provisions of the 1999 Digital Millennium Copyright Act (DMCA)" (emphasis added).[7]

A prominent critic of the WIPO treaties and the DMCA is Professor Pamela Samuelson of U.C. Berkley's Boalt Hall School of Law, who with her husband, software magnate, Robert J. Glushko, have established a foundation which supports challenges to copyright owners' attempts to protect their works online.[8] Last year the Glushko-Samuelson Foundation gave $1.5 million to the Washington College of Law at American University to establish the Glushko-Samuelson Intellectual Property Law Clinic. The press release announcing the opening of the Clinic noted that the gift by Professor Samuelson and Dr. Glushko "was specifically given for the purpose of supporting *balance* in intellectual property law" (emphasis added).[9] The initial project of the Glushko-Samuelson Clinic is to "form a coalition of individuals and organizations concerned about the expansion of copyright holders' rights at the expense of the rights of scholars, consumers and other members of the public through the Digital Millennium Copyright Act of 1998 (DMCA)…"[10]

Keeping up with Technology

The emerging cultural bias against authors rights online has been fueled by the easy access to copyrighted works that file sharing technologies have given to individuals who wish to transmit, receive and download digital files without authorization from rights holders. Virtually every personal computer sold is capable of utilizing MP3 software. This software compresses digital files so that sound recordings loaded into the PC's memory can be transmitted in real time over the Internet to any other computer in the world. It was this technology that made possible the phenomenal success of the commercial file sharing service, Napster. Napster's entire reason for existence was to facilitate file sharing of copyrighted music. And, the company made no serious attempt to license the activity prior to blossoming into service with millions of subscribers. As we know, Napster's unlicensed trafficking in copyrighted content halted as a result of infringement litigation brought by the recording industry. It was possible for rights holders to obtain court orders requiring Napster to cease infringing activity because the service was based on computer servers controlled by the company that facilitated the necessary connection between users.[11]

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[7] Electronic Frontier Foundation, *Censorship & Free Expression - SLAPPs - Abuse of Intellectual Property Law, Cease &Desist, and Notice and Takedown*, *available at* http://www.eff.org/Censorship/SLAPPs/IP_SLAPP/ (visited on Aug. 18, 2002).

[8] Ironically, it is prominent owners of copyright themselves who have supplied much of the funding of groups critical of strong copyright protection in the digital environment. Two of the three founders of the EFF were Mitchell Kapor, the author of the software program *Lotus 123* and John Perry Barlow, a lyricist who wrote songs made famous by the Grateful Dead band.

[9] American University News Press Release, *Rep. Boucher to Discuss Fair Use in the Digital Era at March 23 Celebration of New AU Washington College of Law Intellectual Property Clinic* (Mar. 3, 2001), *available at* http://domino.american.edu/AU/media/mediarel.nsf/f8ea2b04ff71ff128525662c00698201/f6c7657b6b60866f85256a0d0074c244?OpenDocument&Highlight=0,Glushko.

[10] Glushko-Samuelson Intellectual Property Law Clinic, *A Call to Participate in a New Coalition to Protect Individuals' Rights*, *available at* http://www.wcl.american.edu/ipclinic/access.cfm (visited Aug. 18, 2002)

[11] The Napster service permitted users to post information concerning the music files they had stored on their computer on a directory hosted by Napster. All users could then search this directory by song title or artist for songs they desired to download, resulting in a list of online users who have the desired song stored on their computer hard drives. The song-searching user could then select any of users on the list to download the song from. The Napster

However, with Napsters' demise, newer file sharing services, such as Kazaa, Morpheus and Grokster have taken its place. Unlike Napster, these services do not utilize central servers to facilitate user connections with one another. Rather, the software they distribute permits users to search and connect with other users directly, bypassing the need for a central organization to collect user information and facilitate connections between users.[12] Therefore, there is no choke point at which to attack the file sharing system. And, the capacity of these networks to be run from any place in the world makes it extremely difficult to obtain the legal jurisdiction necessary to enforce rights holders' claims against them.[13] A new service that lets views watch pirated motion pictures, Film 88.com, has set up shop in Iran. Film 88.com streams feature-length films to anyone with a RealPlayer multimedia playback system and broadband access to the Internet.[14]

The Search for New Business Models

In spite of the obvious consumer willingness to receive music, films and other copyrighted content over the Internet, rights holders have yet to develop widely accepted business models for licensed digital distribution of their works. The response of some rights holders has been for the moment to simply do everything possible to prevent their valuable properties from getting into the Internet pipeline in the first place. This has been particularly true of motion picture producers whose works cannot be easily obtained without broadband Internet access and a CD burner. However, as larger numbers of people are getting broadband access and most personal computers are being sold with CD burners built in, this policy will be placed under great strain. Witness the emergence of companies such as Film 88.com described above.

Music, on the other hand, is already widely available on the Internet and does not require broadband access to receive it. Also, print materials, particularly periodicals, are widely available online and are generally not copy controlled.

There is evidence that consumers would be receptive to paying for content delivered online if business models could be devised to make such payments easy. A survey of consumer attitudes by the Online Publishers Association found that 12.4 million Americans paid for some type of content in the first quarter of this year, up from 7 million in the first quarter of last year.[15] However, the survey found that the $675 million paid by consumers for digital content in 2001

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service then provided the song-searching user with the Internet protocol (IP) address of the fellow user they selected to download the desired song from. With the IP address provided, the song-searching user could connect directly the selected user's computer, allowing the download to take place from user to user. The music files being transferred from user to user thus were not copied by the Napster servers, but instead, the Napster service acted as an intermediary between users. It was this characteristic of the service that led the District Court to find Napster guilty of not direct copyright infringement, but of vicarious copyright infringement.

[12] The fact that services like Kazaa operate without a central organization facilitating connections between users may make it more difficult for the recording industry to enjoin these services, since the court's decision in the Napster case was supported in part by the large role Napster played in connecting its users through central servers.

[13] Kazaa is headquartered in the Netherlands where a court earlier this year held that it was not liable for infringement since it did not actually copy files without authorization. The Dutch court held that Kazaa could not be held responsible for the actions of the people who actually used its technology to download and copy music.. In addition, Kazaa has since reorganized and reincorporated under another name, further complicating efforts at judicial recourse. Grokster is located in the West Indies. *See* Paul Davidson, *File-Swapping start-ups muddy legal issues*, USA Today (June 25, 2002) *at* E2.

[14] Benny Evangelista, *Escape from Hollywood*, San Francisco Chronicle (June 6, 2002) *at* B1.

[15] Matt Richtel, *A Shift Registers in Willingness to Pay for Internet Content*, The New York Times (Aug. 1, 2002) *at* C4.

went to a relatively small number of subscription services dealing in print content, such as the Wall Street Journal Online, New York Times Digital, and ABC News On Demand.[16]

During the last several years, particularly at the height of the e-commerce stock market boom in the late 1990s, there were several start-up companies that attempted to license the making of copies of print materials obtained online. One example was I-Copyright, a Seattle-based company, that licensed reprints from publishers Ziff Davis and the Los Angeles Times. Similarly, the Copyright Clearance Center (CCC) established a separate venture for this purpose and continues to represent a large number of publishers, including the New York Times. However, I-Copyright collapsed after running through its initial investment capital, and the CCC's efforts are dwarfed by its photocopying license business. None of these efforts has involved licensing each and every download of a copy. For the most part, they have involved the licensing of reprint rights or the downloading of archived material after the initial publications have been taken offline. This has not been proven to be a big business and many publications provide access to archived material for free; it not being worth the effort to charge. As far as print media are concerned, I am not aware of any evidence that online access has reduced the sale of newsstand or subscription copies and, therefore, cut into traditional sources of revenue for publishers.

With regard to sound recordings, however, it is another matter. A recent survey for the International Federation of the Phonographic Industry (IFPI) found that 3.1 million more Europeans were using peer-to-peer file sharing networks in March 2002 than in February 2001when Napster was at its peak.[17] The survey found that the number of blank CDs used to burn music files was 185 million in Germany alone in 2001, compared with only 182 CD Album sales.[18] Globally, sales of sound recordings fell for the first time in many years in 2001,with a decline of about 5%.[19] In countries with high levels of access to the Internet and to CD burners, such as Germany, sales were down even further. In Germany, sales were down 9%, in Austria 19%, in Denmark 19% and in Belgium 10%.[20] This European data are mirrored in a soon to be released study by Peter D. Hart Research Associates cited in a recent *Los Angeles Times* story. According to the *L.A. Times*, the Hart Study will show that, "among people who download more from file-sharing services now than six months ago, 41% purchased less music in the past six months and only 19% purchased more music in the last six months… By more than two to one, those who say they are downloading more say they are purchasing less."[21]

A contrast to the IFPI and Peter D. Hart analyses is a recent study by Forrester Research which, while confirming a significant decline in record sales, concludes that most of the slump in sales is the result of a declining economy rather than unauthorized downloads. According to the Forrester study, people who downloaded songs from the Internet more than nine times per month decreased their purchases of records by only 2 % – not enough to explain the 10% drop in U.S.

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[16] *Id*.
[17] International Federation of Phonographic Industry, A 'Music for Free' Mentality is Challenging the Future of the European Recording Industry, IFPI News (July 10, 2002) *available at* www.ifpi.org.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] P.J. Huffstutter, *Study Says Net Could Benefit Music Firms*, The Los Angeles Times (Aug. 14, 2002) *available at* http://www.calendarlive.com/music/cl-fi-music14aug14.story.

sales so far this year.[22] Further, according to the Forrester survey of 1000 online consumers, only 13% said downloading decreased their purchases of CDs, while 39% said it actually caused them to by more CDs because the downloads exposed them to new artists whose records they wanted to purchase.[23]

The conclusion drawn by the Forrester researchers is that, if sound recording producers can be "more flexible in pricing and offer online access to their entire music back-catalogs" as well as "make downloading music effortless…and impulse buying easy, consumers will be more likely to spend their limited entertainment dollars on music…" The result according to Forrester would be $1.842 billion in new revenue from album and singles downloads and an additional $313 million in subscription revenue by 2007.[24]

I agree with the Forrester researchers that copyright owners, such as sound recording producers, must develop effective business models for exploiting their products online. However, I disagree on the damage caused by unlicensed and infringing downloads. It is only common sense that, if it is easy to steal copyrighted works, they will be stolen. We can see this when we look at the impact of commercial piracy on traditional, offline, markets for copyrighted products. The U.S. sound recording industry alone suffered $2 billion in losses in 2001 from piracy in foreign markets.[25] This compares with sales in the U.S. domestic market for the same period of $13.7 billion.[26] In other words U.S. record companies lost an amount equal to about 14.6% of their domestic revenue as a result of conventional international piracy. And, while they may have purchased their infringing tapes and CDs from commercial pirates, the buyers of these pirated products consist of individual consumers who are apparently as untroubled by purchase of contraband as the young downloaders of online material described above.

The Challenge of Piracy

The International Intellectual Property Alliance's annual piracy survey shows that losses in the sound recording industry are mirrored by the statistics for every other copyright based industry. U.S. motion picture producers lost $1.3 billion last year to international piracy; U.S. software publishers lost almost $2.6 billion; entertainment software publishers (video games) lost nearly $1.8 billion and book publishers lost $636 million.[27] The total U.S. trade losses due to piracy in 2001 exceeded $8 billion. These losses resulted from piracy rates as high as 99% in some countries such as the Ukraine and Paraguay.[28] China, the eighth largest economy in the world, had piracy rates of 88% for videocassettes, 93% for business software, and 92% for entertainment software.[29]

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[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] International Intellectual Property Alliance (IIPA), *IIPA 2002 'Special 301' Recommendations; IIPA 2000-2001 Estimated Trade Loses Due to Copyright Piracy* (Feb. 14, 2002) *available at* http://www.iipa.com/pdf/2002_Feb14_LOSSES.pdf.
[26] Recording Industry Association of America, *Recording Industry Announces 2001 Year-End Shipments*, *available at* http://www.riaa.com/News_Story.cfm?id=491 (visited Aug. 18, 2002).
[27] IIPA, *supra* note 25.
[28] *Id*.
[29] *Id*.

With Internet access available only to a small percentage of the inhabitants of many of these countries, unauthorized downloading is not yet a viable method of obtaining unlicensed works. However, when such access becomes more widely available, there is no reason to believe that the willingness to consume unlicensed copyrighted works will change. In all likelihood the only losers in this coming scenario will be the commercial pirates who will lose their existing markets for contraband tapes and CDs to the Internet.

What is to be done about this threat to the viability of copyright as we have known it?

My own view is that the answer lies in a combination of innovative uses of technology and new business models. Authors' exclusive rights to control reproduction of their works were widely enforceable in the past because the principal threat came from those who possessed the capital and sophistication to set up printing plants, film processing laboratories and record factories to reproduce unlicensed products. In countries such as the United States, Japan and Member States of the European Union, the judicial system was effective in keeping this kind of piracy under control. This is because an aggrieved rights owner or a public prosecutor could easily track down and apply the law to the limited number of malefactors capable of running such commercial operations. However, when the piracy is being undertaken by millions upon millions or individual consumers this historical enforcement model – dependant upon the law alone – breaks down.

Therefore, if rights owners wish to retain control over the distribution and copying of their works, they must use technology to make it difficult to engage in unauthorized access. This notion was the very essence of the recommendations of 1995 *Working* Group on Intellectual Property Rights and the National Information Infrastructure, which I chaired as Assistant Secretary of Commerce in the Clinton Administration.[30] Our Working Group's report assumed that copyright owners would have to use tools such as digital watermarking, encryption, electronic tracking and other kinds of copy control technologies, to retain control over the use of their works in an online digital environment. To enable the effective use of these tools, we recommended that the Copyright Act be amended to create a new Chapter 12, specifically giving rights holders legal redress against those who would promote the circumvention of such tools. This recommendation became central to the negotiating position of the U.S. in the 1996 diplomatic convention which promulgated the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty. The final versions of these treaties adopted the U.S. position. And, the United States Congress, in 1998, embodied these treaty requirements in our national law in the Digital Millennium Copyright Act. (DMCA). As discussed above the DMCA is controversial and has many critics. However, I am convinced that without it, copyright law would become meaningless in the emerging digital age.

Misinterpreting the Fair Use Doctrine

From my point of view, many of the critics of the DMCA argue wrongly that the Act somehow limits the U.S. legal concept known as the doctrine of fair use. In recent years these critics have promoted the notion that fair use is a constitutional right, inherent in the copyright clause of the United States Constitution. In fact, the doctrine of fair use historically arose out of

[30] Bruce Lehman, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995).

the tension between that clause and the First Amendment, which guarantees the right of free speech. Until the advent of the technology of photocopying, the doctrine of fair use was largely limited to the right of quotation – a concept also found in the laws of other nations. Fair use was necessary to permit activities such as quotation, parody or criticism that are essential to the exercise of freedom of speech. However, in a split decision the Supreme Court, in 1975 upheld the Court of Claims decision which held that unlicensed photocopying of entire articles from medical journals by the National Library of Medicine constituted "fair use."[31]

In spite of subsequent decisions making it clear that fair use does not extend to commercial enterprises engaging in photocopying for profit, the *Williams and Wilkins* case gave birth to a generation of defendants who argued that fair use is a defense to nearly every case of copyright infringement.[32] Unfortunately, there are now academic institutes such as the Glushko-Samuelson Clinic and foundations such as the Electronic Frontier Foundation which are single mindedly dedicated to the notion that fair use is the rule rather than the exception, particularly with regard to the use of digital technology to reproduce copyrighted works.

Section 12 of the DMCA, proscribes the removal or alteration of copyright management information and the distribution or importation of copyright management information "knowing that the … information has been removed or altered without authority of the copyright owner." The Act also outlaws distribution, importation or public performance of "copies of works knowing that copyright management information has been removed or altered without authority of the copyright owner or the law."[33] The Act prohibits only anti-circumvention activities undertaken "without the authority… of the law." In my view this clearly means that copy controls can continue to be circumvented for legitimate fair uses. Yet, critics continue to attack the new law as restricting fair use. In particular, there have been outraged responses to enforcement actions such as that involving a Russian computer programmer, Dmitry Sklyarov, who was arrested for giving a presentation and marketing a computer program produced by his Russian based company which was designed to break the protections of Adobe's eBook security products. Similarly, anti-copyright activists have expressed outrage about the successful action against *2600 Magazine,* which held the magazine liable under the DMCA's anti-circumvention provisions for its publication of the DeCSS code, a decryption code created by a Norwegian teenager used to decrypt copy-protection applied to DVDs. Critics have generally responded to these cases of successful enforcement actions under the DMCA by seeking legislation to weaken its provisions and expand activities permitted in the name of fair use.

To me, the most dismaying aspect of the "sky is falling" reactions to the DMCA is the fact that, for all the criticism that it is too onerous, the new law clearly has yet not been effective in bringing unauthorized Internet downloading under control. As a result pro-creator Members of Congress have introduced legislation designed to give copyright owners even more control over the use of their works in digital media.

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[31] Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1974), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[32] *See*, American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2nd Cir. 1994). *See also*, Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522 (S.D.N.Y. 1991).

[33] 17 U.S.C. Sec. 1202 (b).

New Ideas for Legislation

Two pending bills are particularly noteworthy. The powerful Chairman of the Senate Commerce Committee, Senator Ernest Hollings, has introduced a bill which would empower the Federal Communications Commission (FCC) to require digital media device manufacturers to build copyright security systems into products sold in the United States.[34] Another bill, introduced jointly by the Chairman and the ranking minority member of the House Judiciary Subcommittee on Intellectual Property, Representatives Howard Coble and Howard Berman, would empower copyright owners to use computer viruses to disable peer-to-peer file trading networks engaged in unlicensed trafficking in their works.[35] It is highly unlikely that either of the bills introduced this year will soon be enacted into law. However, the fact of their introduction has stimulated intense negotiations among copyright owner interests, digital equipment manufacturers, online access providers and user groups, to try to find a solution to the problem of copyright control on the Internet.

Needed: A More Timely and Cooperative Response from Copyright Businesses

It is noteworthy, that one barrier to creation of a successful policy to protect online distribution of copyrighted works has been the inability of rights holders to agree on common channels for digital distribution and to release sufficient content through those channels to meet consumer demand. This makes it difficult for interest groups and legislators to be clear about the exact technological characteristics of the distribution channels which need to be protected. Any ambiguity about the nature and extent of new statutory protections empowers those who oppose legislation by enabling them to argue that new powers for copyright owners will lead to unintended abuses of those powers

Long after pirate websites, like Napster, Kazaa and Morpheus whetted the appetite of consumers for access to music online, record companies finally began to develop licensed alternatives. In December 2001 services under the control of major record producers went online. Pressplay, a venture jointly owned by Universal Music Group and Sony Music, lets consumers download an unlimited number of songs into their computers for a flat monthly fee of $9.95.[36] In addition to unlimited streams and downloading, the service also allows users to burn 10 songs a month, for a monthly fee of $17.95.[37] MusicNet is a competitive service formed by AOL Time Warner, Bertelsmann AG, Egroup Inc. and RealNetworks, Inc. In addition to the Time Warner and Bertelsmann catalogues, it features music from EMI Records. The service can be accessed through www.RealMusic.com and offers limited streaming and downloading for a subscription fee of $9.95 per month.[38] In addition there are competing independent services such as Emusic which gets its licensed content from wherever it can.

Jon Healy, who covers the entertainment industry for *Los Angeles Times,* has written that, "despite …improvements that make … [these] services more attractive, the major record labels

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[34] The Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).
[35] To Amend title 17, United States Code, to limit the liability of copyright owners for protecting their works on peer-to-peer networks, H.R. 5211, 107th Cong. (2002).
[36] Pressplay, *The Service*, *available at* http://www.pressplay.com/theservice.html (visited on Aug. 18, 2002).
[37] *Id*.
[38] Real.com, *Maximize Your Media*, *available at* http://www.real.com/realone/services/music.html?src=rgdlm (visited Aug. 18, 2002).

still can't give music fans something they've been getting from pirate services for more than three years: a comprehensive catalog of songs." [39] He quotes industry analyst P.J. McNealy as observing that the "incomplete catalog is 'the single biggest hurdle left.'"[40] PressPlay's chief executive is quoted as promising that the catalogues of all major record labels will be available on his service by the end of the year. But, industry executives complain that "it takes time to win clearances from the music publishers and establish new systems to track and account for songs delivered digitally."[41]

If there is a lesson in the record industry experience, it is important to design your strategy, receive copyright clearances, and get out on the web to meet consumer demand before the pirates do. Then you will be in a position to develop with lawyers and lawmakers on enforcement strategies which will work.

The sound recording industry has been in the forefront of dealing with the challenges of technological change for many years. Indeed, sound recordings were not even protected legally from unlicensed reproduction and use until decades after an international consensus on authors' rights was reached in the Berne Convention. And, Europeans did not agree on the "neighboring rights regime" embodied in the Rome Convention until the 1950s. The United States did not grant sound recordings limited copyright protection until 1971. It was the exploitation of sound recordings through the relatively modern media of broadcast and the development of easily recordable audiocassettes that put sound recordings rights holders in the front lines of responding to technological change. And so they remain today in the online digital environment. However, already we see the problems they face beginning to affect other media.

In spite of signs of emerging business models for online delivery of products and in spite of success in legal actions against online pirates, the record industry remains rife with divisions among its member companies and internal interest groups. There are record labels and performers who continue to think that they can give away product for free on line as a means of competing for CD sales. Five weeks ago, an independent record label, Artemis Records, announced that it would forego its right to receive royalties under the statutory collective license for digital webcasting.[42] Similarly, some artists have been willing to release music online for downloading without compensation as a means of developing an audience.

The Internet, the WIPO Treaties and Collective Administration

This paper thus far has focused on the problems of rights holders in exercising their exclusive right to reproduce their works in an online environment where they can be easily downloaded and copied without permission. However, the online digital environment also creates new challenges – and new opportunities – for the exercise of other longstanding rights, such as the right of public performance and the new rights of "making available to the public" under the 1996 WIPO treaties.

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[39] Jon Healy, *Online Music Catalogs Lacking; Internet: Authorized services don't yet match the pirates' breadth of selection, hampering major record labels' efforts to woo customers*, The Los Angeles Times (Aug. 1, 2002) at C3.
[40] *Id*.
[41] *Id*.
[42] Reuters, *Artemis Records to Waive Webcast Fees*, The Los Angeles Times (July 29, 2002) at C3.

My impression of Professor Kitagawa's Copymart concept is that it was intended to address the licensing of these kinds of rights as much or more so than the reproduction right. Traditionally, the rights of public performance and display have been exercised by rights holders collectively through the vehicle of national collecting societies. These societies began in Europe, concurrent with the coming into being of the Berne Convention, and were first formed for the administration of the rights of authors of music. Since the 19th Century they have become common in many countries of the world and have grown into large and powerful organizations, such as SACEM in France, GEMA in Germany, PRS in the United Kingdom, and ASCAP and BMI in the United States. They process billions of dollars in royalty revenue. And, the model of these music authors' societies has been employed to provide remuneration for other categories of creators such as graphic artists. Also, they have been the model for collecting societies administering the neighboring rights of performers and phonogram producers. And, they have been used to exercise the right to remuneration for activities such as photocopying, and the collection and distribution of levies on recording media and equipment imposed in some countries.

For the most part these collecting societies administer what are commonly called, "blanket licenses." That is, licenses to the entire catalogues of all rights holders represented by the society. Under this system there is no direct relationship between the individual works used – and sometimes the quantity used – and the amount paid by the licensee. In the case of music performing rights societies, fees are usually based on the number of seats in an auditorium or the amount of revenue of a broadcaster. In the case of reprographic licenses, royalty payments are based on the number of copies printed by a given machine. In the case of levies on recording media and equipment the fee is simply a percentage of the sale price. The royalties are distributed to individual rights holders on the basis of the popularity of works as determined by surveys. In some cases – particularly as regards music – payments are weighted, based on the societies' collective judgment of the worth or value of particular kinds of music.

With the exception of royalties collected for Berne Convention rights, there are significant national differences in the subject matter of the licenses, who is required to obtain a license, and the method of distribution of the royalty payments. For example, not all countries provide for performers and phonograms neighboring rights. The United States has never adhered to the Rome Convention and does not require analogue broadcasters and other traditional commercial users of sound recordings to obtain licenses from performers and record producers. As a result, the U.S., until the recent advent of digital broadcasting and streaming, never had a collecting society for this purpose.[43]

At the present time all collecting societies are organized on a national basis, even where they administer nearly identical legal rights. Compensation to an author resulting from licenses administered in territories other than the author's domicile are paid to him solely through the societies in his country of domicile. Societies which are members of the International Confederation of Societies of Authors and Composers (CISAC), have reciprocity agreements

[43] Sound Exchange is a new collecting society originally created on the initiative of the Recording Industry Association of America for the purpose of administering the statutory licenses for digital broadcasting and streaming created under the DMCA. As the initial administrative proceedings and judicial appeals necessary to establish royalties have not yet been concluded, Sound Exchange has yet to become a fully functional conduit for royalty payments.

among themselves by which they exchange payments representing royalty collections for the use of music authored by non-nationals. However, these payments are made only after the administrative fees and other dispersements peculiar to the collecting territory are made. Administrative costs differ from country to country. And, some countries, particularly in Europe, divert part of the royalty pool for social purposes considered to be important to the nation, such as the subsidization of concerts and other public performances. There also are significant differences in the royalty rates paid by licensees from country to country, with many European countries having higher rates than the United States.

This system of national collecting societies and blanket licenses originated in a time before computers and before the globalization of culture. Therefore, the societies' current operations are far from the seamless system of tracking of usage and payment of royalties envisioned by Professor Kitagawa's Copymart.

One of the most important issues raised by the global Copymart concept is the potential relationship of digital rights management technology and the Internet to the administration of rights regimes traditionally administered by collecting societies. The possibility of digital tracking of global uses of a work raises the question of whether the balkanization of rights administration among national societies is necessary. Already there has been a *de facto* change in the traditional methods of securing mechanical and synchronization rights from music publishers. The Harry Fox Agency in the United States, a centralized clearing house for mechanical and synchronization rights, offers online rights clearances from anywhere in the world, not just from licensees domiciled in the United States. Further, many music publishers who relied on the Fox agency have established direct online access which permits users to license online without going though any central clearing house at all.

Globalization of Culture and Opportunities for Developing Countries

Related to the problem of the balkanized rights management system of performance rights is the fact of globalization of culture. During most of the 20th Century, the business of music rights administration was confined to a relatively small number of developed countries. Prior to the end of the colonial era, the rights societies of the great powers administered rights for the entire jurisdictions encompassed by their colonial empires. And, even where there were no remaining colonial empires, such as Latin America, European societies such as GEMA set up national collecting societies with close ties to their European parents.

I have seen close up the problems created by this colonial legacy in my own work advising the Government of Jamaica. Until quite recently, Jamaica had no national collecting society and its authors were titularly represented by PRS of the United Kingdom. However, several years ago, Jamaicans established their own authors' society, JACAP. While JACAP has been instrumental in securing Jamaica's adherence to the Berne and Rome Conventions and in seeing that local radio and television broadcasters obtain licenses for their use of music, JACAP remains very isolated and does not have comprehensive reciprocity agreements with other national societies. It is considered only an "associate" member of CISAC. Given the global popularity of Jamaican music, this is particularly troubling. Globally successful Jamaican authors, if they are to effectively exploit their rights, still must join foreign societies.

The problems I encountered in Jamaica can also be seen in Africa. In 1997 the total value of music publishing revenues collected in Africa was only $30.3 million, less that one half of one percent of the total of such revenue collected in the world. And, even that number overstates Africa's royalty income because of that amount, $29.7 million (98%) was collected in the Republic of South Africa. The remainder of the whole of Africa generated only $600,000 thousand for all the continent's authors of music.[44] Nearly all of Africa's nations are members of WIPO and adhere to the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention specifically guarantees to authors the right to remuneration for public performance of their works and fixation of their works in a mechanical medium (sound recordings). However, authors' ability to exploit these rights is meaningless unless there are collecting societies to represent them and to collect royalties from the broadcasters and performance venues which present music to the public.

The lack of local institutions to support their work means that successful African artists must leave their homelands to earn a decent livelihood. Professor Collins of the University of Ghana has observed that the most successful of African musicians have been those from former French colonies who emigrated to France to record their music and take advantage of French-based collecting societies and recording studios to provide their incomes.[45] The tragedy of this "talent drain" out of Africa is that it is happening at precisely the same time that African music is becoming very popular in other parts of the world. The booming market for African sound recordings is now estimated at $1.25 billion per year.[46] Yet, little if any, of this revenue finds its way back into the countries whose culture caused it to come into existence.

New Global Protocols for Administering the New Digital Rights

The lack of a harmonized and equitable global system for the administration of traditional authors' rights is only one of the problems highlighted by the intersection of the twin phenomena of globalization and new technology. The coming into force this year of the two new WIPO treaties creates new opportunities for creators. Unfortunately, as yet there are no international institutions which make it possible to easily license the new and broadened rights granted by these treaties. The WIPO Performers and Phonograms Treaty, for the first time, provides a comprehensive right to performers and record producers to receive compensation from the public performance of their sound recordings, including the right to national treatment in foreign jurisdictions. The United States, which has long refused to recognize neighboring rights of performers and record producers, now has embodied such rights – at least as regards digital performance – in its national law. A collecting society, Sound Exchange, has been set up to administer these rights for producers and performers. As yet, however the actual number of licenses issued is small, the relationship among performers and producers is unclear, and international licensing arrangements remain non-existent.

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[44] Phil Hardy, *The Collection Societies and Africa*, World Bank Music Workshop 12 (June 2001), available at http://www.worldbank.org/research/trade/pdf/IP_handout1.pdf.
[45] John Collins, *The Ghanaian Experience*, World Bank Music Workshop 6 (June 2001), available at http://www.worldbank.org/research/trade/pdf/IP_handout2_collins.pdf.
[46] *Id*.

The implementation of the rights granted by the 1996 WIPO Treaties provides an opportunity to develop a harmonized, global approach to licensing in the digital environment. It is my assumption that the sophisticated producers and talent represented by a collecting society such as Sound Exchange will not take long to address the issue of global enforcement of their rights. It would be most unfortunate, however, if the new global rights management structure continues to perpetrate the inequities and inefficiencies of the old. There will be opportunities for more effective use of new technology to track usage of works, to more accurately account to rights holders for those usages, and to speed payment of royalties to them at less administrative cost. Also, there is an opportunity to provide greater equity to creators in developing countries. If the technology needed to tie into the emerging system of digital rights management can be made available in all countries, rights holders will not be required to emigrate to receive fair compensation for their work and the growth of locally based copyright industries in developing countries will be encouraged.

I do not believe that the promise of digital rights management of the new rights granted in the WIPO Treaties will be realized, however, without powerful global institutions providing the leadership – and in some cases – technical assistance and financial support necessary to make it happen. Historically, we have looked to WIPO itself for this leadership and support. However, I think that the task is beyond WIPO alone. WIPO's development and assistance resources already are strained as a result of budget cutbacks ordered by its General Assembly. And, WIPO will never be in a position to provide the capital resources developing countries need to buy computers, lease broadband telecommunications lines and program complicated rights management software without help. This help should be coming from organizations with resources dedicated to economic development, such as the World Bank and regional development banks. Surely a modern infrastructure for the exploitation of cultural wealth is as important to development as water projects, power grids and other infrastructure to support agricultural and manufacturing wealth.

Finally, we must not forget the role of the powerful cultural industries themselves. They must put parochial concerns aside, cease quarrelling over the details of rights management, agree on technological protocols, and win the confidence of the consuming public in systems of distribution of digital works which respect copyright.

Where Are We Going?

We know where we have been and it has not been a happy experience. Only a few years ago policy makers, businessmen and investors were convinced that a digital paradise was just around the corner. Every few months a Trans-Atlantic, Trans-Pacific, hemispheric or global dialogue among businessmen and policymakers was convened in some capital city. Leaders would opine on the glories of digital commerce and the information age. Chief executives of world famous companies and media moguls rushed to acquire little known startups with assets consisting of nothing more than a business plan. For a short time fortunes were made by college dropouts who were thought to be in the know about the next wave of e-commerce.

Today, few of the moguls who starred at those business-government dialogues retain keys to their executive suites. Lawyers are busier with bankruptcies than with license

agreements. And politicians are struggling to cope with weak economies. Does this mean that the promise of digital commerce was an illusion? I think not. Rather, it takes many years and a lot of hard work to build new businesses and to realize globally ambitious business models without cooking the books. It means that there will be lean years and fat years. It means that problems, such as international piracy, will not go away with the stroke of a pen at a diplomatic conference. Businessmen, through trial and error, will have to refine their marketing models. Legislators and diplomats will have to continue to refine laws and treaties. However, one thing is sure. Technology does not remain static. The Internet is here to stay. And those of us who believe that the protection of creators' rights is more than a business proposition, will have to keep the faith and keep trying to make a robust global "Copymart" a reality. As we have seen in this paper, where we are going is a work in progress.