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Edward Samuels

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CAN OUR CURRENT CONCEPTION OF COPYRIGHT LAW SURVIVE THE INTERNET AGE?

EDWARD SAMUELS

First, we have to clarify what we mean by our current conception of copyright law. As a matter of fact, the story of copyright in the nineteenth and twentieth centuries is the story of a law constantly adapting to new technologies, at an ever-accelerating pace. For example, Congress amended the federal copyright law to cover photographs in 1865,¹ sound recordings in 1909,² movies in 1912,³ and computer programs in 1980.⁴ Without specific amendments, courts interpreted the copyright law to cover radio in the 1920's,⁵ television in the 1950's, and the Internet in the 1990's. In recent years, complicated amendments have been added to handle some of the particular problems caused by technology: to name just a few examples, there's the Sound Recording Amendment of 1971,⁶ the Audio Home Recording Act of 1992,⁷ and the Digital Performance Rights in Sound Recordings Act of 1995.⁸

1. 13 Stat. 540, now embodied in the definition of "pictorial, graphic, and sculptural works" in 17 U.S.C. § 101 (1976).

2. 17 U.S.C. § 1(e) (1909) (current version at 17 U.S.C. § 115 (1976)).

3. Now effectively included in the definition of "audiovisual works," 17 U.S.C. § 101.

4. Although computer programs had already been accepted for registration by the Copyright Office, it is generally conceded that the 1980 amendment to the copyright act, proposed by the Commission on New Technological Uses of Copyrighted Works, finally made the coverage clear. Computer programs are now covered within the definition of "literary works" in 17 U.S.C. § 101, and are subject to the specific limitations of § 117.

5. *M. Witmark & Sons, Inc. v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923).

6. Now covered by 17 U.S.C. § 114(a), (b), and (c). Although musical sound recordings were "copies" of the underlying musical works under prior law, the 1971 amendment for the first time granted federal copyright in the sound recordings themselves.

7. Adding a new chapter 17 U.S.C. § 1001, *et seq.*, ch. 10. The Audio Home Recording Act governs the sale of audio digital home recording devices and media. The act allows home recording of music using such devices, but provides that such devices must incorporate a "serial copyright management" chip to control the making of multiple copies of works. In addition, the act provides for a compulsory licensing fee to help compensate copyright owners for the copying of their works.

8. Adding 17 U.S.C. §§ 106(6), 114(d)-(j). The Digital Performance Rights in Sound Recordings Act for the first time created an exclusive performance right in sound recordings. At the same time, the act creates certain exceptions, and provides a

The most recent major copyright amendment is the Digital Millennium Copyright Act of 1998 (the "DMCA").⁹ That complicated statute is specifically tailored to deal with the copyright problems raised by the Internet, and the digitization of all forms of creative works. It has many complicated provisions, but basically it provides that, if creators of copyrighted works use computer encryption technology to control access to and copying of their digital copyrighted works, then it's illegal for anyone to circumvent any such copy protection system.

So Congress has already cast its vote, and the courts have already begun applying the complicated provisions to the new world of the Internet. Just this past November, Judge Newman wrote the opinion for the unanimous Second Circuit Court of Appeals in *Universal City Studios, Inc. v. Corley*.¹⁰ The Second Circuit in that case affirmed the lower court, holding that it was a violation of the DMCA to post the computer code for circumnavigating the encryption system that controlled access to movie DVD's.

If we want it to, the existing copyright law, including the DMCA, can pretty well take care of most of the copyright problems on the Internet. Of course, there's going to be slippage—many people will violate the rights of authors in their copyrights, and many of them will get away with it. But hey, there's always been slippage. People photocopy magazine articles, tape music, tape television programs, make copies of computer programs, all before the invention of the Internet. Some of the relatively innocent activities have been incorporated into specific exceptions under the statute, or under the flexible fair use doctrine; and some of the relatively innocent activities just aren't worth pursuing.

In fact, it's possible that copyright infringement will be easier to detect and prevent on the Internet than it is in the "real" world. It takes a lot of police to prevent dozens or hundreds of people from selling pirated tapes of the most recent blockbuster movies; and, if the sidewalks outside Macy's or Bloomingdale's are any indication, the copyright owners aren't doing a very effective job in preventing such "terrestrial" piracy. But the Internet is not nearly as invisible, and the

compulsory licensing system for certain performances of digital musical works on the Internet.

9. The DMCA modified several key sections of 17 U.S.C., including § 114; and added 17 U.S.C. § 512 (governing the liability of Internet Service Providers) and new chapters 12 and 13.

10. 273 F.3d 429 (2001).

participants on the Internet are not nearly as anonymous, as they may think. If you try to sell pirated works on the Internet, particularly if you provide some mechanism for your customers to pay you, you can be tracked down.

So the answer to our question is yes, copyright can handle the Internet, right?

Not so fast. While copyright probably *could* handle the *technological* challenge of the Internet, if we wanted it to, some people don't *want* it to. Many scholars, in recent articles and books, have been admiring the presumed "open" architecture of the Internet, and arguing that we need to rethink everything we've ever thought about copyright.¹¹ The Internet, so these people believe, represents the free flow of information and entertainment and communication among all those who participate. Copyright, to these people, represents the attempt by the haves (the companies that own all the copyrights) to keep the goodies away from the have-nots (the consuming public). Shawn Fanning and Napster are the patron saints of the movement, having developed a wonderful peer-to-peer program that allowed all "owners" of music recordings to share "their" music with each other. How dare the music companies come along and shut it down? Why, if the music companies had their way, they would control every use of their music, and prevent anyone from ever gaining access to it. (In fact, music companies don't make money if they don't provide access to their works, and most of them are scrambling to figure out how to distribute their music on the Internet, in a commercially viable way.)

The Internet changes everything, the scholars say.¹² If copyright stands in the way, then you've got to change copyright.

11. Recent popular books on copyright, and many popular articles in major magazines and newspapers, have reflected a decidedly anti-copyright bias. *See, e.g.*, LAWRENCE LESSIG, *THE FUTURE OF IDEAS, THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001). About the only book for a general audience advocating what I consider to be a balanced approach, or what others might consider a generally pro-copyright approach, is mine, EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* (2000). For further information about my book, as well as updates of recent cases and other materials, visit my website at www.nyls.edu/samuels/copyright.

12. Of course, we've heard this one before. When the entrepreneurs were selling investors on the latest dot.com investments, we were told that "the Internet changes everything," and that traditional standards for valuing businesses were obsolete. If you believed that one, then I don't even feel sorry for you for the money that you lost on the stock market.

So, copyright could more or less work on the Internet, but it's just those damned scholars who are muddying up the waters by asking us to rethink the whole concept of copyright, to create exceptions and limitations that will allow this new technology to develop to what they believe is its full potential.

Well, of course, that's not the full picture either. As the new copyright scholars cry "foul" at the copyright owners, the copyright owners have obliged the critics by attempting at every turn to extend their control over every last possible copyright dollar. Some people see an overextension of rights created by the DMCA. And then there's the twenty year extension of copyright—for existing works, extending the copyright term from 75 years to 95 years—passed as the "Sonny Bono" Copyright Term Extension Act. Critics of copyright were able to characterize the term extension as a power-grabbing ploy by Disney and the music publishers, or, worse, by the undeserving "fat cat" children of the presumably more deserving dead composers.

So, what are we to do? If we don't create technological fixes for copyright on the Internet, then copyright won't survive. If we do create the technological fixes, then we'll destroy the openness that makes the Internet the promising new technology it's supposed to be.¹³

When in doubt, go back to core principles. Let's start with the basic premise of copyright, that we best promote the development of the arts and sciences by granting creators the right to control certain uses of their works.¹⁴ There are other key doctrines that establish a balance between the rights of copyright owners and copyright users. There are the idea-expression, the fact-expression, and aesthetic-functional distinctions (copyright protects only particular expressions, not ideas, facts, or functional aspects of works). Certain uses of copyrighted works are allowed, either outright or under so-called "compul-

13. Some authors suggest that the digital age presents the choice as an either-or dichotomy, and that compromises are not possible. However, while computer code has to be written in strict "1-0," "yes-no," "on-off" terms, the law that governs the Internet is fortunately not so constrained.

14. Of course, this also gives creators the option of waiving their rights. Open source computer code, the freeware or shareware exchange of computer programs, or the giving away of music samples in order to encourage the purchase of more works, are all perfectly possible and perfectly consistent with the current copyright law. If there are viable "business models" built upon making money by giving works away for free, then I'm confident that they'll develop even in a copyright world. I suggest, however, that it should be the copyright owner who gets to make the choice, not others who would give away works they have not in fact created.

sory licenses” (where a fee is paid for a particular privilege). Certain uses of works, such as reasonable parody or news or criticism, are protected as “fair uses,” for which the user doesn’t have to pay a fee. And ultimately—though after a pretty long time—copyrights do expire, and works enter the public domain.

Judge Newman has left a legacy in the field of copyright, and the legacy is precisely in his carefully balanced approach to each of the cases he has decided.¹⁵ There’s hardly an area of copyright he hasn’t touched.

Judge Newman is generally sympathetic to the interests of copyright owners, as, for example, when he wrote the Second Circuit opinion upholding the rights of artist Faith Ringgold in the display of one of her creations on the set of a television program.¹⁶ In the DVD case mentioned earlier,¹⁷ Judge Newman understood the importance of encryption technology in protecting the rights of motion picture companies in their works. In what I consider one of his more difficult-to-understand opinions, he filed a dissent in a case setting out the boundaries of the works-of-utility doctrine.¹⁸ While the test he proposes is, I believe, a bit metaphysical,¹⁹ his sympathy is obviously with the creator of the work, and his test is an attempt to allow an artist to get at least some copyright protection in what otherwise might be considered functional works.

At the same time, Judge Newman is sensitive to the concerns of users of works, particularly in his carefully balanced fair use cases.

15. One could probably teach an entire course on copyright using only the cases decided by Judge Newman. Indeed, the leading casebooks already contain liberal doses of his writings. Interestingly, as a government employee, he doesn’t receive copyright in his formal judicial opinions, so casebook authors are free to excerpt his cases as extensively as they want.

16. *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

17. *Universal City Studios v. Corley*, 273 F.3d 429 (2001).

18. *Carol Bernhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985). The court denied copyright protection for the creator of a human-shaped torso form that was used as a mannequin to display clothing. The court held that their artistic features were not separable from the utilitarian or functional features.

19. Judge Newman describes the “conceptual separability” doctrine as follows:

The article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function. The test turns on what may reasonably be understood to be occurring in the mind of the beholder or, as some might say, in the ‘mind’s eye’ of the beholder.

I must confess, I have some difficulty getting into the mind of the theoretical beholder. But I have students who tell me that this entire section of the casebook didn’t make any sense to them until they got to Judge Newman’s dissent.

Take, for example, his sympathetic finding of fair use in a parody of Annie Leibovitz's famous photograph of a pregnant Demi Moore.²⁰

Throughout his opinions (with the conspicuous exception of the Carol Bernhart dissent), Judge Newman avoids the metaphysical and abstract, and tries to base his copyright decisions in a firm understanding of how the marketplace actually works. For example, in the Texaco fair use case,²¹ he is particularly influenced by the fact that the Copyright Clearance Center had established a viable mechanism for licensing the photocopying of scientific articles, and that a finding of fair use would undermine this very practical distribution system.

Another example of Judge Newman's sensitivity to the particular markets is contained in his Sixth Annual Herbert Tenzer Distinguished Lecture of 1998.²² In the lecture and article, Judge Newman recognizes that the principles of copyright are perfectly suitable to such new technologies as computer programs; but he proposes that we should use a terminology that also recognizes the fundamental differences between the new types of works and the old. For example, he warns that, while the idea-expression dichotomy can be valuable in determining the proper scope of computer copyrights, applying the general terms to computer programs might lead to a mismatch that would ill-serve both the analysis of computer programs and the analysis of traditional copyrighted works.

I might move away from referring to source code as the "expression" of an "idea," a phrasing that all too readily enlists the doctrines and case law developed in cases involving written texts, and instead call these arcane writings what they are called in cyberspace.

He would use terms like "program elements," "control structure," "the sequence of operations that [the program] carries out," "data structures," "data flow," and "information architecture." In this way, Judge Newman applies the old law to the new technologies, but in a way that is sensitive to the very important distinctions.

Sometimes, Judge Newman seems to have anticipated further developments. He felt compelled to write a concurring opinion in a financial services case, in order to express reservations that clearly

20. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2nd Cir. 1998).

21. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995).

22. Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 *CARDOZO ARTS & ENT. L.J.* 691 (1999).

anticipate the Supreme Court's Feist decision several years later.²³ And, in an unusual dissent to a summary order denying a motion for a rehearing in banc in the New Era case, Judge Newman expressed concerns that were later addressed by an amendment to the fair use standard, providing that the unpublished nature of a work would not alone bar a finding of fair use.²⁴

Judge Newman approaches all of his copyright cases with an open mind, weighing the competing interests, and rejecting any dogmatic approach that might actually make it easier to project victories for the plaintiff or defendant in a particular case. If we follow his careful example, it's clear that copyright law, with a few adjustments along the way, will do fine on the Internet.

PROFESSOR SAMUELS' COMMENTS ON THE PANEL

Now just let me respond to what several people have said. One of Judge Walker's points was that copyright holders have generally done well. When copyright holders go to court, they generally win, for example, in the Corley or Tasini cases and any number of other examples. But I don't think the copyright owners have the feeling that they always win. There's a lot that's not being litigated—the billions of works that are being copied on the Internet, that there's no point in suing for because by the time you find one person who you can get at, it's going to pop up someplace else. There's a lot of infringement taking place out there that's not surfacing in cases.

And even the industries, when they bring their cases, don't always win. For example, there's the Betamax case. Some in the movie industry spent a lot of money and were very concerned that the Betamax was going to somehow upset their ability to control works. And they lost. They adapted to it. So be it. Then there's the Rio case. In the Rio case [RIAA v. Diamond Multimedia], the copyright owners lost. Apple can still advertise, Rip it, Mix it, Burn it. Maybe we need to change the Copyright Act to adapt the terms for exclusive rights from copy, make derivative works, and distribute to rip, mix, and burn. But we all have

23. *Financial Information, Inc., v. Moody's Investors Service, Inc.*, 751 F.2d 501, 510 (2d Cir. 1984). Judge Newman made clear that "The 'sweat of the brow' rationale is no substitute for meeting" the statutory criteria of copyrightability.

24. *New Era Publications Int'l v. Henry Holt, Co.*, 884 F.2d 659, 662 (2d Cir. 1989). Judge Newman argued that "we do not believe that biographers and journalists need be apprehensive that this Circuit has ruled against their right to report facts contained in unpublished writings, even if some brief quotation of expressive content is necessary to report those facts accurately."

the ability to buy Apple's I-Pod to use on our Macintosh computers and whatever computers we have, to download this stuff. The next wave is to be able to download a video. And I don't think that the music business thinks, after Rio, that they're winning. They think they're losing.

I have a daughter who has a massive file of music, and most of it is on her computer in the form of MP3 files. Now she does claim, of course, she goes and she buys a lot of CDs. The problem is that there are a lot of people who are downloading massive amounts. So I think to characterize the copyright industries as having won is a bit of an exaggeration.

Professor Menell went through a history, most of which I agree with. But when it comes to the DMCA, his concern is that if there is physical protection of works . . . if, in fact, the industry does what Congress has invited them to do, which is to encrypt the copyrighted works, he's concerned that he won't be able to show *12 Monkeys* or other works in his class. That he won't be able to make fair use of works. I don't think that's exactly true. I don't think that anybody who owns copyright is trying to prevent other people from accessing those works. They don't make money if people don't access their works. All they want to establish is that as you get your copy, they get their compensation. In fact, you're able to show *12 Monkeys* using an authorized device. Using an authorized copy of it. You won't be able to make copies of it, but you will be able to show it in class.

I did get to watch the DMCA case being argued in the Second Circuit last year, that was decided in November in an opinion written by Judge Newman, and it basically upheld the DMCA. It held that it was an infringement or that it was a violation of the DMCA to post decryption (the DeCSS) code that would allow people to gain access. And during the oral argument, Judge Newman asked some very interesting questions. One of the questions was, "Does fair use mean that you have the right to make the very best, the very easiest use that you want to make, in the best format?" And I think by the opinion that was handed down, the answer is no. You may not be able to make every use you want, but I think it's a mischaracterization to suggest that the DMCA is somehow going to deny us access to copyright works.

Mr. Patry worries about the protection of computer programs. Actually, again, Judge Newman, in the Tenzer lectures was also concerned about using the idea-expression dichotomy, as we traditionally know it, and applying it to computers. He suggested that we use terms

that will prevent confusion in this area—such as program elements, control structure, sequence of operations—to make sure that when we analyze these things, we’re focusing upon computers and not inviting a sort of backwash of these doctrines into major copyright law.

Mr. Patry is also concerned about the DMCA, which he claims was drafted by industry, as if somehow that means everything is suspect. My perception is that the copyright literature, in recent books by Lawrence Lessig and Jessica Litman, for example, are anti-copyright. They are anti-DMCA. They suggest that somehow copyright owners are trying to prevent people from having access to things on the Internet. The topic for today’s discussion is, can the concepts of copyright, as we know them, work on the Internet. I think that what we’re discovering is that they *do* work. I think that applying general principles of fair use, idea-expression, works of utility, and looking at various other doctrines that have been worked out in the copyright act, that, in fact, they are capable of it. The DMCA is but the latest of a lot of statutes that try to deal with copyright and technology. It’s certainly not a well-drafted act. And I have been quoted as saying it’s probably one of the most confusingly written acts in the history of Congress, which is a pretty good accomplishment.

However, imagine that you honestly believe that the Internet does pose a threat, that the ease with which people can make copies does pose a threat, that if you don’t lay down some law and some mechanism for preventing that, that the cat will be out of the bag and it will be too late 10 years from now to rescue works that have gotten out there in digital, unprotected, form. And imagine that even though you know there are flaws, you want to try to set up some system for dealing with it. I think that’s what Congress did. And the fact that, of course, it was drafted by industry, I don’t think undermines the intent of what Congress was doing. So, basically, my take on it is, I agree with most of the historical background, which I think proves that in fact, the doctrines of copyright do work very well on the Internet and for computers, as they have over the past 20 years, and of other works, digitized works, that are not on the Internet. My concern is not that we have too much control. My concern is that we have too little control. And what is the solution when in doubt between the choices, this all or nothing, too much or too little control? You go back to basic copyright principles.

And in this area, I don’t think there is anybody living today who has had more to say about that than Judge Newman. There are more

cases in the casebook by Judge Newman on the fundamental doctrines than any other judge. And if anybody proves that the copyright principles do work, even on the Internet, even for DeCSS, I think it's his opinions. So I'm a little bit more optimistic that the system will handle it. I don't know how it will come out any better than anyone else on this panel, but I'll bet that when we come back in 5, 10, 15 years, there will be solutions, and it will not be the end of the world. Thank you.