

# **Electronic Publishing and the Evolving International Intellectual Property Regime**

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## ***Introduction***

As we leave the Industrial Age behind us and move into the Information Age, the transition from “bricks and mortar” commerce to electronic commerce and from paper to electronic publishing pose major challenges for international intellectual property regimes.

Electronic commerce has taken off. Whatever concerns about consumer acceptance there were five years ago have given way to “click and mortar” business models where e-commerce has an established role complementing traditional commerce. The digital publishing market segment, approximately \$8 billion today, is expected to reach \$70 billion by 2004.<sup>1</sup> A significant portion of the GDPs of the industrialized countries is now based on the production and distribution of knowledge. While there are still issues that need to be dealt with, primarily the infrastructure of consistent standards for transactions, digital commerce in digital property will certainly continue to grow.<sup>2</sup>

Copyright and patent law worldwide, of vital importance to the production and distribution of knowledge, are struggling to keep pace with advances in technology. Intellectual property experts speak of the “growing incoherence” and “incipient breakdown” of the international intellectual property system.<sup>3</sup> There is the possibility that much of traditional copyright law may be marginalized.

Patents, too, are troubled. Two years ago the United States Patent and Trademarks Office began awarding patents for Internet business methods, such “one-clicking shopping” and “name your own price” reverse auctions.<sup>4</sup> The awarding of these “junk” patents, which seem to fly in the face of the Patent Office’s requirement that an invention be original and not obvious, may pose a threat to innovation in e-commerce, since entrepreneurs would potentially be forced to license these patents before starting up their competing Web sites.

The ability of an ordinary individual to make perfect digital copies and send them anywhere around the world undermines traditional copyright markets. Because of that fact, publishers have moved into electronic publishing with some hesitation. However, technical means are on the horizon that can restrict access to and uses of digitized works, which raises the specter of “all-consuming copyright owner control.”<sup>5</sup>

My perspective in all of this is that of a librarian who attempts to deal with practical issues relating to copyright on my campus. An appreciation of the evolving and complex interrelationship between library services and copyright law should be a part of every librarian’s expertise. At this conference I hope to gain a clearer understanding of

developments in intellectual property outside the United States and of the technology that will drive those developments.

### ***Historical Background***

Existing international intellectual property regimes have evolved from ad hoc privileges granted by governments to printers after the invention of the printing press. As copyright law has evolved over the centuries, its focus has shifted from publishers to authors and it has assumed an “intricate architecture” that promotes a number of public policy objectives, such as promoting the interests of science, research, education, and certain cultural values.<sup>6</sup> Derived from two main sources, the American (or Anglo-American) “utilitarian” tradition, which tolerates a limited monopoly right to authors over what would otherwise be the property of all, and the French (or continental European) “droit d’auteur” tradition, in which authors possess “moral rights,” on the basis of which authors have the right to claim their authorship, copyright has tended to greater and greater harmonization. Developments over the last twenty-five years have been in the direction of making United States law more “moral rights” oriented and less “utilitarian” oriented.

Any discussion of copyright, in all its philosophic, legal, and economic dimensions, comes back to two questions. Is free speech a natural right of the public and copyright a limited exception that is tolerated only to encourage the creation of new works? Or is copyright a natural right of authors, which entitles them to economic rewards? No country has a system that is exclusively based on one or the other view. All countries recognize that copyright is a “precarious balance” between the interests of the author and those of the public. Give too little incentive to authors to create and the public domain may be impoverished; give too much reward to authors, and they may be able to undertake measures that deny the public fair access to their works or stifle discourse and cultural development.

An international intellectual property regime began to take shape in the 1880s, when ten countries of Europe established the International Union for the Protection of Literary and Artistic Works and signed the Berne Convention for the Protection of Literary and Artistic Works in 1886. Besides the Berne Convention, to which over 100 countries are now signatory, the Universal Copyright Convention (1955), the World Intellectual Property Organization (1970), and the Trade Related Aspects of Intellectual Property agreement (1995) mark significant events in the evolution of the current international intellectual property regime. The World Intellectual Property Organization (WIPO), an intergovernmental organization with headquarters in Geneva, is responsible for the promotion of the protection of intellectual property throughout the world and for the administration of various multilateral treaties dealing with the legal and administrative aspects of intellectual property. The TRIPs agreement,<sup>7</sup> a part of the so-called “Uruguay Round” negotiations that created the World Trade Organization, sets global standards for the protection of intellectual property. Countries are required to implement agreed minimums of patent, copyright, and trademark protection within 10 years.

As information and the knowledge industries have grown in importance in the developed countries, national legal regimes have steadily expanded the scope of property rights in information. The movement towards multilateral intellectual property regimes is an extension of this tendency. However, the establishing of minimum standards of protection in these multilateral agreements has the effect of eroding traditional territorial and political notions of sovereignty. Ironically, multinational corporations which have large intellectual property holdings must turn to the national legal regimes in order to underwrite the value of their holdings. This “centripetal pull” of national intellectual property regimes complicates the evolution of a truly global intellectual property regime.<sup>8</sup> In addition, the Internet poses a challenge to fundamental international law precepts because two of the most important sources of jurisdiction, territorial sovereignty and nationality, are becoming meaningless in cyberspace.

United States and European interests have dominated the internationalization of the intellectual property regime. By “brute economic force” they have imposed their notions on all the countries of the world.<sup>9</sup> But enforcing copyright laws across national boundaries is almost impossible. WIPO’s new “Digital Agenda”<sup>10</sup> is gaining currency but the prospect of universal international harmonization is distant. Its ten points address such issues as entry into force of the WIPO “Internet Treaties”<sup>11</sup> before December 2001 and the urgency of adjusting the international legislative framework to facilitate electronic commerce and exploitation of intellectual property in the public interest. The “Internet Treaties”—the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)—were adopted in December 1996 and presently eleven countries, including the United States,<sup>12</sup> have ratified them. At least 30 countries must adhere to each of the treaties before they enter into force.<sup>13</sup>

### ***Breakdown of the Current Regime***

Many critics have raised the issue of whether copyright law will eventually disappear in the digital age. Some have claimed that copyright is of diminishing utility to society, that it is a “burden” to free speech, that a “collision” between large entertainment conglomerates controlling intellectual property and the public is in the offing.<sup>14</sup> Others state that, far from breaking down or disappearing, copyright is evolving towards a “bad” intellectual property regime.<sup>15</sup>

Publishers used to have complete control over their products and the content of intellectual property was closely linked to its medium--text in the form of a printed page, a book, for example. The laws governing the uses of both the medium and the message were relatively clear. With the rise of the Internet and the emergence of multimedia, however, publishers have lost this control and the medium has become decoupled from the message. “The answers to such questions as ‘Who owns what?’ and ‘What, exactly, is owned?’ and ‘What rights does ownership convey?’ are the subjects of heated debate.”<sup>16</sup>

Copies used to be a useful measure for deciding when a copyright owner's rights had been violated, because they were easy to find and easy to count. The difficulties of making infringing copies used to be an effective way of preventing infringing. The question is whether copies are a useful measure in an era when making copies is so easy and so much a part of using digital media. A rethinking of copyright and the replacement of copies as the essential "compensable unit" in assuring authors' exclusive rights may be in order. In line with the typical public understanding of copyright, perhaps copyright should be recast as an exclusive right of commercial exploitation.<sup>17</sup>

Critics have also pointed out that hitherto copyright has worked fairly well because it was largely applied to institutions, like publishing houses, not individuals, who did not really "publish." Now that the Internet has made it possible for any individual to be a publisher, it may be time to rethink whether the rules of copyright need to be reformulated in light of this new reality.<sup>18</sup>

The average person is profoundly ignorant about copyright and the way it works. Popular notions about fair use are often at odds with that established in law, and the gap between legal expectations and common practices seems to be widening. For example, most people believe that making money off others' works is copyright infringement, while non-commercial uses are fine. "You might say that the public takes an expansive few of fair use, at odds with that of the experts."<sup>19</sup> Naive Internet users rely on an implicit understanding that a Web page wouldn't have been placed on the Web for public access unless the rights holder permitted it to be viewed, giving at least tacit permission for the viewing and the copying that accompanied the viewing.<sup>20</sup>

The Napster litigation that is currently receiving much attention in the United States press may be the beginnings of an "all-out assault on copyright on the most basic, conceptual level."<sup>21</sup> Although the controversy has to do with music files, there are certain to be implications beyond that medium. The Napster Web site offers software that allows users to open their hard drives to one another and to exchange MP3 files, many of them protected by copyright. It is estimated that some 5 or 6 million persons have downloaded the Napster software. Powerful forces in the music industry, including the Recording Industry Association of America (RIAA), are suing Napster. Earlier this year, a judge ruled that Napster is not a "mere conduit" for information and must stand trial for copyright infringement. The current cases has some overtones of the landmark 1984 Supreme Court case involving VCRs that virtually rewrote the copyright statute and established consumers' rights to tape broadcasts for personal use. Some speculate that the Napster litigation, if it works its way up to the Supreme Court, may force the Court in a similar fashion to rewrite the copyright statute. Regardless of how the Court eventually rules, "the idea is already out there." Other programs, such as Freenet and Gnutella, are designed to avoid the central server problem which makes Napster such an easy target to sue. The 5 to 6 million people who have downloaded Napster software seems to be evidence that a sizeable percentage of the population doesn't like the current balance in copyright. By their actions they seem to be saying that they have a right to distribute freely copies of recordings for personal use.

Many feel that efforts to tighten existing laws are doomed because it is a losing battle to halt the ingenuity of hackers and the pace of technological innovation. Traditional means of battling infringement are proving less successful in the face of rapidly evolving Internet communications.<sup>22</sup> In the United States, the No Electronic Theft Act of 1997<sup>23</sup> and the Digital Millennium Copyright Act (DMCA) of 1998<sup>24</sup> are efforts to increase the penalties for online copyright infringement and to outlaw the manufacture and circumvention of technological copyright protections. Critics charge that the DMCA is “unilateral technology disarmament,” that it tips the historic balance between the rights of copyright owners and the public interest too far in favor of the former, and that it has a hidden agenda--depriving the public of the ability to access and use information in legitimate ways. In the face of strong opposition from the library, cryptology, software development, and civil liberties communities, and in its haste to push through the final legislation, Congress put the anti-circumvention provision on hold for two years and hearings<sup>25</sup> are now being held on a set of rules that would exempt from the anti-circumvention section certain classes of works covered by copyright. One hopes that the issue of whether the anti-circumvention provision could have an adverse impact on free speech, teaching, research, news reporting and criticism, by giving copyright owners the means to carefully control access to information will be clarified for Congress.<sup>26</sup>

### ***“Click-On” or “Click-Wrap” Agreements***

Julie Cohen speaks of a “new wind” blowing in copyright law, offering copyright owners “the tantalizing possibility of near-absolute control of their creative and informational content, even after its delivery to end users, via self-enforcing digital contracts.”<sup>27</sup> We certainly feel this new wind in academic libraries as we negotiate more and more licensing agreements for access to online resources. Licensing has three characteristics which differentiate it from the sale of physical copies of books. It is a limited transfer of rights, use of the content is on stated terms and conditions, and a license is governed by contract law, rather than by copyright law.

An example from the United States is worth mentioning here. A group of commercial software industry giants is spearheading an effort for the legislatures of all fifty states to revise the Uniform Commercial Code governing commerce in and among all the states. At present, there is no clear statutory law across all states which applies to computer information transactions. The proposed Uniform Computer Information Transactions Act, known as UCITA, would cover computer software, multimedia products, computer databases, and online information. UCITA redefines the sale of computer information as the licensing of “intangible” information. UCITA has been touted as good for the information-technology economy by standardizing and clarifying rules of commerce for electronic information, but when you read between the lines, it represents a shift from a property-based model of transactions in computer information—involving a full transfer of property, with the purchaser enjoying all the copyright doctrines such as fair use and first sale<sup>28</sup>—toward a model where the private law of contract is predominant and the seller retains some of his rights in the property that is being licensed. The danger of UCITA lies in unraveling the fair use and first sale doctrines that undergird and stabilize

the free flow of information and the equity of public access to knowledge.<sup>29</sup> Paula Samuelson believes that UCITA “may contribute to a fundamental transformation in the way information is disseminated in our culture, indeed, throughout the world.”<sup>30</sup> Critics have also pointed out that UCITA is fundamentally unfair because it encourages licensors to include in a contract whatever terms they can, “while recourse for licensees is mostly to be found in expensive litigation after the fact.”<sup>31</sup> The American Library Association is vigorously pursuing a lobbying effort against UCITA. Regardless of how UCITA plays out in the United States, the issues it raises—how information license contracts can be formed, what default rules should apply, and what public policy limitations should be imposed on the freedom of contract—will need to be resolved and there needs to be some international consensus. “If [UCITA] is not the right answer, another answer must be found.”<sup>32</sup>

This issue is of importance internationally because Internet distribution of copyrighted materials cannot be done under a nation-specific license. Here’s where the significance of differences in national intellectual property regimes comes into play. Strong points out that a United States publisher might encounter moral rights problems in France in its use of photographs (since moral rights are of greater importance in French copyright law than in the United States) or that a German publisher might encounter what it considers theft of its database in the United States (since database protection is stronger in Germany than in the United States). Licensing arrangements clearly defining rights and conditions of use may be the wave of the future in international e-commerce in online publications.<sup>33</sup>

### **“Pay as You Read”**

*“We are on the brink of the biggest information revolution for 5,000 years with a social and technological impact that will quite literally re-write the book. What is this great invention that will grip the nation? It is the electronic or e-book.”*<sup>34</sup>

Hyperbole aside, e-books are coming, and the technological infrastructure is already in place. E-books will largely be distributed through the use of sophisticated hardware and software code, embodied in what is variously called “digital rights management” (DRM), “trusted systems,”<sup>35</sup> “copyright management systems,” or “technical protection services.” DRM is the “missing link” in convincing publishers to move to the Web.<sup>36</sup> These systems can regulate access to digital content, prevent misuse and unauthorized access and distribution, and provide other management and tracking information to content owners. Although there are a welter of competing schemes,<sup>37</sup> it is not clear which will prevail.

At present only about 10,000 or so hand-held electronic reading devices or “information appliances” for reading e-books are currently in use.<sup>38</sup> The demand for them has been hindered by incompatible file formats and proprietary technologies. The two readers that have reached the market, NuvoMedia’s Rocket eBook<sup>39</sup> and SoftBook Press’ SoftBook Reader,<sup>40</sup> restrict users to viewing only e-books designed to run on their own devices.

But the e-book business seems to ready to take off, with several other reading devices nearing release and the development of reader software, such as the Glassbook Reader,<sup>41</sup> that enables downloading and reading PDF-based electronic titles on a desktop or laptop computer.

Other companies such as netLibrary, iBooks, and Ebrary.com, distributing to PCs, demonstrate alternate schemes. netLibrary uses a “one copy at a time” model, based on the traditional method of using a library. Unlike in a library, however, entire e-books cannot be printed, but selected pages can. If a user tries to print out an entire book, the system will display a copyright infringement notice; after about three of these warnings, he or she is cut off. iBooks.com uses a sophisticated algorithm that allows a potential customer to see just enough of a document to see if they'd like to buy it without any danger that they'll take the document without paying for it. Ebrary.com uses an Acrobat plug-in which allows browsing but not downloading, copying, or printing.

More and more e-book retailers are showing up on the Web. They include Fatbrain,<sup>42</sup> 1stbooks.com,<sup>43</sup> and Librius.com.<sup>44</sup> Fatbrain is a distribution channel for conventional publishers, but it recently announced its “eMatter” program.<sup>45</sup> eMatter is one of several examples of an emerging alternative model of publishing in the online environment. It allows authors to publish their own works on the site, retain their copyright, set their own book prices, and keep half the profits.

Stephen King's latest short story, “Riding the Bullet,” was the first title by a major author to be issued exclusively in e-book format. The servers of several Web retailers were swamped with about half a million orders on the first three days after its release.<sup>46</sup> Through code, it was made available only on computer and hand-held instruments like the Palm Pilot. Once downloaded, a permissions notice advised that “no text selections can be copied from this book to the clipboard, no printing is permitted for this book, this book cannot be lent to someone else, this book cannot be given to someone else.” At first Simon and Schuster, the publisher, insisted that “Riding the Bullet” was not available to libraries, but now apparently they have relented and allow a “one download, one device” arrangement that allows libraries to download a copy to an e-reader and circulate it to one borrower after another.<sup>47</sup>

What are the implications of a broadly implemented DRM? Is it only a way to ensure that authors get their fair share of profits, or is it an attempt to do away with fair use and public domain? DRM potentially could enable copyright owners to control how, when, where, and even who can have access to information. They may lead us into a “regime in which we'll have to pay each time we look at, listen to or otherwise use any copyrighted material”<sup>48</sup>--a “pay to read” scenario. The practical effect is that DRM has the potential to kill fair use.

Harvard University law professor Lawrence Lessig paints a dark, pessimistic picture of the way the needs of e-commerce are dictating the architecture, the “code,” of the Internet, and how this architecture has ramifications for intellectual property.<sup>49</sup> Lessig believes that the “invisible hand of cyberspace, through commerce, is constructing an

architecture that perfects control.”<sup>50</sup> Lessig’s point is that if the “pay to read” scenario were to become the norm, content providers would not have to resort to the courts for protection from copyright infringement, as in the past, because it is the code that determines what a user can and cannot access, not the law. And, because it permits a more “fine-grained” control over the access and use of protected material, DRM is actually superior to copyright law. This is a new world in which “[c]ode can, and increasingly will, displace law.”

## Conclusions

No one can read the future; if it were possible, you can be sure that knowledge would be locked up in a “business methods” patent or controlled on an “information appliance.” In a more serious vein, however, I hope that we all keep informed on these movements towards licensing and digital rights management that are certain to affect the way we access and use electronic texts in the future. It seems fairly certain that the media giants would like to say—and perhaps are saying— “the Internet is nothing but a huge copying machine” and turn away from copyright towards licenses and DRM. The consequences for the public, however, would be bad. We need to resist this “pay-per-view infotainment”<sup>51</sup> vision of our future. Ultimately we have to ask two questions. How much control should we allow over information? By whom should this control be exercised?

There will continue to be tension between law and technology, between the interests of rights holders and the public. We need to watch our legislatures and our courts as they respond to new challenges to copyright. Whatever our interest in the issues, we need to become involved and let our concerns and views be known to lawmakers. What this means for me personally is that I need to find suitable ways to work with and within the law, not only as a librarian and educator, but also as a member of a law-abiding community.

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<sup>1</sup> “Copyright Clearance Center.”

<sup>2</sup> Paskin.

<sup>3</sup> Reichman, 2445.

<sup>4</sup> Rudich, 17.

<sup>5</sup> Netanel, 285.

<sup>6</sup> Samuelson, “Encoding the Law into Digital Libraries,” 37.

<sup>7</sup> Overview available at <http://www.wto.org/wto/intellect/intell2.htm>; the full text is available at <http://www.wto.org/wto/intellect/1-ipcon.htm>

<sup>8</sup> Aoki, 50.

<sup>9</sup> Strong.

<sup>10</sup> “WIPO ... ‘Digital Agenda’.”

<sup>11</sup> Text available at <http://www.wipo.org/eng/diplconf/distrib/94dc.htm>

<sup>12</sup> The United States ratified the WIPO Copyright Treaty as a part of its Digital Millennium Copyright Act in October 1998 (specifically the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998; 105 P.L. 304).

<sup>13</sup> “WIPO Welcomes.”

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- <sup>14</sup> For example, John Lederer, on the cni-copyright discussion list.
- <sup>15</sup> Among them, James Boyles. See his article “A Politics of Intellectual Property: Environmentalism for the Net?” (<http://www.wcl.american.edu/pub/faculty/boyle/intprop.htm>) and his book, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1996).
- <sup>16</sup> Lejeune.
- <sup>17</sup> Litman, 41.
- <sup>18</sup> Lessig, 193.
- <sup>19</sup> Strong.
- <sup>20</sup> *Digital Dilemma*, p. 46.
- <sup>21</sup> James Rogers (jetan@ionet.net), e-mail of 3 May 2000 to cni-copyright@cni.org
- <sup>22</sup> Gibbons and Ferri.
- <sup>23</sup> <http://thomas.loc.gov/cgi-bin/bdquery/D?d105:1:./temp/~bdRTDY:@@@L/bss/d105query.html>
- <sup>24</sup> Analysis of the DMCA by Jonathan Band is available at: <http://www.arl.org/info/frn/copy/band.html>
- <sup>25</sup> Statements from the hearings are available at: <http://lcweb.loc.gov/copyright/1201/hearings/>
- <sup>26</sup> Reyna.
- <sup>27</sup> Cohen, 1090.
- <sup>28</sup> The First Sale Doctrine, a rule embedded in United States copyright law, allows persons to lend or resell a book after they have purchased it.
- <sup>29</sup> Auld.
- <sup>30</sup> Samuelson, “Does Information Want to Be Licensed?”
- <sup>31</sup> “The Uniform Computer Information Transactions Act (UCITA)” (<http://www.educause.edu/policy/ucita.pdf>)
- <sup>32</sup> Samuelson, “Good News and Bad News,” 50.
- <sup>33</sup> Strong.
- <sup>34</sup> Kidner.
- <sup>35</sup> For “trusted systems,” see especially Mark Stefik, “Trusted Systems,” *Scientific American*, March 1997 (<http://www.sciam.com/0397issue/0397stefik.html>) and Tobe Liebert, “Should We Trust ‘Trusted Systems?’” (<http://www.llrx.com/features/trust.htm>)
- <sup>36</sup> Clark.
- <sup>37</sup> Such as such as ContentGuard, Digimarc (a plug-in used in other applications, such as Adobe Photoshop and CorelDraw), SysCoP (an online watermarking service), Globally Unique Identifiers (GUIDs), Mighty Words, and iCopyright.com (“instant copyright and reprints clearinghouse”).
- <sup>38</sup> Epstein, 58.
- <sup>39</sup> See their “E-book community” focused Web site, <http://www.Rocket-Library.com>
- <sup>40</sup> <http://www.softbook.com/>
- <sup>41</sup> Downloadable from [www.glassbook.com](http://www.glassbook.com)
- <sup>42</sup> <http://www.fatbrain.com>
- <sup>43</sup> <http://www.1stbooks.com/>
- <sup>44</sup> <http://www.books2read.com>
- <sup>45</sup> Sample eMatter documents are available at [www.fatbrain.com](http://www.fatbrain.com) and at [www.mightywords.com](http://www.mightywords.com).
- <sup>46</sup> Zito.
- <sup>47</sup> Schneider.
- <sup>48</sup> Gillmor.
- <sup>49</sup> Lessig.
- <sup>50</sup> Lessig, p. 6.
- <sup>51</sup> Linda Dailey Paulson, “Private Property,” quoting Eric Eldred, of Eldritch press, the plaintiff in an unsuccessful legal challenge to the Copyright Term Extension Act (*Eldred v. Reno*).