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Electrifying Copyright Norms and Making Cyberspace More Like a Book

Ann Bartow

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2003]

Articles

ELECTRIFYING COPYRIGHT NORMS AND MAKING CYBERSPACE MORE LIKE A BOOK

ANN BARTOW*

ABSTRACT

The first half of this Article charts the evolving but eminently ascertainable social norms of the use of analog copyrighted works by individuals, and characterizes these norms as “what is” in real space and “what ought to be” in cyberspace. The Author argues that while “what is” in the analog world may be imperfect, uncertain and unsatisfactory at times, it represents a discernible practical equilibrium upon which copyright holders’ ability to control and extract income from their works is balanced against the rights of fair users. Authors, content distributors and users all make decisions within a familiar longstanding copyright framework, within which lots of small scale unauthorized copying occurs, but content creation and distribution is still adequately incentivized. Nevertheless, “what is” in terms of real space copyright use norms is not making the transition to cyberspace, and will not, absent legislative intervention. Instead, copyright owners are using the attributes of digitalization to realize their own normative view of “what ought to be,” absolute control over copyrighted works that are embodied in electronic formats.

Using the specific example of non-profit libraries, the second half of this Article explains how society will suffer if analog copyright use norms are not electrified and “what is” becomes dramatically altered in the digital domain: Individuals will lose traditional levels of access to informational works and be deprived of familiar ways and means of using copyrighted works. In consequence, their respect for copyrights is likely to

* Assistant Professor of Law, University of South Carolina School of Law, Columbia, South Carolina. Professor Bartow can be contacted via e-mail at bartow@law.sc.edu. This Article is dedicated to Casey Bartow-McKenney, and to artist, novelist and playwright Lynda “Libraries saved Lynda Barry’s life! Yeah! Right on!” Barry. It may be freely copied for nonprofit educational purposes. Not to be taken internally. Your mileage may vary. Read at your own risk. The author thanks the following friends and colleagues for assistance and encouragement: Ed Baker, Dan Burk, Stacey Dogan, Lolly Gasaway, Llew Gibbons, Sheldon Halpern, Mark Lemley, Jessica Litman, Michael J. Madison, Malla Pollack and Fred Yen. The author also benefited tremendously from the opportunity to present this work at the 2002 Computer Freedom and Privacy Conference (special thanks to Deidre Mulligan and Peter Jazsi), the Law and Society 2002 Annual Meeting (special thanks to Steven Hetcher), and the 2002 Southeastern American Association of Law Schools Annual Meeting (thanks again to Steven Hetcher).

erode as the distributive goals of the copyright system are correspondingly unfulfilled.

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I. INTRODUCTION

LAWS have both functional and expressive aspects.¹ When 30 million people exchange music files over the Internet,² federal judges can rule that the file trading infringes copyrights and they can enjoin online services and technologies that facilitate the file trading.³ What these ju-

1. See, e.g., C. Edwin Baker, *Injustice and the Normative Nature of Meaning*, 60 MD. L. REV. 578, 579 (2001) (noting both normative and expressive aspects).

2. See, e.g., Janelle Brown, *The Gnutella Paradox*, SALON (Sept. 29, 2000), at http://www.salon.com/tech/feature/2000/09/29/gnutella_paradox/print.html (stating Napster has 30 million users); *Schools Recess on Napster*, WIRED (Aug. 30, 2000), at <http://www.wired.com/news/print/0,1294,38525,00.html> (stating Napster has 25 million users).

3. See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1022-28 (9th Cir. 2001) (finding defendant likely engaged in secondary and vicarious copyright infringement and noting that "[u]ses of copyrighted material that are not fair uses are rightfully enjoined"); see also *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000) (holding that plaintiffs were entitled to partial summary judgment because defendant had infringed plaintiffs' copyrights). The recording industry's massive legal attack has forced some file-sharing services out of business, while forcing others to adopt a "strike-first" strategy. See Brad King & Jeffery Terraciano, *Scour: Going, Going, Gone*, WIRED (Dec. 12, 2000), at <http://www.wired.com/news/business/0,1367,40632,00.html> (reporting on liquidation of Scour's assets, made necessary because of large expenditures by company to defend itself from industry lawsuits). But see Brad King, *File Traders Take Aim at RIAA*, SYMPATICO (May 2, 2001), at <http://computers.sympatico.ca/news/wired/stories/0,1856,62,00/0,1572,43496-62,00.html> (discussing file-trading service Aimster's

rists cannot accomplish, however, is to make those 30 million people “obey” the copyright laws, at least not as a matter of collective conscience. Even more problematically, neither Congress nor the courts can seem to articulate in a meaningful way what it means for an individual consumer to respect copyrights. There is a growing disjuncture between the Copyright Act, copyright case law and the ways individuals (in their consumptive capacities) have traditionally used, and would prefer to continue to use, copyrighted content.

Pragmatic concerns that shift and evolve over time, rather than commonly held precepts of right and wrong, have long driven copyright law. Copyright owners have a profit-maximizing normative view of copyrights best described as “absolute control.” This vision of a world in which permission must be obtained for every use of a copyrighted work conflicts not only with the policies underlying the copyright laws, but also with the ways in which copyrighted works have traditionally been accessed and experienced by copyright-consuming individuals. Yet recently, large scale copyrighted content owners have effectively positioned themselves as the victims of an immoral citizenry that will “steal” copyrighted works at every opportunity unless the laws and the courts intervene. In response, the legislative and judicial branches of government have orchestrated and implemented changes to the copyright laws based on assumptions that copyrights (and the underlying creative works that copyrights “protect”) are increasingly imperiled, and that guarding them from the ravages of popular infringement requires progressively stricter safeguards.

There has always been tension between how individuals actually utilize copyrighted works and how copyright laws attempt to regulate such use. Content owners have, for example, tried (sometimes successfully) to use copyright law to prevent or control the use of photocopiers,⁴ the sale of used books⁵ and the rental of videocassettes containing motion pictures.⁶ Friction between the owners and consumers of copyrighted works,

preemptive lawsuit against recording industry, seeking finding that service's encrypted network does not violate copyright laws and explaining that suit may save company from fate suffered by Napster and Scour).

4. *See, e.g.*, *Princeton U. Press v. Mich. Doc. Servs., Inc.* 99 F.3d 1381, 1383 (6th Cir. 1996) (finding photocopying violated copyright laws); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994) (same); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1547 (S.D.N.Y. 1991) (same). *But see* *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1362 (Ct. Cl. 1973) (finding photocopying did not violate copyright laws).

5. *See, e.g.*, *Bobbs-Merrill v. Straus*, 210 U.S. 339, 350 (1908) (denying ability of copyright holder to set future resale price of book); *Doubleday, Doran & Co. v. R.H. Macy & Co.*, 199 N.E. 409, 411 (N.Y. 1936) (rejecting power of state to fix selling price of books); *see also* M.J. Rose, *Are Authors Abused By Used?*, WIRED (Mar. 19, 2002), at <http://www.wired.com/news/culture/0,1284,51113,00.html> (discussing online sale of used books).

6. *See, e.g.*, *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986) (finding improper public performance of copyrighted works); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 158 (3d Cir. 1984) (same).

however, has increased dramatically as the “physical embodiments” of copyrighted works are increasingly available (often primarily and sometimes exclusively) in electronic formats.⁷

Some digital technologies offer copyright owners the possibility of increased ease and efficiency in the creation, distribution, monitoring and control of their copyrighted works. Other technological developments, however, threaten the ability of content owners to control and profit from their copyrighted content at all. Digital technologies and the Internet simultaneously increase both the risks of extensive copyright infringements, and the potential rewards of large scale controlled distribution of copyrighted works. As a result, large-scale copyright owners are trying—through lobbying and litigation—to tailor copyright laws to favor technologies that support their goals and to enfeeble or eliminate those that do not. The consequences for individual copyright users are that copyrighted works in digital formats are increasingly subject to access and use controls.

Emerging copyright management techniques in the digital environment represent forced changes in the way copyrighted works are experienced by end users.⁸ Copyright consumers may be chafing under these new access and use limitations, and reacting with increased hostility toward the very concept of copyright protections. New, rigidly enforced restrictions on use and access to copyrighted content, especially if accompanied by increased costs, may motivate otherwise law-abiding copyright users to circumvent copyright controls (or at least to feel increasing sympathy for those who do so). While they may facilitate higher profits and more control over users, these restrictions do not appear to foster enhanced or principled respect for copyrights. Instead, they may actually be undermining the perceived legitimacy of the copyright laws among the copyrighted work consuming populace. One overarching theme of this Article is that if the government wants its citizens to respect copyrights, the copyright laws as they are promulgated and enforced, must be more consistent, comprehensible and respectful of individuals’ needs and experiences. Real space copyright use norms are defined for the purposes of this Article as patterns of behavior associated with the end use of creative or informational works. The copyright laws, both as drafted by Congress and interpreted by the courts, must embrace and reflect longstanding copyright consumer use norms, rather than conflict with them, if they are to elicit widespread compliance.

7. See, e.g., *A&M Records*, 239 F.3d at 1011 (explaining how Internet can be utilized to create MP3 files and transfer such files among users); *UMG Recordings*, 92 F. Supp. 2d at 352 (finding unlicensed copying of copyrighted music recordings is not fair use); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 346 (S.D.N.Y. 2000) (holding that decryption software violated copyright laws); *Recording Indus. Ass’n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624, 633 (C.D. Cal. 1998), *aff’d*, 180 F.3d 1072 (9th Cir. 1999) (denying injunction against handheld MP3 device).

8. The term “end user” is used to distinguish the ultimate user of a product from other users of the product, such as installers and administrators.

This Article also analyzes the possibility of codifying real space⁹ norms associated with use of copyrighted works in traditional ink-and-paper mediums in order to statutorily mandate a comparable level of access to information in digital formats. While the copyright laws have never been uncomplicated nor clear-cut, the norms of real space use can be fairly straightforwardly ascertained and documented. This Article posits that if individuals could access and use digitalized copyrighted works in old, familiar ways, perhaps they would also restrain themselves to analog levels of unauthorized copyright uses and infringements. It advocates adapting pre-existing real space copyright use norms to electronic formats as a mechanism for protecting the legitimate interests of copyright owners without depriving individuals of the customary real space access to information provided by bound books and periodicals. The concept of codifying real space copyright use norms is then specifically explored as a mechanism for enabling non-profit libraries to provide library patrons with the same functional levels of access to information in electronic form, and through cyberspace, that have long been enjoyed in real space with respect to printed materials.

II. THE INTERSECTION OF NORMS AND LAW

Over a decade ago, Robert Ellickson published a book that is widely regarded as a seminal work on the role of norms in regulating social interactions, entitled *Order Without Law: How Neighbors Settle Disputes*.¹⁰ After studying formal and informal dispute resolution among Shasta County, California cattle ranchers and their neighbors, Ellickson observed that the small, close-knit community had developed its own set of internal rules for addressing property damage caused by trespassing live-stock and for ensuring the construction and repair of boundary fences. Based on the results of his research, he hypothesized that members of close-knit groups tend to govern their interactions by developing informal norms that maximized the objective welfare of group members.¹¹ Where such informal governance occurred, Ellickson argued, a legal system could appropriately defer

9. The term "real space" is used rather than "meat space" largely because the author is a vegetarian.

10. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); see also Richard H. McAdams, Comment, *Accounting for Norms*, 1997 Wis. L. REV. 625, 631-32 (discussing Ellickson's views on societal incorporation of norms with law).

11. ELICKSON, *supra* note 10, at 282-83. Ellickson identified five varieties of norms: Substantive norms, which define the conduct that is to be rewarded or punished; remedial norms, which establish whether reward or punishment is appropriate, and the form and degree of reward or punishment if any; procedural norms, which determine how information is gathered and acted upon by those who impose sanctions; constitutive norms, which establish the internal structures of norm governance; and controller-selecting norms, which administer choices between alternative sets of rules, such as between those of the relevant legal system and those of an informal, norm-based dispute resolution mechanism. See *id.* at 132-36.

to the group's informal practices by giving substantial weight to applicable custom. Nevertheless, he asserted that legal rules would become more important when the social distance between disputants increased, when the magnitude of a dispute increased and when the legal system allowed disputants to externalize costs to third parties.¹²

Informal norms are those that develop outside the confines of structured organizations, as contrasted with "formal norms" imposed by a centralized governing body, which are better described as rules. The norms referred to in this Article are of the informal variety, unless otherwise noted. They are also herein restricted to "end user norms," those directly associated with the utilization of copyrighted works as a matter of ultimate consumption. The norms related to using copyrighted works to create new works that may enhance or compete with the original work are very important and equally deserving of exploration, but are not considered here.

Isolating a specific norm, establishing the precise moment when a norm is formulated or adopted, articulating the rationale for a particular norm and charting the contours of any given cognizable norm are all subjective determinations invariably fraught with ambiguity. Eric Posner has written that norms resemble common law doctrines more than they resemble statutes because they reflect a societal desire for flexible situational justice, but they are not constrained by the concern for consistency that jurists often impose on applications of common law doctrines.¹³ This, he asserted, makes it more difficult to describe a norm than to articulate a doctrine of the common law. In Posner's estimation, "[n]orms are fuzzy."¹⁴ Steven Hetcher has similarly observed that "[t]here is a systematic ambiguity . . . in the social-scientific conception of a norm, between norms understood as rules and norms understood as patterns of behavior."¹⁵

Discussion of the role of norms in legal scholarship has frequently surfaced in conjunction with both the "law and society" and "law and economics" approaches to legal analysis, which offer radically differing perspectives.¹⁶ One of Ellickson's many contributions to norms discourse was

12. See *id.* at 283 (describing factors that lead to resolution of disputes through law rather than through norms).

13. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1700 (1996) (exploring use and definition of "norm").

14. *Id.* at 1699.

15. Steven Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J.L. & TECH. 149, 154 (2001).

16. See ELLICKSON, *supra* note 10, at 7-8 (discussing acrimony between both groups). Ellickson defines the differences between both camps in this manner: "To exaggerate only a little, the law-and-economics scholars believe that the law-and-society scholars group is deficient in both sophistication and rigor, and the law-and-society scholars believe that the law-and-economics theorists are not only out of touch with reality but also short on humility." *Id.*; see also generally Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157 (2000) (discussing socio-economic scholars' embrace of social norms importance

his overt rejection of the supposition that correctly evaluating the interplay between norms and the law requires a particular political or philosophical bent. As Richard McAdams has observed, "Ellickson criticized the extreme law and society claim that norms determine behavior to the exclusion of law—what he called 'legal peripheralism'—and also the extreme law and economics claim that law determines behavior to the exclusion of norms—'legal centralism.'"¹⁷ This Article attempts to adopt the Ellicksonian approach of avoiding a stark doctrinal or philosophical orientation when discussing copyright use norms. In fact, to even characterize norm theory as a singular or unified construct is inaccurate. Even among self-identified law and economics adherents the word "norm" can have various meanings.¹⁸ For the purposes of this Article, Steven Hetcher's characterization of social norms is adopted. Hetcher defines norms as follows:

[N]orms, at their core, are patterns of behavior, not rules, statements, or other linguistic entities. A norm need not be expressed in linguistic terms in order to have content, whereas a rule is by definition linguistic. A norm's content is defined in terms of its strategic structure. A norm, then, is behavior of a certain sort, which may or may not have an attached linguistic component. When characterizing a group's norms, it is neces-

on human development), available at <http://www.gwu.edu/~ccps/etzioni/A277.html>.

17. McAdams, *supra* note 10, at 632.

18. Compare Posner, *supra* note 13, at 1699-1700

("A norm [is] a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior [A] norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law."), with Clayton P. Gillette, *Lock-In Effects In Law and Norms*, 78 B.U. L. REV. 813, 832 n.54 (1998) ("By norms I mean regularities within the society to which we believe members of the society ought to conform, and that are enforced through mechanisms other than legal sanction."); see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350-51 n.55 (1997) (discussing distinction between norms and regularities and stating his opinion that mere "intentional regularit[ies] or 'convention[s]'" are not norms). Because I am interested in norms as regulations analogous to governmentally imposed common or statutory law, I adopt this more restrictive and less descriptive definition. On the other hand, Robert Axelrod finds that a norm exists "to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in [that] way." ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION* 47 (1997). If the source of the punishment includes legal as well as extra-legal sanctions, Axelrod's definition seems to be too broad for my purposes. But to the extent that the existence of a norm entails any form of punishment for its violation, the concept of a norm involves a normative element. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1580 (2000) ("[A] norm can be defined as an obligation backed by a nonlegal sanction. Sanctions such as criticizing, blaming, refusing to deal or shunning are nonlegal insofar as the people who impose them are not state officials."); see also McAdams, *supra* note 10, at 634 ("If one scratches beneath the surface, it is clear that economic theorists have widely divergent views on what norms are and how they function.").

sary to keep in mind the difference between norms and rules, as it is important to be able to look at the actual practices of groups, rather than merely going by what they express linguistically. Talk is cheap; it is conforming behavior that creates benefits for conforming groups and externalities for third parties.¹⁹

Thus references to copyright-related norms in this Article are allusions to actual practices of various groups with respect to exploitation of copyrighted content. For example, librarians and library patrons affiliated with a particular library may constitute a close-knit community. There may be rules which require the library to post “copyright warnings” on photocopiers that can be used by library patrons to photocopy works in the library’s collections,²⁰ but the library may, without fear of censure, choose not to supervise use of these photocopiers or to intervene even if individuals seem to be engaging in excessive photocopying. The library’s “rules” concerning photocopier use are thus supplanted by an informal norm that permits unfettered photocopying. The library benefits from this norm both to the extent that easy access to copiers makes library patrons happy and from any income that the photocopiers generate for the institution. Library patrons benefit from the convenience afforded by the library photocopiers. Any acts of infringing copying that occur constitute externalities that affect third parties—the owners of the affected copyrighted works.

An articulation of recognized norms is putatively an objective expression of how individuals behave, but how norms are identified and defined is influenced by and subject to the normative biases of the observer, who has her own internalized vision of how the world is, and how it ought to be.²¹ That being said, if they are to be the basis for law, the norms of real space use of “analog” copyrighted works must be as fairly and impartially set out as is feasible, because to do otherwise would compromise the legitimacy of the undertaking. Thus, while the advocacy tone imbuing the description of why real space levels of information access need legislative mandates in the electronic environment will be unmistakable to the reader, it is hoped that the iterated norms in the second half of this Article are rendered as neutrally and dispassionately as possible.

19. Steven Hetcher, *Norm Proselytizers Create A Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 892 n.53 (2001) (citation omitted).

20. See 17 U.S.C. § 108(f)(1) (1998) (limiting liability of libraries for copyright violations by patrons using reproducing equipment in library if equipment displays notice that copies may be subject to copyright law).

21. This author admits a strong general preference for weak, “low barrier” copyright protections. For a further discussion of “low barrier” copyright protections, see *infra* notes 86-87 and accompanying text.

A. *Copyright Norms*

*The secret rules of engagement
are hard to endorse,
when the appearance of conflict
meets the appearance of force.*²²

Copyright use norms doubtlessly vary by category of work and by the formats in which works are embodied. Entire CDs containing music are probably played and replayed more frequently than whole books are read and re-read because people are less likely to want to read books repeatedly than they are to play songs over and over. As a result, music CDs on loan are probably “burned” more frequently than borrowed books are photocopied or scanned onto hard drives. This does not necessarily mean that as a moral or ethical matter copyrights in music are respected less than copyrights in literary works; it simply means that as a practical matter the works are consumed differently.

The “containers” in which copyrighted sound recordings and musical compositions are sold to consumers have changed and multiplied fairly dramatically over the past few decades. The same recordings may be (or at least may have been at some point in time) available on vinyl records in 78, 45 and/or 33 rpm formats, on eight track tapes, on cassette tapes, on compact disks and as MP3 files. They can be easily copied from each of these formats, or simply off of a radio broadcast. They can also be shared from person to person without any copying across formats. However, because MP3 files may be simple and virtually free to copy, and sharing them without any copying could additionally require simultaneously sharing a computer or hand held MP3 player, sharing them as conveniently as tapes or CDs functionally requires making copies. Building the norms of CD and analog format usage into MP3 files can best be achieved by limiting playing of an MP3 file, original or copied, to one device at a time. This approach contrasts favorably with one that renders MP3 files uncopyable, because this ignores pre-existing norms of unfettered copyability long enjoyed by consumers.

The variety of containers in which literary works are widely embodied is more limited. Though “e-books” and books-on-tape or compact disc are all available to consumers, ink and paper is still the predominant format in which the typical work of fiction is purchased. The widespread and long-standing popularity of bound books suggests deeply entrenched norms of use that photocopiers and scanners have done little to dislodge or modify. Rather than making copies of an analog book, a consumer may retain possession of books she expects to re-read, and loan, sell or give away those she feels finished with.

22. TRAGICALLY HIP, *Grace, Too, on Day for Night* (MCA Records 1994).

Respect for copyrights is not an inherent or natural part of the cultural infrastructure. Instead, it is either learned or it is not. Sheldon Halpern has suggested, first, that because copyright law is fractured, inconsistent and difficult to understand, perhaps copyright laws do not have a normative role and, second, that the law is there because it is needed so that appropriate energies can be focused on enforcement of the law.²³ Can there be law without legislation, or order without law, within the unauthorized use framework? The unilateral authority over use and access that digitalization gives copyright owners makes evolution of mutually satisfactory norms unlikely with respect to electronic formats. In a more specific context, Julie Cohen offered the following commentary to explicate her view that consensual norms are unlikely to develop in the realm of digital copyright management:

The parties affected by the impending digital copyright management regime exhibit none of the characteristics that Ellickson identifies as important for the development of such norms. First, the “community” of authors, owners, and readers of copyrighted works is neither well defined nor close-knit. It encompasses, on the one hand, giant publishing and entertainment conglomerates such as Time-Warner and, on the other, anyone who has ever read a newspaper article or watched a movie. While all members of the copyright “community” depend on one another, in some sense, for the production, distribution, and consumption of creative works, the community’s sheer size and diversity of tastes ensures that members do not depend on each other with the same immediacy as two Shasta County neighbors who share a boundary fence.

A second, and related, objection is that to the extent digital copyright management systems can be said to reflect shared extra-legal norms developed by repeat-player members of a copyright “community,” that community does not include readers. The transient nature of the reader’s interest in particular copyrighted works, compared with the more enduring interests of the authors and copyright owners in administering the rights to all of their works, marks the reader as the outsider. Ellickson offers a highway collision involving a passing tourist as an example of a situation in which Shasta County locals are content to leave adjudication of fault and determination of remedy to the legal superstructure. The passing tourist has no authority to invoke the system of third-party enforcement that has arisen among neighbors who are repeat players in interactions with each other. Similarly, it is extremely unlikely that the individual reader who

23. See Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum in se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 11 (2000) (noting Halpern’s belief in necessity of copyright laws).

wishes anonymous access to a copyrighted work will be able to pressure the owner to grant it by invoking shared norms that the reader helped create.²⁴

Thus, Cohen describes a dysfunctional macro digital copyright community in which overarching norms that are inclusive of, and responsive to, the needs of end consumers are unlikely to emerge, largely due to the power imbalance between large copyright owners and discreet individuals. Cohen's specific concern underlying this analysis is that, in real space, the ability to read anonymously is a norm, but it is one that can be abrogated in electronic media by the adoption of digital copyright management technologies. A new norm prohibiting anonymous access, imposed unilaterally by copyright holders, would permit—and indeed facilitate—rampant data collection and data based reader profiling.²⁵ It would also prevent people from reading (and possibly writing) online without revealing their identities.

Cohen allowed that, in some situations, consensual private ordering may occur in cyberspace,²⁶ but seemed pessimistic about the possibility of real space copyright use norms moving unscathed into the digital realm.²⁷ A parallel assumption of this Article is that unless the norms are codified so that they have the force of (and indeed become) laws, they probably cannot survive digitalization. It will require legislation to move real space use norms into cyberspace. Full and accurate codification, however, will require that real space use norms be carefully and fully cataloged, regardless of how little they correspond with formal copyright laws or comply with the copyright precepts advanced by courts.

1. *Imaginary Fences and Gates*

*Was a big high wall there that tried to stop me
A sign was painted said: Private Property,*

24. Julie E. Cohen, *A Right To Read Anonymously: A Closer Look At "Copyright Management" In Cyberspace*, 28 CONN. L. REV. 981, 995-96 (1996) (citations omitted).

25. See *id.* at 985 (discussing use of transaction records generated by copyright management systems to learn more about customers through "profiling").

26. See *id.* at 996-97 (outlining parameters for when Ellickson's model of consensual private ordering based on shared extra-legal norms may be valid in cyberspace).

27. Mark Lemley has articulated similar sentiments. See, e.g., Mark Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 578 (1997) [hereinafter Lemley, *Overlapping*] (discussing how cognitive differences between copyright law and real world can have troubling consequences). Additionally, Lemley has resoundingly criticized the idea that private ordering through social norms could govern the Internet in an efficient and socially beneficial way. See Mark Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1293 (1998) [hereinafter Lemley, *Internet Norms*] (explaining that movement towards private ordering, by taking public law out of regulation, would lead to inefficient governance by combination of norms and code).

*But on the back side it didn't say nothing—
This land was made for you and me.*²⁸

As one commentator expressed it, “[i]ntellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective.”²⁹ As is described below in more detail, copyright law, as articulated by statutory provisions and court decisions, is not particularly coherent, nor is it physically or cognitively accessible to typical end consumers of goods and services that embody or contain copyrighted works.³⁰ Even more troubling, however, is the fact that even a good grasp of the Copyright Act³¹ and applicable case law (which is, of course, the hallmark of a top quality legal education) will not provide effective guidance about how to legally use another’s copyrighted work.³² In other words, not even someone with a firm knowledge of the copyright law can confidently expect to reliably identify the metes and bounds of copyright compliant behavior across disparate factual situations because copyright laws are neither clear nor applied consistently or predictably.³³

Ordinary consumers who want to make a single unauthorized copy of a copyrighted work for personal use may believe that this is “legal” in the sense that it is probably a legitimate and anticipated non-infringing use, but it is also possible that they rationalize what they do despite an underlying belief that unauthorized copying is wrong, illegal or both.³⁴ The ramifications of making an unauthorized copy are largely indeterminate. As Sheldon Halpern has written:

Individual determinations of moral and ethical conduct require a moral and ethical context. The problem for intellectual property law in general, and the law of copyright in particular, is the lack

28. WOODY GUTHRIE, *This Land is Your Land*, on GREATEST SONGS OF WOODY GUTHRIE, VOL. 1 (Vanguard Records 1972), available at <http://angam.ang.univie.ac.at/roadcult/guthrie/Land.htm> (last visited July 27, 2002).

29. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Over-protective*, 29 VAND. J. TRANSNAT’L L. 613, 616 (1996).

30. For a further discussion of the incoherent nature of copyright law, see *infra* notes 91-92, 100-01 and accompanying text. For a further discussion of how the incoherent nature of copyright law has manifested itself in the form of myths and urban legends, see *infra* notes 93-99 and accompanying text.

31. See generally 17 U.S.C. §§ 101 et seq. (2002).

32. Fair Use is set out in 17 U.S.C. § 107 (1992).

33. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 34 (1994) [hereinafter Litman, *Exclusive Right*] (finding copyright law technical, inconsistent and difficult to understand); Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587, 613-14 (1997) [hereinafter Litman, *Reforming*] (discussing technicalities of copyright rules).

34. See, e.g., Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY (Sept. 2000), at 58 (observing that people come up with intellectual justifications for downloading music such as “information wants to be free,” “the labels are thieves” and “everything’s going to the Net anyway”), available at <http://www.theatlantic.com/issues/2000/09/mann.htm>.

of such an underlying clear context. The nature of American copyright law makes it difficult, if not impossible to find or to construct an unambiguous moral compass.³⁵

Copyright laws are not intended to create only locked gates or unscalable fences. The same barriers that are intended to stand as bulwarks against piracy,³⁶ are also intentionally designed to allow some unauthorized admissions to otherwise corralled, copyrighted works. Because the gates are imaginary, individuals must make independent moral judgments about when it is acceptable to enter and when unauthorized entry might constitute a trespass. These judgments are likely to be based on past experiences, observation of others' behaviors in similar circumstances and some understanding of the precepts of copyright law.

The primary doctrinal justification individuals have for making non-permissive uses of copyrighted works is the concept of fair use, codified in section 107 of the Copyright Act,³⁷ and framed as a limitation on the exclusive rights of copyright owners. A "fair use" of a copyrighted work may be unauthorized, but it is not an infringement of a copyright.³⁸ Section 107 explicitly sets out exemplary unauthorized uses that are potentially (but not necessarily) fair, including "criticism, comment, news reporting, teaching, scholarship or research."³⁹ These examples were arguably chosen based on observed pre-existing norms of unauthorized use. It is difficult to imagine full and effective criticism, for example, unless access to the work being critiqued is free, both in the sense of being unfettered and also being without cost, so that excessive access charges cannot prevent or compromise use of the work.

The listed archetypical fair uses are all socially valuable activities that copyright owners would be motivated to attempt to restrain or manipulate. Negative criticism or commentary, unfavorable news reporting and inauspicious treatment by teachers, scholars and researchers are all activities that the First Amendment protects. For this reason alone, these activities must, as a general proposition, fall within the scope of fair use when aimed at (and therefore making use of) copyrighted works.⁴⁰ These are also uses

35. Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 OHIO ST. L.J. 569, 572 (2001).

36. Defined here as large scale, for-profit commercial copyright infringement.

37. Fair use is further codified in 17 U.S.C. § 1008 (1992).

38. See 17 U.S.C. § 107 (1992) (establishing fair use of copyrighted material).

39. *Id.*

40. See, e.g., C. Edwin Baker, Essay, *First Amendment Limits on Copyrights*, 55 VAND. L. REV. 891, 898-99 (2002) (noting role of press clause on ensuring constitutional protection against improper governmental interventions); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 988 (1970) (suggesting conflict between First Amendment and Copyright Act can be reconciled by accommodation of their respective principles); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 166-67 (1998) (differentiating between permissible and impermissible uses of copyrighted materials); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees*

of copyrighted works that are likely to result in the authorship of new creative works. Therefore, copyright law is doctrinally bound to allow, if not encourage, some unrestricted usage through fair use. The scope of fair use is always broader for unauthorized users who make a “transformative use” of a preexisting work and thereby create something potentially worthwhile themselves.⁴¹ A survey of fair use jurisprudence suggests that people who make unauthorized uses of copyrighted works for the express purpose of creating new, original works are viewed as having earned the right to make fair uses of copyrighted works. Unproductive unauthorized uses are often viewed as less justifiable.

The end use copyright consumption that is the primary focus of this Article does not directly implicate First Amendment speech issues, though burdens on the freedom to communicate are consequentially imbedded in any encumbrance on the ability to access and use copyrighted works.⁴² Nor is consumption of copyrighted works extolled here for its role in stimulating the production of new works, though access to existing works assuredly generates new ones. Instead, the critical inquiry here is what fair use means when the anticipated use is not expected or likely to be linearly productive and, therefore, concerns about free speech or the transformative use doctrine do not calibrate the scope of fair use. If, for example, someone purchases a compact disk containing copyrighted music solely for personal entertainment purposes, which uses of the compact disk are unauthorized, and what unauthorized uses are unfair? Alternatively, assuming it was possible as a technological matter, is it fair to loan an e-book to a friend or make copies of it, even though the copyright owner has requested that you do not?

of Free Speech and Press?, 17 UCLA L. REV. 1180, 1184 (1970) (describing conflict over which forms of speech fall within meaning of First Amendment).

41. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[Transformative works] lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”) (citation omitted); see also *Princeton U. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (noting degree to which challenged use transforms original work is determinative of whether copyright law has been violated); *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 923 (2d Cir. 1994) (explaining that while transformative use is not essential for finding of fair use, it may serve to outweigh other factors suggesting unfair use); *Penguin Books, U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 2000 U.S. Dist. LEXIS 10394, at *54 (S.D.N.Y. July 21, 2000) (concluding that fair use doctrine intends to protect transformative uses); *Am. Geophysical Union v. Texaco*, 802 F. Supp. 1, 11 (S.D.N.Y. 1992) (noting that transformative, productive secondary uses have been historically favored throughout development of fair use concept); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (finding transformative use or productive use of secondary work essential for finding of fair use).

42. See, e.g., *Baker*, *supra* note 40, at 894-95 (noting potential conflict between First Amendment and copyright law).

Section 107 sets out statutory “factors to be considered” when a court is evaluating whether any given non-permissive use is a fair one. The enumerated factors include: (1) the purpose and character of the use, including whether the use is of a commercial nature or for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work used; and (4) the effect of the use upon the value or potential market for the work.⁴³ Presumably, anyone contemplating an unauthorized use ought to be guided by these factors and the ways in which courts have applied them. Nevertheless, what this all means to a person who photocopies newspaper clippings and mails the copies to friends; or to someone who checks a computer game out of the library, plays the game and then returns it to the library several days later; or to a group of parents who share children’s videos and books-on-tape among themselves rather than each purchasing their own copies; or to a church that sponsors dances at which CDs of popular music are played; or a florist who plays the radio in her shop; or to a hair stylist that posts pictures of well-coifed celebrities on her salon wall, is unclear. Few have likely heard of section 107 of the Copyright Act and, even if they have, they are unlikely to feel informed or constrained by it.

Fair use is an elastic and evolving concept that perplexes even those charged with applying the doctrine. Consider the teachings of the *Sony Betamax* case,⁴⁴ one of the most important copyright disputes ever decided by the Supreme Court of the United States. In his *Sony* dissent, Justice Blackmun aptly stated: “The doctrine of fair use has been called, with some justification, ‘the most troublesome in the whole law of copyright.’”⁴⁵ As if to underscore this point, the five Justices comprising the *Sony* majority and the four dissenters managed to disagree over the doctrine’s general application and then, specifically, over how each and every one of the section 107 factors should be applied to the facts of the case.⁴⁶

The *Sony* decision had a direct impact on the lives of almost everyone in the United States by finding that taping television programs in homes

43. See 17 U.S.C. § 107 (listing factors to determine fair use).

44. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

45. *Id.* at 475 (Blackman, J., dissenting).

46. See, e.g., A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 60-61 (1989). Oddi observed: The Copyright Act subjects the “exclusive rights” to certain express exceptions. The “fair use” doctrine, as now codified in section 107 of the Copyright Act, provides one of the most significant exceptions to direct infringement. However, in the words of Justice Blackmun in the [*Sony*] *Betamax* case: “The doctrine of fair use has been called, with some justification, ‘the most troublesome in the whole law of copyright.’” As if this point needed any further demonstration, the majority and dissent in [*Sony*] *Betamax* proceeded to disagree over the doctrine’s application as a general principle and how each and every one of the factors were to be taken into account in its application.

Id.

on videocassette recorders, without the permission of those who owned the copyrights in those television programs, fell within the scope of fair use. Yet the majority opinion in *Sony*, like so much statutory and court-made copyright law, is an expressive disaster. The *Sony* plaintiffs, largely producers of television programs and cinematic movies, brought an action against Sony in federal district court, alleging that consumers who purchased Sony's Betamax videotape recorders were engaging in the unauthorized and infringing recording of copyrighted works that had been exhibited on commercially sponsored television. The action asserted that Sony was contributorily liable for this copyright infringement because they marketed the Betamax and profited from its sale. The plaintiffs sought money damages, an equitable accounting of profits and an injunction against the manufacture and marketing of videocassette recorders. The United States District Court for the Central District of California denied all relief, holding that noncommercial home recording of material broadcast over the public airwaves was a fair use of the copyrighted works and that Sony could not be held liable as a contributory infringer, even if the home use of a videocassette recorder was considered an infringing use.⁴⁷

The United States Court of Appeals for the Ninth Circuit reversed, found Sony liable for contributory infringement and ordered the district court to fashion appropriate relief.⁴⁸ This "relief" could have enjoined the sale of videocassette players to consumers, or burdened such sales with licensing regimes or mandatory royalty payments. Instead, the Supreme Court reversed the court of appeals, but on a five-to-four vote that was unusual, even in the annals of controversial five-to-four Supreme Court splits, because of the atypical distribution of personages on each side of the decision: Chief Justice Burger and Justice Brennan voted with the majority, endorsing an opinion penned by Justice Stevens, and joined by Justices White and O'Connor, while Justices Marshall, Rehnquist and Powell joined Justice Blackmun's dissent.⁴⁹ Thus, the *Sony* outcome is not easily characterized as "liberal" or "conservative," as those terms are generally understood in the political context. Yet another odd aspect of this decision was that it was reached only after the Supreme Court heard oral arguments twice in the case before issuing its opinion.⁵⁰

The *Sony* majority opinion is routinely cited as support for analytic arguments made by both plaintiffs and defendants in the pleadings of copyright infringement cases because it manages to buttress a variety of conflicting propositions simultaneously.⁵¹ It covers so much rhetorical

47. See *Sony*, 464 U.S. at 419-27 (explaining procedural history).

48. See *id.* at 427-28 (noting decision of Court of Appeals).

49. See *id.* at 418 (breaking down distribution of Justices regarding Court's opinion).

50. See JAMES LARDER, *FAST FORWARD* 240-45, 264-74 (1987) (compellingly recounting odd aspects of *Sony* decision).

51. See, e.g., Reply Brief of Appellant, *Napster, Inc. A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (No. 00-16401), available at <http://>

territory that language taken from the decision can be (and is) used to support a wide range of constructions of the fair use doctrine.⁵² In one passage, the *Sony* decision goes so far as to assert a “presumption” that unauthorized commercial uses are infringing.⁵³ A somewhat reconfigured Supreme Court was later obligated to explicitly disavow this assertion to reach the desired analytic outcome in *Campbell v. Acuff-Rose Music, Inc.*,⁵⁴ another important fair use case litigated in the wake of *Sony*.

At issue in *Acuff-Rose* was the rap group 2 Live Crew’s commercially released parody of late musician Roy Orbison’s song “Oh Pretty Woman.” The Supreme Court’s verdict in the *Acuff-Rose* case was a unanimous one, reversing a court of appeals decision that had, in turn, reversed a district court holding. The *Sony* opinion included the express statement that “every commercial use of copyrighted material is presumptively . . . unfair”⁵⁵ The Court of Appeals for the Sixth Circuit relied heavily on this passage in rendering its decision for the copyright owner in *Acuff-Rose*, as 2 Live Crew’s disputed song parody was clearly a for-profit endeavor. Yet, in the *Acuff-Rose* majority opinion he penned, Justice Souter criticized the court of appeals decision for “inflating the significance” of the commercial nature of the work. He rather astonishingly took the court of appeals to task for inappropriately applying “a presumption ostensibly culled from *Sony*”⁵⁶ A more charitable view is that the court of appeals was simply reaching for the bright line it assumed the *Sony* court had thrown down to help illuminate the fair use fog permeating copyright jurisprudence. As *Acuff-Rose* made clear, however, though the *Sony* decision constituted an important statement on the scope of fair use, not even federal judges can agree on the content, meaning and further application of the statement.

Average consumers are probably oblivious to the judiciary’s role in keeping VCRs available and affordable. To them, the *Sony* case largely means that using a VCR to tape situation comedies, soap operas, dramas, news programs, movies, concerts and sporting events—indeed anything broadcast via television—is cost-free once they possess the necessary equipment, which is widely available. They are unlikely, however, to directly

news.findlaw.com/hdocs/napster/brief0912.pdf; see also Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right To Photocopy Freely*, 60 U. PITT. L. REV. 149, 195 (1998) (describing *Sony* as “rife with broad generalizations”).

52. See, e.g., Bartow, *supra* note 51, at 195 (discussing how conflicting language in *Sony* has been used to argue and support opposing constructions of fair use); Litman, *Reforming*, *supra* note 33, at 613 n.135 (describing *Sony* as illustrative of fact-specific nature of fair use); James E. Murrill, Jr., *Sounds and Silence: Downloading and Fair Use in A & M Records, Inc. v. Napster*, 24 AM. J. TRIAL ADVOC. 469, 470 (2000) (discussing Napster’s argument that its service constitutes fair use under *Sony*).

53. See *Sony*, 464 U.S. at 451 (describing commercial use of copyrighted material as “an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright”).

54. 510 U.S. 569 (1994).

55. *Sony*, 464 U.S. at 451.

56. *Acuff-Rose*, 510 U.S. at 570.

credit five Supreme Court Justices with interpreting copyright law in a way that makes unregulated taping possible.⁵⁷

Nor are they likely to comprehend why individual acts of copying are treated disparately depending on the copying mechanisms employed. For example, while the Audio Home Recording Act⁵⁸ *de facto* legitimized making a non-profit copy of a song to share with another person using analog technology, using peer-to-peer file sharing software to accomplish the same end has been held to infringe copyrights.⁵⁹ Analog cassette tape recorders can make an unlimited number of copies of a work while, under the Recording Act, digital audio tape recorders are legally required to contain serial copy management systems.⁶⁰ The inescapable conclusion that the copyright laws permit making poor to mediocre quality unauthorized copies, but forbid making good ones, is apt to be quite confusing to the ordinary observer.

2. *The Limitations of Consensual Fence Building*

As a consequence of the ambiguity and uncertainty of the copyright laws, select copyright communities (those with at least some indicia of being close-knit) have engaged in, or least attempted, consensual rulemaking, though not particularly spontaneously or informally. Examples of this include CONTU, the “photocopy guidelines” and CONFU.

57. One recent estimate is that 95 million U.S. households have VHS video-cassette recorders, while 30 million have DVD players. See Ann Kellan, *Is VHS Obsolete?* (CNN television broadcast, Jun. 25, 2002), at <http://www.cnn.com/2002/TECH/ptech/06/25/dvd.vhs/index.html> (discussing growing trend in household use of DVD players).

58. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4247 (codified in scattered sections of 17 U.S.C.).

59. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 920, 927 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002) (preliminarily enjoining Napster from engaging in, or facilitating others in, copying, downloading, uploading, transmitting or distributing plaintiffs' copyrighted music, based on plaintiffs' prima facie establishment of Napster's direct copyright infringement and court's conclusion that Napster likely engaged in contributory infringement of plaintiffs' copyrights). Plaintiffs established that virtually all of Napster's users engaged in unauthorized downloading or uploading of copyrighted music, that Napster had reason to know about infringement by users and that Napster facilitated such file sharing. *Id.* at 911, 919-20; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014, 1020 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002) (affirming district court's conclusions that actions of Napster's users violated plaintiffs' copyrights and that Napster's knowledge of its users actions made file-sharing company contributorily negligent).

60. See 17 U.S.C. § 1002 (1992) (instituting copying controls and prohibiting importation, manufacture and distribution of nonconforming digital audio recording devices; developing procedure to verify that systems meet Act's standards; prohibiting encoding of information on digital music recordings; and requiring accurate transmission or communication of copyright status of recordings).

a. CONTU

The United States Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) to study and make recommendations about copyright issues related to computers and photocopiers.⁶¹ Congress decided that the Commission should be comprised of four members to represent the interests of authors and publishers, four members from "copyright user" communities (largely libraries and educational institutions), four general public interest representatives, including a consumer protection expert and the Librarian of Congress.⁶²

Ultimately a majority of CONTU members recommended (among other things) that computer programs in machine-readable form should explicitly be deemed copyrightable subject matter.⁶³ A spirited dissent by one Commissioner, author John Hersey, opined that computer programs were fundamentally different in nature from copyrightable works such as sound recordings, motion pictures and videotapes.⁶⁴ He argued that conventional works used technology to communicate with human beings, while computer programs communicated only with machines, and were properly described as labor saving mechanical devices rather than copyrightable literary works.⁶⁵ Nevertheless, apparently relieved to have another entity make the call, Congress passed the CONTU majority's recommended amendments to the copyright statute without debate.⁶⁶ In this way, informal (if not completely consensual) rulemaking begat statutory copyright law. Though in this case perhaps ill advised, it represented the grafting of one set of real space norms, copyright protections for literary works, onto electronically embodied creations.

b. The "Photocopy Guidelines"

While the Copyright Act of 1976 was being debated and drafted, a coalition of twenty-five educational associations (the "Ad Hoc Committee on Educational Organizations on Copyright Law Revision") advocated a blanket exemption from infringement liability for copying done for non-

61. See, e.g., NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS (CONTU), CONTU GUIDELINES ON PHOTOCOPYING UNDER INTERLIBRARY LOAN ARRANGEMENTS—FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 54-55 (1979), available at <http://www.cni.org/docs/infopols/CONTU.html> (last visited July 30, 2002).

62. See Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 695 n.128 (outlining Commission members).

63. See *id.* at 665 (noting finding of Commission).

64. See *id.* at 737 (summarizing Commissioner Hersey's dissent).

65. See *id.* (opining that computer programs in machine-readable form should not be copyrightable because they are machine parts). "When a program becomes machine-readable the 'writing' metaphor breaks down . . ." *Id.*

66. See *id.* at 666, 694 (mentioning lack of debate in Congress over amendments to statute).

commercial educational purposes.⁶⁷ Publishing interests forcefully opposed this proposal. In an effort to defuse some of the tension surrounding educational photocopying issues, three groups of authors, publishers and educational institutions (the American Association of Publishers, the Ad Hoc Committee on Educational Organizations on Copyright Law Revision, and the Author's League of America, Inc.), were brought together and charged with finding common ground on the issue of educational photocopying. Together they negotiated "minimum standards of educational fair use," which were denominated the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," [hereinafter referred to as the "Guidelines"].⁶⁸ These Guidelines were, and continue to be, controversial.⁶⁹

67. See Eric D. Brandfonbrener, Note, *Fair Use and University Photocopying*: *Adison-Wesley Publishing v. New York University*, 19 U. MICH. J.L. REFORM 669, 682-83 (1986) (explaining that Congress paid considerable attention to copyright issues presented by university photocopying throughout twelve years of congressional debate regarding § 107). Though this recommendation was ultimately rejected, § 107 was amended to include a specific reference to "multiple copies for classroom use." *Id.* at 684. The first prong of § 107's four part test for fair use was also amended to direct consideration of whether a use was commercial or non-profit educational in nature. *Id.*

68. ASS'N OF AM. PUBLISHERS, INC., AD HOC COMM. ON EDUC. ORGS. ON COPYRIGHT LAW REVISION & AUTHORS LEAGUE OF AM., INC., AGREEMENT ON GUIDELINES FOR CLASSROOM COPYRIGHTING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS, H.R. REP. NO. 94-1476, at 68-70 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681-84.

69. See Bartow, *supra* note 51, at 160-62 (footnotes omitted) (discussing controversial nature of guidelines).

Described by some academics as "a publishers' wish list of restrictions," the Guidelines authorize teachers to make a single copy of a chapter from a book, article from a periodical or newspaper, short story, short essay, short poem, or chart, graph, diagram, drawing, cartoon, or picture from a book, periodical or newspaper "for his or her scholarly research or use in teaching or preparation to teach." The "Guidelines" for making multiple copies are much more restrictive. Copies must be limited to one per student, and the reproductions must be brief. Complete works can be reproduced only if they are comprised of less than 2,500 words. With respect to longer works, only 1,000 words or ten percent of the work, whichever is less, may be reproduced, though copying up to 500 words is always permissible.

The decision to photocopy these short works or excerpts must also be spontaneous. "Spontaneity" under the Guidelines requires that the photocopying be at the "instance and inspiration of the individual teacher," and that the time span between the decision to use the work and the actual use be "so close in time that it would be unreasonable to expect a timely reply to a request for permission." According to at least one court, providing photocopies of copyrighted materials at the beginning of a semester that will not be assigned until later in the semester is a violation of the spontaneity requirement.

The Guidelines restrict "cumulative" photocopying by limiting the use of a brief or excerpted work to one course per school, and, with the exception of works contained in newspapers and "current news periodicals," confine a teacher to nine or less "instances of such multiple copying" per course. Teachers are further limited to copying only one short

Both the American Association of University Professors (A.A.U.P.) and the Association of American Law Schools (A.A.L.S.) denounced the Guidelines as too restrictive of photocopying.⁷⁰

The Ad Hoc Committee answered these objections by emphasizing that the Guidelines were only minimum standards for educational photocopying, and expressed "hope that the interested parties would meet in the future to develop new guidelines for areas where the Guidelines did not apply or were inappropriate." This never happened, and educational photocopying disputes have since moved to the courtroom.⁷¹ Though

work or two excerpts per author, and only three works or excerpts per collective work or periodical volume per class term.

The Guidelines also set forth the following additional restrictions. Photocopies cannot "be used to create or to replace or substitute for anthologies, compilations or collective works." No copies can be made from "consumable" works that students could otherwise be required to purchase, such as "workbooks, exercises, standardized tests and test booklets and answer sheets." Copying cannot "substitute for the purchase of books, publishers' reprints or periodicals[,] be directed by [a] higher authority [or] be repeated with respect to the same item by the same teacher from term to term." "No charge shall be made to the student[s] beyond the actual cost of the photocopying," and all photocopies must carry a copyright notice.

This is what adherence to the Guidelines' construction of "fair use" means in practice: First, a professor makes the "spontaneous" decision to use a portion of a copyrighted work that is in no way "consumable" or a substitute for a reprint or other publication that she could have required students to purchase. Then, the Guidelines dictate that the professor may photocopy only excerpts of about three pages or less from any copyrighted work (and less than two pages if the underlying work is a short one); require that the professor copy and distribute no more than nine of these diminutive excerpts during the entire semester; and compel the professor to ensure that she is the only person in the entire school who multiple-copied each excerpt that term. The professor must additionally warrant that, in totality, the photocopied excerpts do not take on the appearance or function of an anthology or compilation. Finally, the professor must never use the excerpt again.

While compliance with the Guidelines almost automatically renders educational photocopying fair use, failure to comport with the Guidelines does not (yet) automatically constitute copyright infringement. Educational photocopying that does not meet the Guidelines is evaluated under the general fair use four part test set out in § 107.

Id.; see also Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1562 n.145 (describing "poorly kept secret" in academia that classroom copyright guidelines are often ignored or rationalized away); Eileen N. Wagner, *Beware of the Custom-Made Anthology: Academic Photocopying and Basic Books v. Kinko's Graphics*, 68 EDUC. L. REP. 1, 15 (1991) (explaining that even though educators have complained about unrealistic burden of Classroom Guidelines, they have not been amended for twenty-five years).

70. See Bartow, *supra* note 51, at 159-60 (recounting negative views of Guidelines).

71. See, e.g., Princeton U. Press v. Mich. Doc. Servs., 855 F. Supp. 905, 907-08 (E.D. Mich. 1994), *aff'd in part and vacated in part*, 99 F.3d 1381 (6th Cir. 1996) (holding that act of copying works of scholarship and binding copies into "coursepacks" for college students violated fair use doctrine); Basic Books, Inc. v.

Congress specifically declined to incorporate these Guidelines into the Copyright Act, the few judges that have considered the issue have opined that educational photocopying meeting the Guidelines constitutes fair use of copyrighted works. No guidance has been given, however, about how far an educator can surpass the limitations of the Guidelines without exceeding the boundaries of educational fair use.

While in "real space" there are certainly tensions around the scope of educational fair use,⁷² in cyberspace these are exacerbated by the ability of content owners to track copying online as they could never do with photocopy machines. If she considers the copyright issues at all, a teacher might grant herself broad fair use privileges when it comes to photocopying a few chapters out of an out-of-print tome⁷³ for her students, taking a calculated risk that either she will not get caught, or will be successful in mounting a fair use defense to any infringement allegation. When use and duplication of electronic content is carefully controlled and proactively monitored, however, the same teacher may not even have the option of making copies for her class, regardless of whether it would be fair use to do so. Recent efforts by the U.S. Copyright Office to hammer out written policies concerning educational photocopying that were acceptable to

Kinko's Graphics Corp., 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (holding that Kinko's copying of excerpts from books whose copyright was owned by Basic Books, compiling excerpts into course "packets" and selling packets to college students for profit violated Copyright Act).

72. See Bartow, *supra* note 51, at 150-51 (explaining how compression of fair use in education by judges responding to publishers' concerns leads to educational institutions' attempts to simultaneously mollify publishers and protect themselves against charges of copyright infringement); Stephana I. Colbert & Oren R. Griffin, *The Impact of "Fair Use" in the Higher Education Community: A Necessary Exception?* 62 ALB. L. REV. 437, 437 (1998) (discussing aggressive debate among publishers, authors and academics concerning fair use doctrine); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 658 (2001) (discussing *Williams & Wilkins* case and suggesting that although *Williams* may give CONTU Guidelines important support, *Williams* is arguably inconsistent with fundamental precepts of fair use); Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 CORNELL J.L. & PUB. POL'Y 541, 557 (1999) (noting that photocopying of academic expression is form of derivative use that has recently been scrutinized in university context).

73. Some commentators argue that if a content owner fails to make a work available (such as by letting a book fall out of print) then non-permissive access to, and copying of the work would fall within the doctrine of fair use. See, e.g., Brad King, *Why You Can't Sell What You Buy*, WIRED (Jan. 16, 2001), at <http://www.wired.com/news/print/0,1294,41184,00.html> (discussing doctrine of first-sale within fair use doctrine). However, at least one federal judge has ruled that out of print works present the most compelling case for royalty payments since there is no other mechanism by which a content owner can extract profits from the work. See *Kinko's*, 758 F. Supp. at 1533 (stating analysis that unauthorized copying damages out-of-print books more than it damages current or available ones because copy royalties are sometimes only stream of income available to authors and publishers of out-of-print works); see also Bartow, *supra* note 51, at 57 (noting that availability of work has inverse relationship with prospective scope of fair use usability resulting in out-of-print works having broader fair use scope than widely-distributed books).

both content users and content owners were unavailing,⁷⁴ and there is no indication that copying issues will be resolved consensually in the future.

c. CONFU

The Conference on Fair Use ("CONFU")⁷⁵ was an attempt by non-profit educational copyright "consumers" such as libraries, and copyright "producers" such as publishers, to cooperatively draft a set of rules pertaining to the scope of fair use in electronic materials that both interest groups could live with. However, these negotiations failed because the parties were too far apart on many issues.⁷⁶ One commentator noted:

[Ninety-three] organizations representing for-profit and non-profit publishers, the software industry, government agencies, scholars and scholarly societies, authors, artists, photographers and musicians, the movie industry, public television, licensing collectives, libraries, museums, universities and colleges spent untold amounts of money and more than 2 1/2 years of their time and their energy to find agreement on the scope of fair use in various electronic contexts. Now it seems that not enough of their constituents, and in some cases, not even the participants themselves, agreed with the result to qualify the Proposed Guidelines as consensus documents. Forgive the overgeneralization, but users thought the Guidelines were overrestrictive and copyright owners thought they were giving away too much.⁷⁷

The subject of interlibrary loans (ILLs) was one area of CONFU contention.⁷⁸ Publishers manifested a powerful desire to curtail or eliminate ILLs in the digital environment, thereby derailing a norm of library func-

74. See NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 127 n.9 (2000) [hereinafter *DIGITAL DILEMMA*] (explaining that Guidelines attempted to clarify copyright law, but political complexities made it difficult for truly workable guidelines to emerge).

75. See generally Bruce A. Lehman, *The Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use [CONFU]*, (Nov. 1998), at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.pdf> (last visited July 30, 2002).

76. See Crews, *supra* note 72, at 610-11 (analyzing CONFU's inability to reach consensus on proposed guidelines for multimedia development, digitizing of visual images and distance learning); Laura N. Gasaway, *Impasse: Distance Learning and Copyright*, 62 OHIO ST. L.J. 783, 799 (2001) (explaining that although CONFU participants spent two years drafting educational fair use guidelines, resulting guidelines did not receive broad support).

77. *CONFU: The Conference on Fair Use*, at <http://www.utsystem.edu/ogc/IntellectualProperty/confu.htm> (last visited July 30, 2002).

78. See, e.g., *CONTU: CONTU Guidelines on Photocopying Under Interlibrary Loan Arrangements*, at <http://www.utsystem.edu/ogc/IntellectualProperty/illconfu.htm> (last visited July 30, 2002) (establishing guidelines "to assist librarians and copyright proprietors in understanding the amount of photocopying for use in interlibrary loan arrangements permitted under the copyright law").

tionality.⁷⁹ Librarians objected strenuously, since this would interfere with libraries' ability to continue to offer their patrons the same levels of access and service. No effective consensual rulemaking developed. Instead, using their superior bargaining power, publishers have simply imposed their desired outcome on libraries through licensing agreements, at least in the context of electronic journals,⁸⁰ as is discussed in more detail below.

While these undertakings were far more formal and contrived than the rulemaking Ellickson observed in Shasta County, they still represented communitarian attempts to reach common understandings and build frameworks for informal dispute resolution of select copyright issues. However, the parties largely failed to informally agree upon how to characterize existing practices, or to reach anything resembling consensus on the most controversial issues. As a result, the negotiation outcomes do not form the foundation for emerging norms, as areas of agreement were not widely accepted by nor communicated to the interested groups putatively represented at these negotiations.

The law does not inform end consumers of copyrighted materials about the appropriate parameters of unauthorized use of copyrighted materials and, unless they are part of a particular copyright-using community, such as teachers, researchers or librarians, individuals are unlikely to have any role in any ad hoc rule making, or even an awareness of it. Almost by default, the absence of cogent and accessible copyright laws and copyright rules leaves only norms, the actual practices and conventions of copyright use, which simultaneously influence and are shaped by both emerging technologies and individual acts.⁸¹

3. *Imaginary Fences and Gates Make Ineffectual Corrals*

At a very general level, most people would probably agree that respecting copyrights is a desirable social practice, especially if they understand the role that copyrights can play in compensating content creators, and in providing incentives for investments in new creative works. Dennis Chong has argued that "even when the substance of the group norm does not directly serve one's interest, it can be in one's interest to conform when the norm represents a social convention that everyone has an inter-

79. See Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 148 (2000) (recounting negotiations between publishers' representatives and librarians over guidelines for Interlibrary Loan in digital environment).

80. See *id.* (noting that recent license agreements for electronic journals effectively made CONTU Guidelines inapplicable by placing burdens on lending library rather than borrowing library).

81. Cf. Etzioni, *supra* note 16, at 157-78 ("[S]ocial norms . . . are a major factor among those that shape predispositions, the wants of people, and the bases of individual choices."). Norms are not merely formed via rational choice. According to Etzioni, "the sources of norms are remote in time . . . they are passed from one generation to the next; and they derive authority by virtue of their being a part of tradition rather than reflecting deliberations." *Id.* at 173.

est in supporting so long as others do so.”⁸² Forgoing unauthorized uses of copyrighted works might become a norm if it was assumed and expected that such forbearance would incentivize the creation and distribution of new copyrighted works. Nevertheless, few average consumers are apt to believe, nor would it be logical or reasonable for them to presume, that respecting copyrights at a personal level will have a cognizable effect on the price or selection of creative works available for their consumption.⁸³ Rather, they are more likely to respect copyrights (if at all) because it seems ethical, or because they are forced to do so by technological means, or because they fear being sued or arrested if they do not.

An important threshold question, then, is: When is an unauthorized use of a copyrighted work unethical and actionable? There are significant disagreements concerning what specifically it means to respect copyrights, and the level of respect that copyrights ought to be accorded.⁸⁴ At one

82. Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2082-83 (1996).

83. In a different context, C. Edwin Baker explained the disjuncture between the costs and benefits and the prices of media products as follows:

Think for a moment about externalities of media practices and products. Members of the public benefit tremendously if a newspaper's reputation for investigative reporting deters misconduct by government officials or corporate executives, but effective deterrence means that the newspaper has no story to sell. The paper receives nothing for this valuable product. Even when an investigation uncovers spectacular misconduct and publication leads to reform, most people receive the benefit without buying or reading the paper. Similarly, even a person who buys no newspaper, biography, or novel can reap a reward from those who do if their media consumption leads them to be wiser voters or more cultured people. In contrast, you can be hurt by another person's media consumption if it leads to unwise voting, a boring personality, or damage to your material or cultural environment. Most dramatically, you are hurt if consumption by others is one factor in a causal chain that leads them to murder, rape, or rob you. These are all costs and benefits that are not taken into account in the selling or purchase decisions and, thus, lead the market to misprice media products.

In economic terms, these costs and benefits are not brought to bear on the entity producing the content: they are not “internalized” by publishers, for example. Products that create negative externalities are sold for less than their real social cost, while those creating positive externalities must be sold for more than their social cost. Given the economic maxim that a lower price generates more purchases, people will consume more media products that create negative externalities and less of those that create positive externalities than they would if charged the item's real cost. Given the huge externalities, both positive and negative, almost no relation can be expected between the media the market actually provides and the media it would provide if properly priced.

C. Edwin Baker, *Two Misplaced Objections*, 23 BOSTON REV. 14, 14 (1998), available at <http://bostonreview.mit.edu/BR23.3/baker.html> (last visited July 30, 2002).

84. Forcing subtle, nuanced and often diverse bodies of scholarship into one category along a tripartite continuum is a problematic undertaking at best. Nevertheless, it does appear that the scholarship assessing the level protection that should be afforded to copyrights can be divided into three groups: those that favor strong, or “high barrier” protections; those that favor weak, or “low barrier” protec-

end of the spectrum are copyright absolutists, who endorse broad “high barrier” copyrights, either because they believe that robust copyright protections are likely to spur investment in the creation and distribution of

tions; and those that take a middle of the road view on the subject. For a further discussion of scholars taking the “high barrier” road, see *infra* note 85 and accompanying text. For a further discussion of scholars taking the “low barrier” road, see *infra* notes 86-87 and accompanying text.

“Middle of the Roadists” (arguably or by self-description) include Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyperlinking to Infringing Content*, 87 IOWA L. REV. 829, 845-49 (2002) [hereinafter Dogan, *Infringement Once Removed*] (proposing standard for secondary copyright liability that expressly considers tension between copyright’s goals of inducement and restraint); Stacey L. Dogan, *Is Napster A VCR? The Implications of Sony for Napster and Other Internet Technologies*, 52 HASTINGS L.J. 939, 950-53 (2001) [hereinafter Dogan, *Is Napster A VCR?*] (arguing for balancing approach to evaluating applicability of staple article of commerce doctrine); Jon Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 599-603 (1999) (advancing pro-creativity argument for repeal of Term Extension Act and importance of First Amendment limitations); Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637, 680-82 (2000) [hereinafter Ghosh, *Regulatory Takings*] (arguing that intellectual property is protected by Takings Clause to greater extent than real property); Shubha Ghosh, *Gray Markets in Cyberspace*, 7 J. INTEL. PROP. L. 1, 30-32 (1999) [hereinafter Ghosh, *Gray Markets*] (arguing that intellectual property is different and more porous species of property than real property); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614-27 (1982) (describing three-prong test for determining fair use in copyright infringement cases that will unify various factors which courts have made relevant in fair use determinations); Dennis Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885, 997-90 (1992) (believing copyright to be appropriate as incentive to produce works that might not otherwise be produced); Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 996-1000 (1997) (noting that courts have dubious task in intellectual property cases of differentiating between imitation and improvement); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 BERKELEY TECH. L.J. 519, 546-57 (1999) (advocating need for copyright protection, but recognizing that too much protection may stall competition and innovation of technology); Eugene Volokh & Mark Lemley, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 210-14 (1998) (arguing that in libel cases, damages are appropriate for copyright and trademark claims and that intellectual property should not be beyond scope of First Amendment scrutiny); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2445-49 (1998) (discussing copyright law and deviations in treatment from other free speech restrictions and whether First Amendment due process rules should apply to copyright cases); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1890-93 (2000) (claiming that courts should interpret copyright law and Digital Millennium Copyright Act so that free speech and interests of society in preventing copyright infringement are balanced); Diane Leenheer Zimmerman, *Adrift in the Digital Millenium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279, 285-87 (2001) (questioning whether deviations in Copyright Act narrow rights on those who rely upon Act for research and education); see also generally Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel”*, 38 EMORY L.J. 393 (1989) (expressing, perhaps, low to moderate view of copyright protection).

new works, or simply because they deem content owners entitled to strong copyrights as a matter of right.⁸⁵ One radically opposing view is that copyright protection should be very weak, presenting “low barriers” to use and protecting against little beyond literal copying.⁸⁶ This precept is usually

85. Those who appear to be in favor of strong copyright protections (for a diverse range of reasons and not necessarily in every context) may include ED SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 150 (2000) (noting Congress’ constant expansion of copyrightable subject matter); Jane Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1619 (2001) (arguing that tighter control will offer public increased quantity and quality of work produced); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 260 (discussing how stronger copyright protections through institution of private property regime would result in greater savings for society); Halpern, *supra* note 23, at 11 (describing focus on law enforcement and importance of law enforcement to copyright law in society); Roberta Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?* 38 VAND. L.J. 1, 4-5 (1985) (describing moral right doctrine and discussing how implementation of doctrine would provide benefit of uniform means of protecting personal interests of creator and would permit courts to avoid reliance upon inferior theories); Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, (forthcoming 2003) (challenging Lessig’s view of copyright as control mechanism).

86. Advocates for “low barrier” approaches to copyright protections appear to this author to include STUART BIEGEL, *BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 291 (2001) (arguing that “not only is the current law not working . . . but that efforts to implement more restrictive laws have not succeeded in bringing private personal copying under control”), available at <http://www.gseis.ucla.edu/iclp/call-for-realism.htm>; LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 14-15 (2001) (advocating that constraints on “real space” creativity are no longer justified for Internet); JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 14 (2001) (“The fact that technology enables copyright owners to exercise more complete control is no reason to modify the copyright law to facilitate it.”); DAVID POST, *HIS NAPSTER’S VOICE IN COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN AN INFORMATION AGE* (W. Crews & A. Thierer eds., 2002), reprinted in *Mots Pluriels*, special edition (“The Net: New Apprentices and Old Masters”), No. 18 (August 2001), at <http://www.arts.uwa.edu.au/MotsPluriels/MP1801index.html>; SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 182-84 (2001); Keith Aoki, *(Intellectual) Property & Sovereignty: Notes Towards a Cultural Geography of Copyright*, 48 STAN. L. REV. 1293, 1314-18 (1996) (advocating “low barrier” in domestic U.S. context); Julie Cohen, *Copyright and The Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1142-43 (1998) (noting that copyright law authorizes too much intrusion and that proposed provisions would threaten constitutionally proscribed limits of copyright protection); Rod Dixon, *When Efforts to Conceal May Actually Reveal: Whether First Amendment Protection of Encryption Source Code and the Open Source Movement Support Re-drawing the Constitutional Line Between the First Amendment Copyright*, 1 COLUM. SCI. & TECH. L. REV. 1, 106-08 (2000) (favoring thin protection of copyright for software); Michael Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 169-73 (2000) (arguing that for complexity to be brought back to copyright, one must first expand interplay between copyright and free speech); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 64-65 (2001) (taking skeptical view on social value of price discrimination and arguing that reward for producer should be limited to amount adequate to stimulate creation of work); Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 SW. U. L. REV. 1, 1 (2000) (arguing that intellectual prop-

either based on the perception that all works build on a preexisting body of art, music, literature and knowledge, and therefore no new work is truly original (nor entitled to be treated as if it is), or tied to the belief that an expansive public domain is the best way to encourage the creation of beneficial new works.⁸⁷

Even advocates of the “low barriers” approach to copyright protection unequivocally recognize that acts of unauthorized copying can infringe copyrights. People who make multiple copies of others’ copyrighted works without permission or permissible motive, and then sell the copies to others for financial profit are sometimes referred to colloquially as “pirates.” Most observers would agree that extensive piracy represents the sort of quintessential feat of copyright infringement for which the copyright laws were drafted and are justifiably enforced. It is smaller scale acts of copying, in which the non-permissive copies may substitute for purchases of authorized ones but are not sold for financial gain, that incite disagreements with respect to the appropriate characterization of the copying and the appropriate treatment of the copier by the copyright laws.

Some unauthorized copying is tied to professional mores and traditions. For example, Robert Ellickson asserted that academics chronically ignore the prohibitions of copyright law by non-permissively photocopying each other’s scholarly writings but in so doing, adhere to professional norms designed to serve the specific interests of the academic community.⁸⁸ The relevant externalities—the costs of any copyright infringement—fall on publishers, but benefits to publishers accrue as well to the extent the copying leads to purchases of authorized copies of the copied work, or to the creation of new works that are issued and profited from.

erty clause should be able to control government’s ability to bypass financial scrutiny); Richard H. Stern, *Legal Protection of Screen Displays and Other User Interfaces for Computers: A Problem in Balancing Incentives for Creation Against Need for Free Access to the Utilitarian*, 14 COLUM.-VLA J.L. & ARTS 283, 328 (1990) (arguing that copyright protection of non-literal aspects and functional features of computer software does not promote but hinders technological progress); Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1184 (2001) (recommending limited personal use privilege for noncommercial uses of copyrighted works); John Perry Barlow, *The Economy of Ideas*, at <http://www.eff.org/~barlow/EconomyOfIdeas.html> (last visited Aug. 31, 2002) (arguing that entire concept of copyrights is outdated and ill-suited to cyberspace).

87. See James Boyle, *Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2038 (2000) (“[T]he romance with which we view authorial creation and the incentives/public goods story combine to provide a very powerful public rhetoric in support of expansive intellectual property rights . . .”).

88. ELLICKSON, *supra* note 10, at 260-62 (discussing photocopying practices of university instructors). Ellickson noted that “there is abundant, if unsystematic evidence that university instructors engage in rampant unconsented photocopying when preparing class materials.” *Id.* at 260. Nevertheless, Ellickson pointed to “[i]mpressionistic evidence suggest[ing] that professors’ substantive norms *do* disallow the copying of major portions of books for classroom use” where “such copying would significantly diminish authors’ royalty income.” *Id.* at 262 (emphasis in original).

Other unauthorized acts of copying occur within a more deeply personal sphere, and therefore implicate notions of a right to autonomy over one's physical possessions within the home, in addition to copyright concerns. Music, for example, might be copied so that several household members could enjoy it simultaneously in various rooms or automobiles, or so that one person could listen to it in several different venues more conveniently, without having to move a compact disk or MP3 player back and forth. When, where and how often the music will be played, are choices individuals may resist having monitored or proscribed by outsiders. The ability to make a few personal copies of the music increases the autonomy individuals have over use of the music. Whether copyright law provides individuals with a legal "right" to copy simply on the basis of a preference for this autonomy alone, when the copying does not directly advance any other social goal, is a source of great contention. Whether individuals have the actual practical ability to make personal copies, however, is largely determined by the capabilities of the technologies that are available to them, which, in turn, is increasingly a function of the copyright laws. Accordingly, some copying technologies are openly permitted within the confines of the imaginary copyright corral, while others are fenced out.⁸⁹

89. Copying technologies that are openly permitted include VCRs, photocopiers and analog cassette recorders. *See, e.g.*, 17 U.S.C. § 108 (1998) (discussing conditions under which library photocopying is permissible); *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 460 (1984) (noting that videotaping live broadcasted television programs for personal use did not constitute copyright infringement). Similarly, the Diamond Rio technology of copying music files from hard drives (not directly from a digital recording) is permissible, having recently survived litigation. *See Indus. Assoc. of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1076 (9th Cir. 1999) (finding that MP3 player did not infringe upon copyright law because it did not directly reproduce digital recording). Conversely, digital audio tape, or DAT, is subject to certain statutory constraints. *See* 17 U.S.C. § 1001-10 (2001) (listing special restrictions on digitally copied recordings). Copying technologies that are fenced out include many of the most popular file-sharing technologies. *See, e.g.*, *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015-17 (9th Cir. 2001) (commenting that direct economic benefit is not required to show commercial use, however, repetition can show commercial use); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 430 (2d Cir. 2001) (upholding injunction on distribution of encryption code that jeopardized DVD copyrights); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (noting that defendant used web service for commercial use by drawing clients to attract large advertising base); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 226-27 (S.D.N.Y. 2000) (ruling that irreparable harm would occur without injunction preventing distribution of DVD encryption); Brad King, *Ruling Spells Doom for Aimster*, *WIRED* (Sept. 4, 2002), at <http://www.wired.com/news/print/0,1294,54950,00.html> (noting that *Napster* caused demise of other such downloading and file-sharing services); King & Terraciano, *supra* note 3 (discussing copyright infringement against Scour, another music trading service, which caused its bankruptcy).

4. *Norm Gaps*

Sometimes “norm gaps,” a disjuncture between actual and desirable social practices, can exist or develop in a given milieu. Steven Hetcher has explained:

Gaps between actual versus desirable social practices may emerge for a variety of reasons, including small group migrations or the discovery of new scientific information. Sometimes when a smaller group migrates into a larger group, some minority practices are deemed to be out of step with the morality of the majority group, and a norm gap exists between actual and desirable practice from the majority perspective. In the case of cigarette smoking, the disclosure of new scientific information about the health impacts of smoking has opened a gap between actual and desirable practices.⁹⁰

Some large institutional copyright owners lobby and litigate in an effort to close the norm gaps they perceive between actual and desirable social practices with respect to copyrighted works. Certainly there is little evidence of strong norms of cooperation and trust between copyright holders and their customers. Assuming that fostering and maintaining appropriate levels of respect for copyrights are indeed advantageous societal objectives (and this author believes that as a general matter they are), it is worth considering some of the possible impediments to achieving them: The complexity of copyright law; exaggerations about the scope of copyright protections by copyright owners; hypocrisy by copyright owners who demand respect for their own copyrights but ignore the copyrights of others; attempts to copyright protect public domain works; and a sense that copyrights are constructed to provide content owners with something resembling a free lunch.

a. The Gap-Creating Complexity of Copyright Law

Part of the explanation for any “copyright norm gap” may be that the copyright law is voluminous, complicated and often counterintuitive to non-lawyers (and sometimes even to lawyers as well). This is quite problematic in contexts in which the cumulative behaviors and attitudes of individuals toward copyrights can significantly affect markets and industries.⁹¹ Robert Ellickson maintained that when people find the costs

90. Hetcher, *supra* note 19, at 896.

91. See DIGITAL DILEMMA, *supra* note 74, at 127 (explaining that current copyright law is focused less on behavior of large organizations than on behavior of individuals), available at http://www.nap.edu/html/digital_dilemma/ch4.html. Accordingly, the “voluminous” body of “arcane and complex” copyright law today works against individuals, who lack the resources of large organizations to “analyze, understand, and even help draft legislation.” *Id.* In this environment, “[c]onsumers thus face the problem that the law is large, complex, and industry specific.” *Id.*

of learning about the law and submitting to formal dispute resolution processes to be very high, they will prefer to fall back on common-sense norms, and that if obtaining information is costly, "one cannot assume that people will both know and honor law."⁹² One important implication of high transaction costs for learning the law is that it may be meaningless for the government to reconfigure the law (or for copyright owners to lobby the government to reconfigure the law) if seemingly affected individuals will ignore or remain unaware of the law and any changes to it.

At present, most ordinary people are better versed in copyright myths and urban legends than in actual copyright law. Over a decade ago Jessica Litman observed that not even immediate and obvious stakeholders such as authors and publishers comprehend very much about the particulars of the copyright protection structure.⁹³ She further asserted that while members of the public do not find the overall idea of a copyright counterintuitive, they find the specifics of copyright law hard to grasp due to "its mind-numbing collection of inconsistent, indeed incoherent, complexities."⁹⁴ Amendments to the Copyright Act and the promulgation of "copyright-related" statutory provisions in Title 17 have only made the law in this area more complicated and less accessible since Litman wrote her compelling commentary.⁹⁵ Otherwise intelligent people may not even believe doctri-

92. ELLICKSON, *supra* note 10, at 281.

93. Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 236 (1991) [hereinafter Litman, *Myth*] (discussing failure of those whom copyright law was intended to protect to fully understand its protections). Litman stated:

Neither copyright law, nor the models that seek to interpret it, seem to pay great attention to the process of authorship. Perhaps because the universe appreciates the aesthetics of symmetry, authors appear to return the favor by paying little attention to the copyright law. One would think that the two realms scarcely overlapped for all the attention each receives from the other. One might posit that copyright law is written by lawmakers unfamiliar with the process of authorship and that authorship is committed by innocents unversed in the details of copyright. The hypothesis seems compelling if one has but slight acquaintance with both domains. Indeed, it is a hypothesis that remains persuasive notwithstanding that the copyright law was written not by lawmakers or bureaucrats, but by authors and publishers and the people who represent them. Although the community of industries that copyright affects paid close attention to the provisions of the copyright law during the long copyright revision process, individual authors and publishers appear to have internalized the substance of those provisions not at all.

Id.

94. *Id.* at 237-38.

95. See, e.g., Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.) (enhancing copyright protection for digitally created works); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 301-304) (extending copyright term to 95 years from date copyright originally secured and allowing libraries and non-profit educational institutions to, during last 20 years of any term of copyright of unpublished work, reproduce such work for purposes of scholarship or research).

nally accurate explanations of pertinent facets of copyright law. As Sheldon Halpern related:

Let's assume that you've got a client who says, "I've written a book, how do I copyright it?" Well, if you tell the client the truth, you will say, "You already have." The client will say, "I don't believe you," and will go away. The client will go to somebody else who will tell the client, "If you pay me some money, I will file some papers in the Copyright Office." But the fact is that the first answer is the correct one.⁹⁶

Litman also made the important observation that those who view copyright law in economic or utilitarian terms inherently assume something abjectly false: that the authors for whom the copyright law seeks to create incentives for are generally aware of, or responsive to, this incentives framework.⁹⁷ Mere passive consumers of copyrighted works are even less likely to be alert to, no less motivated by, their doctrinally assigned role in creating incentives for the authorship of new works and balancing the interests of content creators, content distributors, and society. Though they are theoretically constrained by copyrights, neither the substantive requirements nor the substantive consequences of the copyright laws are likely to be apparent to the average individual consumer of copyrighted works.

More recently the authors of *The Digital Dilemma* concluded that both consumers and copyright owners are poorly informed about copyright law, and hold many widespread misconceptions about the nature and scope of copyrights.⁹⁸ For example, consumers may erroneously believe that lack of a copyright notice means that a work does not have copyright protection. Similarly, rights holders may be under the incorrect impression that copyright protection accords them absolute control over every use of the works in which they own copyrights.⁹⁹

96. Halpern, *supra* note 23, at 4-5.

97. See Litman, *Myth*, *supra* note 93, at 241 (observing potential false assumption by general population that authors understand copyright law).

98. See DIGITAL DILEMMA, *supra* note 74, at 123 (noting lack of formal research regarding public knowledge about copyrights as applied to intellectual property).

99. See *id.* at 127 (discussing copyright holders' lack of knowledge of scope of protections of their copyrights). As, the *Digital Dilemma* authors observed:

Although no rigorous study has been done, there is circumstantial evidence suggesting that many rights holders, too, are misinformed about legal behavior with respect to intellectual property, and do not understand the legal limits to their control. For example, a major academic publisher places the following legend on the page bearing the copyright notice for its publications: "No part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission."

Id.

In addition to noting the apparent pervasiveness of significant misapprehensions about copyright law, the authors observed that even well informed individuals might find the interpretation of the sections of the Copyright Act relating most directly to the conduct of members of the general public complex and difficult. Moreover, dependable assistance with copyright quandaries is unlikely to be available. While companies might have the resources to comprehensively analyze and track evolving copyright legal doctrine (and even to influence its legislative direction), ordinary consumers generally do not.

It is hard to see how the legal rules of copyright can serve the roles assigned to them by doctrinal scholars or economists if individual actors do not pay these legal rules any attention. The conclusion that *The Digital Dilemma* authors reached was that “if, as a matter of legal and social policy, members of the general public are expected to comply with the requirements of intellectual property law, then it is important that the law be set forth in a clear and straightforward manner that the general public can readily comprehend.”¹⁰⁰ They call for “a greater degree of simplicity, clarity, straightforwardness, and easy comprehensibility for all aspects of copyright law that proscribe individual behavior,” which might be facilitated by “the development of specific interpretive guidelines on those aspects of consumer behavior that raise questions frequently encountered in daily life in dealing with copyright protection.”¹⁰¹ In other words, copyright law should (but clearly does not at present) resonate like a social norm, and any given use to which copyrighted content is put should strike people as fairly obviously right or wrong.

b. Gap-causing Exaggeration About Copyright Scope

Another potential cause of copyright norm gaps is that copyright holders exaggerate the scope of their ownership rights. One group of commentators observed:

. . . [A] major academic publisher places the following legend on the page bearing the copyright notice for its publications: “No part of this book may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission.”

The use of similar legends or legal notices is widespread in the publishing industry. Yet the fair use privilege in the Copyright Act clearly authorizes the reproduction of at least some limited portion of a copyrighted publication for legitimate purposes, in-

100. *Id.* at 125.

101. *Id.* at 127. However, other commentators have observed that a unitary legal construct with universally applicable precepts, or “one size fits all” copyright law may not be possible or even desirable. *See, e.g.,* Halpern, *supra* note 35, at 590-91 (noting difficulties associated with unitary copyright law).

cluding critical commentary, scientific study, or even parody or satire. In that respect the absolute nature of the prohibition above is an overstatement of the copyright owner's rights. Similar observations could also be made with respect to the type of notice prohibiting any form of copying that appears on videocassettes and digital video disks (the so-called "FBI notice"), in the shrink-wrap licenses that accompany mass market software, in point-and-click licenses, and even on some individual Web sites.¹⁰²

No doubt intended to have an *in terrorem* effect, such overstatements may be counterproductive in terms of encouraging respect for copyrights. If consumers recognize them as overstatements and perceive them to be excessive, they may ignore them entirely as a result.¹⁰³ Even judges will sometimes remark on overreaching by copyright holders, as Judge Easterbrook did somewhat scathingly in one case, writing: "A definition of derivative work that makes criminals out of art collectors and tourists is jarring despite [the plaintiff's] gracious offer not to commence civil litigation."¹⁰⁴

The absolutist language used in copyright notices or "warnings" reflects the norm preferred by some copyright owners. This desired norm is that individuals abstain from any unauthorized copying whatsoever, which is much more restrictive of use than the actual copyright laws. Attempts at absolute copyright protection such as these are aggressively pitted against rights of fair use and access to information. Accordingly, it is difficult to characterize any given behavior or norm as the outcome of rights or interest balancing, even if people are assumed to know and understand copyright law, which they cannot be. Individuals may, however, recognize that certain actions taken by copyright holders are driven by greed rather than law. Additionally, there is a possibility that when the letter-C-in-a-circle copyright notice is followed by words such as "unauthorized reproduction prohibited," individuals react to it as a contemptuous ultimatum.¹⁰⁵

102. DIGITAL DILEMMA, *supra* note 74, at 128.

103. *See id.* (explaining importance for copyright holders to understand scope of copyright protection in order to avoid making overstatements).

104. *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997). It should be noted, however, that this was a Seventh Circuit case in which the plaintiff artist was simply asserting (unsuccessfully) a claim that had actually prevailed twice in the Ninth Circuit. The plaintiff relied on those Ninth Circuit holdings. *See Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309, 314 (D. Alaska 1993), *aff'd* 38 F.3d 1218 (9th Cir. 1994) (holding that mounting of copyrighted artistic note cards on ceramic tiles were derivative work and violated artists' copyright); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988) (affirming district court's finding that attaching photographs cut from commemorative book to ceramic tiles violated not only photographer's copyright, but that of book publishers as well).

105. *Cf.* Cass Sunstein, *Social Norms and Big Government*, 15 QUINNIPIAC L. REV. 147, 153 (1995) (noting that "Ultimatum Game" demonstrates that certain economic predictions about rational self-interest are incorrect; rather, social norms influence people's behavior when they negotiate distribution of potentially shared

In fairness to large institutional copyright holders, individual authors sometimes assert an equally expansive view of copyrights. Academics frequently post conference papers or works-in-progress on web pages with admonitions such as “Unauthorized reproduction prohibited,” or “No part of this paper may be reproduced or cited without the permission of the author.” Yet, it seems unlikely that the author of a paper containing such a notice truly expects readers to contact her before they click on the print button that the software, with which she has posted her paper, so conveniently and tantalizingly features. If she is so concerned about unauthorized reproductions, she probably should not have posted the document on the Internet in the first place, especially not on an unrestricted website and in an easily downloaded and/or printed format. Under the circumstances, her “copyright notice” is not entitled to a great deal of respect, nor in all likelihood does she truly expect it to receive much.¹⁰⁶

c. Gap-Fostering Exemplar Expediency

Copyright owners argue that unauthorized copying constitutes disdain for copyrights. Yet, large content owners will themselves fail to respect copyrights when it is in their financial interest to ignore the moral or even legal precepts of copyright constructs, especially if they do not fear provoking well funded copyright infringement suits. For example, despite the pro-artist rhetoric they often employ, large copyright owners are notorious for trampling the copyrights of individual authors. Such contempt for the copyrights of individual owners is evidenced by (to take one example) the devious machinations by which the recording industry recently tried to—and almost succeeded in—depriving songwriters of termination interests in their copyrighted works.¹⁰⁷ This was almost accomplished

pool of money); see also Bart Kosko, Editorial, *How Many Blonds Mess Up a Nash Equilibrium?*, L.A. TIMES, Feb. 13, 2002, at B13 (noting that “[s]tudies of ultimatums have shown that we can be so selfish that we become envious and we don’t achieve a Nash equilibrium”).

106. In contrast, many of the CDs produced by Righteous Babe Records, such as those featuring the music of Ani DiFranco, bear the somewhat cryptic legend, “unauthorized duplication, while sometimes necessary, is never as good as the real thing.” ANI DIFRANCO, *TO THE TEETH* (Righteous Babe Music/BMI 1999). It would be interesting to know what effect if any this approach has on consumers. In a slightly different vein Pete Seeger reported in June of 1967:

When Woody Guthrie was singing hillbilly songs on a little Los Angeles radio station in the late 1930s, he used to mail out a small mimeographed songbook to listeners who wanted the words to his songs. On the bottom of one page appeared the following: “This song is Copyrighted in the U.S., under Seal of Copyright # 154085, for a period of 28 years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don’t give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that’s all we wanted to do.”

Woody Guthrie Folk Festival, at <http://woodyguthrie.com> (last visited Aug. 30, 2002).

107. For a discussion of the music industry’s attempt to rob artists of their rights through legislation, see *infra* notes 107-14 and accompanying text.

when a Congressional aide, now employed by the Recording Industry Association of America (R.I.A.A.), surreptitiously placed a short but extremely substantive addition to the Copyright Act into the Satellite Home Viewer Improvement Act of 1999,¹⁰⁸ after debate on this unwieldy bit of unrelated legislation had concluded.¹⁰⁹ This brief insertion created a new category of “works for hire” under section 101(2) of the Copyright Act (“sound recordings”), and the R.I.A.A. (which has since hired the aide as a lobbyist)¹¹⁰ falsely represented to Congress that this was merely a “technical amendment.”¹¹¹

What the amendment really did was to render music companies the “authors” as well as the owners of sound recordings (performed by non-employee musicians) as a matter of law. If music companies had the forethought to “incorrectly” label the songs as “works for hire” in copyright assignment contracts beforehand, this surreptitious change in the law potentially made the designation very meaningful. The fact that many copyright assignments in the music industry asserted work for hire status over the master recordings of independently performed songs before this change in the law was attempted suggests music companies planned to reap the bounty of this “technical amendment” well in advance.¹¹² The amendment actually went into effect for a brief period of time, but when the true importance of the insertion became apparent, the subterfuge was undone by Congress, which then specifically revised the Copyright Act to expressly state that section 101(2) should be interpreted as if the amend-

108. See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 Appendix I, § 1011(d), 113 Stat. 1501, (codified at 17 U.S.C. § 101 (1994 & Supp. V 1999)), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (2000).

109. See 17 U.S.C. § 101 (1999) (changing definition of “work for hire” by inserting phrase “as a sound recording” after “audiovisual work”).

110. See, e.g., Brad King, *Rule Reversal: Blame it on RIAA*, WIRED (Aug. 10, 2000), at <http://www.wired.com/news/print/o,1294,38129,00.html> (“The RIAA hired Mitch Glazier, the chief counsel to the Senate subcommittee that passed the legislation, just three months after the controversial clause was added. . .”).

111. See, e.g., 145 CONG. REC. S14696, 14712 (Nov. 17, 1999); *Copyright Act is Amended to Make Sound Recordings Eligible for Classification as Works Made for Hire*, 21 No. 9 ENT. L. REP., Feb. 2000, at 8 (describing amendment as “technical and clarifying change” to Copyright Act); Courtney Love, *Courtney Love Does The Math*, SALON, at <http://www.salon.com/tech/feature/2000/06/14/love/> (last visited July 30, 2002) (discussing music piracy); Mann, *supra* note 34, at 52 (discussing amendment).

112. See Kathryn Starshak, Comment, *It's the End of the World as Musicians Know it, or is it? Artists Battle the Record Industry and Congress to Restore their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 90 (2001) (noting existence of evidence suggesting that recording industry had been lobbying for “works for hire” amendment for years). But see Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 416 (2002) (asserting that many musical compositions may be works for hire because they meet definition of “collective works”).

ment was never enacted.¹¹³ Had the recording companies been successful in making the change to section 101(2) permanent, human recording artists would have lost the ability to terminate the copyright assignments in their song recordings after 35 years as a result of losing statutory “author” status. This is an otherwise unwaivable right that the Copyright Act specifically provides for them.¹¹⁴

Press reports of the incident and media attention paid to the aghast reactions of well known musicians helped convince Congress to undo the handiwork of the record companies as a legislative matter.¹¹⁵ It also helped build a societal awareness that copyright laws can act as tools of repression used against artists rather than to benefit them. When this sort of nefarious plotting is exposed, it begins to seem possible that musicians could actually make more money if copyrights were completely abolished, so that they could perform, sell merchandise, offer subscriptions and engage in other career related activities without having to negotiate royalties, pay intermediaries or otherwise interact with and risk exploitation by large corporations.¹¹⁶ Anyone looking for a way to internally justify using a peer-to-peer file trading service to download free music certainly received plenty of material to work with from this sorry episode.

In a similarly self-serving vein, many content owners opposed certain provisions of the North American Free Trade Agreement (NAFTA), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Berne Convention that imperially commanded the sudden acknowledgement of copyrights in foreign works previously treated as part of the public domain.¹¹⁷ Prior to these international treaties, it had been technically non-infringing to make unauthorized use of certain foreign works because the works were not formally copyright protected within the borders of the United States. Nevertheless, ignoring copyrights

113. See Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (repealing additions to “works for hire” definition in Copyright Act).

114. See 17 U.S.C. §§ 203, 304(c) (1998) (explaining procedures for termination of licenses granted by author and termination of licenses covering extended renewal term, respectively).

115. See, e.g., Rob Evans, *Senate Votes to Undo Controversial “Work for Hire Law”*, LIVEDAILY (Oct. 13, 2000), at <http://www.livedaily.citysearch.com/news/1996.html> (noting efforts by Don Henley—and Sheryl Crow—led Artists Coalition advocacy group); Bill Holland, *Hearings Sought on “Work for Hire” Law*, RAC, at <http://recordingartistscoalition.com/bbhear.html> (describing reactions to last-minute inserting of provision) (last visited Oct. 6, 2002).

116. See, e.g., Kevin Kelly, *Where Music Will Be Coming From*, N.Y. TIMES MAGAZINE, Mar. 17, 2002, at 29-30 (detailing “battle over online music”); see also Mann, *supra* note 34, at 49 (explaining how record companies use copyright law to disadvantage musicians).

117. See, e.g., Sabra Chartrand, *Foreign Artists Whose Work is in the Public Domain in U.S. Will Get Their Protection Back*, N.Y. TIMES, Mar. 27, 1995, at D2 (noting that North American Free Trade Agreement provisions restored copyrights from Mexican and Canadian film and television works that had previously been in public domain).

because they were legally unenforceable was not behavior that strengthened normative societal respect for copyrights as a moral or ethical concept. It is also ironic that content owners opposed the same sort of pro-copyright strengthening legislation they often pursue on behalf of their own copyrighted content, demonstrating again that their view of copyright law hinges upon self-interest rather than principle.¹¹⁸

Cass Sunstein once remarked on a similar phenomenon in a very different context, that of civil rights.¹¹⁹ He noted that the Civil Rights Act of 1964 was actually supported by some southern restaurants that were discriminating against African Americans on the basis of race.¹²⁰ Had the restaurants decided on their own to start serving African American patrons, they would have violated a prevailing social norm of segregation. Subsequent changes in the law made this norm illegal. The Civil Rights Act of 1964 gave these restaurants the ability to begin serving African Americans, thereby potentially increasing their patron pool, without risking social censure.¹²¹ Their view of civil rights was clearly driven by concerns for profit rather than principle, and they were prepared to let the decision about whether or not to respect the rights of African Americans be dictated by the interplay between law and social norms: When it was legal to discriminate, they would discriminate if this were more profitable than opening their doors to African Americans. Once it was illegal to discriminate, no one could criticize them for conforming to the new legal regime because the potential costs of not abiding by the law were large and, in at least some cases, compliance with the law increased restaurant profitability by expanding customer bases.

Thus, it is in a flagrant display of “do as I say, not as I do-ism,” that some content industry players work both sides of the street, trying to simultaneously profit from authorized and unauthorized uses of copyrighted works. For example, again in the context of Internet music file sharing, one commentator observed: “[T]he [recording] industry is not simply fighting an unorganized group of college kids. In an illustration of Lenin’s remark about capitalists’ selling the rope with which to hang themselves, businesspeople are lining up to profit from activities they officially decry.”¹²² Additionally, the commentator listed several examples of content owners who invested heavily in file trading businesses and who were ready to get rich off technologies like Napster if the courts decided that file-trading facilitators were not liable for contributory copyright in-

118. See, e.g., CRAIG JOYCE, ET AL., COPYRIGHT LAW 347-51 (5th Ed. LEXIS Pub. 2000) (discussing copyright restoration); Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595, 600-08 (1996) (analyzing constitutionality of legislation restoring copyright).

119. See Sunstein, *supra* note 105, at 157 (discussing differences between social role of consumer and social role of citizen).

120. See *id.* (detailing subtle ironies of Civil Rights Act).

121. See *id.* (explaining effect of Civil Rights Act on restaurants).

122. Mann, *supra* note 34, at 46.

fringement.¹²³ When large content owners behave opportunistically rather than in a consistently copyright-respectful manner, they undermine the message that respect for copyrights is an ethical imperative, and instead informally reinforce an attitude of cynicism by consumers toward copyrights that they formally condemn.

Nor does the United States as a nation have a history of consistent respect for copyrights. When it was useful and profitable to do so, publishers in the United States “disrespected” copyrights in foreign works on a broad scale, acting as much the pirates as the unauthorized copiers they currently ask the U.S. government to target with trade sanctions.¹²⁴ It was only when content owners in this country widely desired international protections to protect their copyrighted works abroad that the U.S. government began advocating and facilitating reciprocity of copyright respect across national borders.¹²⁵

d. Gap-Sparking Assertions of Copyright in Public Domain Works

Publishing entities may also lose credibility when they claim copyrights in public domain works, at least to the extent that individuals recognize that publishers are attempting to fence off portions of the literary and cultural commons. Yet, there are monetary enticements to assert non-existent copyrights, and few, if any, financial or legal risks to doing so. As Paul Heald articulated:

Unfortunately, current practice seems to provide few disincentives for the impoverishment of the public domain. Why shouldn't a publisher claim rights in public domain material? Why not affix threatening language that will intimidate consumers into paying for otherwise fair uses of validly copyrighted material? The cost of affixing a copyright notice or threatening language is very low, and the rewards can be substantial. Those consumers who are intimidated will pay; those who understand that a Bach Cantata or Shakespearean play belongs to the public

123. See *id.* (discussing music industry ties to such file sharing entities as MP3Board.Com, Scour.Com and others); *cf.* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 924 n.28 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002) (discussing recording industry's online music downloading ventures designed to protect intellectual property rights); Eric Boehlert, *In Defense of (Napster) Collusion*, SALON (Nov. 2, 2000), at <http://www.salon.com/business/feature/2000/11/02/collusion/print.html> (noting Bertlesmann's investment in Napster).

124. See, e.g., JAMES J. BARNES, *AUTHORS, PUBLISHERS AND POLITICIANS: THE QUEST FOR AN ANGLO-AMERICAN COPYRIGHT AGREEMENT 1815-1854* 1-30 (1974) (discussing depression of 1837-43 and American book trade); VAIDHYANATHAN, *supra* note 86, at 26-34 (explaining European push for stricter American copyright laws).

125. See, e.g., BARNES, *supra* note 124, at 1-30 (examining early American attempts to protect copyright); VAIDHYANATHAN, *supra* note 86, at 26 (discussing pressures domestically and abroad resulting in changes to American copyright protection policies).

will not. In either event, the putative copyright holder sees only a potential gain; economics and common sense would predict that, in the absence of a significant deterring cost, spurious claims of copyright will proliferate.¹²⁶

In some circumstances provisions of the Digital Millennium Copyright Act and overreaching by content owners could even physically obstruct access to works that are non-copyrightable, or in the public domain. This can be accomplished because technological protection systems engaged in metering usage of copyrighted works can also be employed to gate keep access to any public domain work that a commercial entity converts to electronic form.¹²⁷ For example, unless a public interest entity digitalizes the complete works of William Shakespeare, libraries could find that they must obtain the works from commercial electronic publishers who charge for and monitor access to Shakespeare plays as if they were copyright protected.

The prospect of paying copyright royalties, or “licensing fees” that have the look and feel of copyright royalties, to access public domain works would be infuriating to those who recognized what was transpiring. A person could very well feel completely justified in circumventing “copyright controls” to secure the ability to use content that is not copyrighted. Using any means necessary to access content that is illegitimately copyright protected may violate “copyright-related” laws such as the Digital Millennium Copyright Act, but it hardly seems immoral. Quite the contrary, it actually evokes the specter of well-warranted civil disobedience.

e. Something for Nothing: The Gap-cultivating Impact of the Lack of Formalities and Low Threshold of Originality

Additionally, a norm gap-wrenching backlash may be created when individuals learn that copyright protections vest automatically, or gain an awareness of the low level of originality required to obtain a defensible copyright. Again, this assumes that a person actively attempts to educate herself about the precepts of copyright law, perhaps in a laudable effort to be “copyright compliant.” What she learns, however, may make her question how much respect or deference copyright holders have actually “earned” through labor or monetary investments.

126. Paul J. Heald, *Payment Demands for Spurious Copyrights: Four Causes of Action*, 1 J. INTELL. PROP. L. 259, 261 (1994) [hereinafter Heald, *Payment Demands*]; see also Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241, 255-58 (1996) [hereinafter Heald, *Reviving the Rhetoric*] (detailing practice of spurious claims to copyright in musical arrangements by music publishing industry).

127. See, e.g., Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 166 (2001).

i. elimination of formalities

In 1989, the United States dispensed with the requirements that copyrighted works be registered with the U.S. Copyright Office, or contain formulaic copyright notices, to be eligible for copyright protection.¹²⁸ This was done to bring the country into compliance with the Berne Convention, and to meet its obligations as a signatory of this multilateral copyright treaty.¹²⁹ However, eliminating formalities occasioned a tectonic shift in the way individuals must look at the universe of potentially copyrighted content. When copyright notices were required, one could assume that a work that did not bear a current copyright notice was in the public domain. Now, almost fifteen years after the copyright notice requirement was jettisoned, one must assume that almost everything is copyrighted until proven otherwise.¹³⁰ As a consequence, copyright protections may take the form of background noise, rather than important and attention-worthy constructs. Copyrights are everywhere, and therefore are nothing special.

The realization that copyright protection adheres automatically—without paperwork, consultations with attorneys or bureaucratic entanglement—may also devalue the perceived significance of copyrights. While many people may be constitutionally disposed toward enjoying free lunches, the contravening maxim that “you get what you pay for” would suggest that copyright protections that are freely and effortlessly obtainable are of little inherent worth, and therefore undeserving of much respect.

ii. low level of originality

Judicial repudiation of copyright justifications such as “industrious collection” and “sweat of the brow” made sense from a doctrinal standpoint to those who understood the importance of divorcing determinations about the scope of copyright protections from subjective judgment calls about the quality or “protection worthiness” of a disputed work.¹³¹ However, replacing heuristics that evoke hard work with a requirement of a low level (or “scintilla”) of originality seems to suggest that a work will qualify for copyright protection even if few resources or very little effort

128. *See, e.g.*, 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.02[C][3] (2002) (noting that following U.S. implementation of Berne Convention Implementation Act, on or after March 1, 1989, notice was no longer required for copyright protection).

129. Pursuant to The Berne Convention Implementation Act of 1988, mandatory copyright notice requirements ceased as of March 1, 1989, but incentives for the voluntary use of copyright notices were retained. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 1, 102 Stat. 2853 (1988).

130. *See, e.g.*, Jessica Litman, Presentation at Duke Public Domain Conference, available at <http://www.law.duke.edu/pd/realcast.htm> (last visited July 30, 2002).

131. *See, e.g.*, *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 352 (1991) (explaining that copyright is reward for difficult task of fact compilation).

was invested in it. This can create a perception that copyright owners can “work the system” and receive something valuable (a defensible, infringeable copyright), for almost nothing. If copyright owners are regarded as skilled manipulators of the copyright law, copyright law itself can appear to be somewhat of a scam, and therefore undeserving of respectful adherence.

In a related vein, content owners’ attempts to portray starving artists and musicians as the real victims of copyright infringement are significantly undermined when lawsuits over the copyrightability of pedestrian items such as phone books or page numbers are publicized. Ordinary observers would not likely consider data collections to be creative works, nor their compilers to be “authors” in any meaningful sense. Even an accurate and succinct explanation of the concept that uncopyrightable facts and ideas can become the sole underpinnings of an enforceable compilation copyright when they are selected, coordinated and arranged with a “scintilla” of originality is likely to be met with confusion and incredulity.¹³²

Additionally, press reports about seemingly unmeritorious copyright suits brought against successful authors,¹³³ (for example, the widely publicized but so far stunningly unsuccessful copyright infringement suit against Harry Potter author J.K. Rowling¹³⁴), or on behalf of long dead authors (for example, the “Wind Done Gone” infringement suit brought by “the estate of” *Gone With the Wind* author Margaret Mitchell¹³⁵) may taint the entire concept of copyright with an aura of gamesmanship and illegitimacy. In the first example, the unknown author suing Rowling has been portrayed as a jealous, opportunistic crank who is using copyright law as a tool of extortion.¹³⁶ In the second, a lay person might reasonably

132. See 17 U.S.C. §§ 101, 103 (2001) (defining “compilation” as collection of preexisting materials so that result constitutes piece of original authorship); *Feist*, 499 U.S. at 363 (stating that works must have more than de minimis amount of creativity to receive copyright protection).

133. See Julie Dunn, *Muggles From Earlier Time Haunt Hogwarts Express*, N.Y. TIMES, Mar. 18, 2001, at C2 (explaining challenges to “Harry Potter” books’ authenticity); David D. Kirkpatrick, *Harry Potter and the Battle Over Creativity*, N.Y. TIMES, Apr. 1, 2001, at A1, available at http://www.cesnur.org/recens/potter_08.htm (“Legal challenges filed by the famous and the little-known alike over the originality of creative works have proliferated steadily over the last 20 years, partly because of the soaring value of intellectual property in a media-saturated culture.”).

134. See, e.g., Dunn, *supra* note 133, at C2 (discussing infringement suit by creator of “Harry Potter” character); Kirkpatrick, *supra* note 133 (same); see also Tom Perotta, *Judge Throws Out ‘Harry Potter’ Copyright Suit*, at <http://www.law.com> (last visited Sept. 19, 2002).

135. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (holding that plaintiff would most likely be unsuccessful in overcoming defendant’s assertion of defense of fair use).

136. See, e.g., Linton Weeks, *Muggle Versus Wizard; ‘Harry Potter’ Crew Sues Author Who Says Her Ideas Were Lifted*, WASH. POST, Mar. 27, 2001, at C1 (examining infringement claims of “Larry Potter” author).

wonder why copyright law potentially enables dead authors to reach from the grave to silence living writers.¹³⁷

f. Some People Are Unrepentant Copyright Infringers

Content users are decidedly not assumed to hold values that predispose them toward non-infringing use behaviors. Copyright holders seem to have little confidence that the number of consumers who have internalized copyright-respecting social norms is adequate to render their copyrights sufficiently profitable. Yet as Albert Einstein once observed, humankind would be in a poor way if ethical behavior were driven only by fear of punishment and hope of reward after death.¹³⁸ There is in fact reason to believe that individuals will respect copyrights even without being threatened with dire consequences for not doing so. Robert Cooter claims that the extent to which an individual has internalized a social norm can be measured by how much she will pay to conform to it.¹³⁹ In the copyright context, respect for copyrights might be measured by how much a person is willing to pay for goods that embody copyrighted works; or by how many free or inexpensive unauthorized copies a person is willing to forgo; or by how much inconvenience a person is willing to bear to avoid infringing. The substantial profits often reaped by large content owners such as the music, movie and publishing industries suggests that individuals will and do respect copyrights to some degree and in some contexts.

One of the doomsday scenarios painted by a music industry research company in April of 2000 was that "within three years the industry could lose as many as one out of six CD sales to Internet piracy."¹⁴⁰ While one-sixth of sales certainly represents a lot of revenue to lose, the implications of a prediction that five-sixths (or about 83%) of presumably copyright-

137. See Gerald Nachman, Editorial, *Let's Say Enough to Copyright Welfare*, N.Y. TIMES, Mar. 3, 1995, at A26 (noting that heirs of copyright holders refuse to allow reprint of work).

138. "A man's ethical behavior should be based effectually on sympathy, education, and social ties and needs; no religious basis is necessary. Man would indeed be in a poor way if he had to be restrained by fear of punishment and hope of reward after death." ALBERT EINSTEIN, *THE EXPANDED QUOTABLE EINSTEIN* 206 (Alice Calaprice ed., 2000); see also Cooter, *supra* note 18, at 1577 (quoting Gerard Lynch). Lynch stated:

What society wants from its members, in any case, is not an intelligent calculation of the costs and benefits of abiding by its basic norms, but more or less unthinking obedience to them. To the extent people are specifically comparing the costs and benefits of breaking criminal laws, the battle is already lost; many of them must conclude, in particular situations, that the calculus favors law-breaking. . . . For society to function, most people have to obey the law for reasons of conscience and conviction, and not out of fear of punishment.

Id.

139. See *id.* at 1581 (discussing people's willingness to perform civic acts).

140. Mann, *supra* note 34, at 40 (referencing warning by Bernstein Investment Research Group).

respectful CD purchases will still occur, despite the allure of free Internet file trading, cannot be dismissed as meaningless. In addition, when a CD that contains songs easily available for free on the Internet sells 2.4 million authorized copies in a week,¹⁴¹ books that could easily be scanned and infringingly distributed over the Internet sell millions of ink and paper copies¹⁴² or movies draw millions of people to theaters and video rental stores despite DeCSS,¹⁴³ it looks like copyright laws are working fairly well.¹⁴⁴

That being said, however, it is clear that some cohort of people will not pay for copyrighted content if they can obtain it for free. Content owners assert that, as a consequence, the government should facilitate (or at least allow) copyright protections to be reconfigured to thwart copy-

141. See *id.* at 56 (citing first-week sales of 'N Sync's *No Strings Attached*). As Mann observed:

Ascertaining the financial impact of file-swapping is difficult—indeed, the discussion quickly verges on the theological. Because not everyone who downloads a song would otherwise have paid for the compact disc, one can't simply multiply the number of illicitly traded CDs by the average price of a CD to estimate the economic impact of unauthorized copying. So pro- and anti-sharing advocates rely on indirect data. In May, Reciprocal, a start-up in New York that hopes to make money from secure downloads, released a study showing that CD sales at stores near colleges—thought to be hotbeds of Napster users—had slipped slightly, whereas overall CD sales had risen. Scoffing, pro-Napster forces pointed out that this year, when MP3 is supposedly destroying the music business, the industry is selling more compact discs than ever before. Such sales increases, in the view of John Perry Barlow, an advocate of sharing and a former lyricist for the Grateful Dead, are the logical outcome of music-swapping, which exposes audiences to new music. Counterargument: it is simply the demographic boom in the number of teenagers that is propelling the rise in music sales. Counter-counterargument: this spring new records by Eminem, Britney Spears, and 'N Sync were easily available on the Internet, yet buyers mobbed stores for all three; *No Strings Attached*, by 'N Sync, sold 2.4 million copies in its first week—more than any other album in history.

Id.

142. See, e.g., David D. Kirkpatrick, *Book Returns Rise, Signaling a Downturn in the Market*, N.Y. TIMES, July 2, 2001, at C1 [hereinafter Kirkpatrick, *Book Returns Rise*] (noting “booming” sales at online bookstores); David D. Kirkpatrick, *A Year Only as a Best Seller at No. 1 Chain*, N.Y. TIMES, Oct. 29, 2001, at C1 [hereinafter Kirkpatrick, *A Year Only*] (stating that over past fifteen years “[t]he annual sales of the top sellers rose from the hundreds of thousands to several million copies, even though the number of books sold each year increased only slightly”).

143. See Jack Valenti, *Valenti Reports Record-Breaking Box Office Results, Continued Decrease in Production Costs and Praises Movie Industry War Efforts in Showest Address*, at <http://www.mpaa.org/jack/pressreleases> (Mar. 5, 2002) (gloating about Hollywood's record revenues in 2001). Hollywood's 2001 revenues were higher than ever in human history, with theater admissions the highest since 1959 and U.S. box office receipts alone at \$8.41 billion. See *id.* (observing, however, that over 270,000 movies are illegally downloaded every day and noting that number is increasing).

144. But see, e.g., Halpern, *supra* note 35, at 569-72 (recounting “pirate stories”).

right free riders, decreasing accessibility and restricting use of copyrighted materials for everyone else in the process. Whether the pessimistic view of human behavior underlying this perspective is empirically justified is a question no one seems to want to ask or answer. If people internalize the assumption that everyone will always infringe copyrights if given an opportunity, perhaps they will live up or down to these negative expectations in ways that exacerbate norm gaps.

5. *Proselytizing*¹⁴⁵ and *Coercing New Norms*

Bob Hamilton once observed that “an interesting characteristic about money is that the people who have it don’t like to lose it; indeed, they will take many, even extreme, steps to avoid losing money.”¹⁴⁶ Large-scale content owners fear that norms of unauthorized copying and sharing will deprive them of opportunities to realize profits from their copyrighted works, and have reacted accordingly. Members of the resource rich music industry, for example, have used every weapon in their arsenals to dislodge the disharmonious norm of unauthorized song sharing over the Internet that has developed among a rather large section of the population. Music industry tactics run from persuasion, in which they proselytize respect for their copyrights, to coercion, a strategy that one commentator has described as “legislation, litigation and leg-breaking.”¹⁴⁷

a. Proselytizing

Copyright holders want obeisance by consumers to a normative interpretation of copyright laws that provides broad and powerful monopoly rights, because this will maximize control over and profitability of copyrighted works. They generally do not want to publicly acknowledge that the copyright law has goals other than maximizing the income stream of

145. I borrow the term “proselytize” from Steven Hetcher, but use it in a much more sardonic manner than he has employed it. See Hetcher, *supra* note 15, at 151 (“The word ‘proselytize’ is appropriate because it would be reductionist to describe these entrepreneurs as merely fostering preferences for data privacy. Privacy norm proselytizers seek to arouse the moral consciousness of consumers vis-à-vis websites’ collection and use of personal data.”).

146. Robert W. Hamilton, *Constitutional Issues Involving Use of the Internet: Liability for Third-Party Content on the Internet*, 8 SETON HALL CONST. L.J. 733, 736 (1998).

147. Mann, *supra* note 34, at 41; see also Richard Barbrook, *How the Music Industry Blew It*, SALON (Oct. 30, 2001), at http://www.salon.com/tech/books/2001/11/30/sonic_boom/print.html (reviewing John Alderman’s *SONIC BOOK*).

During the late 1990s, while so many others were succumbing to dot-com hype, the music business stubbornly resisted any accommodation with the new technology. Its corporate leaders used all of their lobbying power and legal resources to attack the Net. They had the copyright laws strengthened, blocked software development and closed down Web sites. They even successfully prosecuted Napster—one of the most popular services on the Net.

Id.

copyright owners. Instead, they castigate copiers, labeling them pirates and thieves and sometimes employing stunning hyperbole.¹⁴⁸ For example, at the 2002 Grammy Awards, Michael Greene, the president of the National Academy of Recording Arts and Sciences, revealed that he had paid three college students to download as many music files as possible over the Internet to prove the scope of the music piracy problem, and claimed that they had managed to download 6,000 songs in two days.¹⁴⁹ The students themselves later admitted that they had spent three days on the project, half the files never completely downloaded and 4,000 of the songs were obtained through private messaging with their friends rather than downloaded from publicly accessible websites.¹⁵⁰ The exercise was apparently supposed to underscore the R.I.A.A.'s announcement that its data showed a ten-percent decrease in music sales, purportedly due to on-line piracy and CD burning.¹⁵¹ Similarly, Metallica attorney Howard King rhetorically equated using Napster with thievery, stating, "At this moment, all around the world, hundreds of thousands of people are breaking into record stores and stealing CDs and tapes. Or they might as well be."¹⁵² In their complaint filed against Napster and several universities, plaintiffs Metallica and Creeping Death Music accused Napster users of exhibiting "the moral fiber of common looters."¹⁵³

148. See, e.g., *Metallica Sues Napster, Universities, Citing Copyright Infringement and RICO Violations*, LiveDaily (Apr. 13, 2000), at <http://www.livedaily.com/news/781.html> [hereinafter *Metallica Sues Napster*] (last visited July 30, 2002).

Searching for the band's tracks and downloading them on Napster, she said was like 'walking by a Tower Records or HMV music store, seeing that the cash register was open and that no one was in the store, and helping yourself to whatever was available,' according to Gayle Fine of Q Prime, Metallica's management company). According to Metallica drummer, Lars Ulrich, "From a business standpoint [trading files via Napster], this is about piracy—a.k.a. taking something that doesn't belong to you; and that is morally and legally wrong. The trading of such information—whether it's music, videos, photos, or whatever—is, in effect, trafficking in stolen goods. . . .

Id.

149. See Neil Strauss, *Downloading Files and Storms*, N.Y. TIMES, Mar. 7, 2002, at E3 (discussing Greene's experiment).

150. See *id.* (explaining problems students encountered while attempting to download music files).

151. See, e.g., Chris Ayres, *Fall in Sales Casts Cloud on Grammys*, LONDON TIMES, Feb. 26, 2002, Business (stating that "music industry is being brought to its knees by Internet piracy").

152. Howard King, *Two Views on the Copyright Dispute Between Metallica and Napster* (CNN television broadcast, May 19, 2000), at <http://www.cnn.com/LAW/columns/dual.metallica.05.19/> (last visited July 30, 2002).

153. Lisa Bowman, *Metallica's Napster Hit: 'Enter Lawman'*, ZDNet (Apr. 13, 2001), at <http://zdnet.com/2100-11-519908.html?legacy=zdn>; see also Michelle Goldberg, *Metallica Takes on Napster*, THE STANDARD (Apr. 14, 2000), at <http://www.thestandard.com/article/display/0,1151,14119,00.html> (citing ZDNet's report about Metallica's press release).

Robert Cooter has asserted that a person who intrinsically values obeying a social norm will pay something to do so, independent of resulting advantages or disadvantages,¹⁵⁴ but an individual who does not intrinsically value obeying the social norm will do so only if it has instrumental value, such as generating praise from neighbors, or it facilitates the making or saving of money.¹⁵⁵ Copyright owners hope that if enough people internalize their preferred normative view of high barrier copyrights protection, non-permissive uses will dramatically decrease. Individuals who intrinsically value complying with this new copyright norm will “pay” to obey it by foregoing acts of unauthorized copying. Those who do not intrinsically esteem obeying the norm will still honor it if the instrumental value of doing so is high enough, and if the likely consequences of making an unauthorized copy are confiscation of the work and legal censure, it probably will be. Whether the threat of peer censure would provide an effective deterrent is decidedly less certain.

Content owners would prefer people to respect copyrights as matters of conscience and conviction, rather than because they fear punishment, because infringing acts may be hard or expensive to detect. In addition, content owners do not want to alienate their customer base by using resource intensive legal means to pursue small scale copying by individuals if they can avoid it.¹⁵⁶ Copyright owners have therefore been attempting to shift the social meaning of unauthorized access and copying from morally neutral to morally reprehensible, by using lobbying, the legal system and publicity and “education” campaigns to influence public opinion away from any perception that unauthorized uses of copyrighted works are socially legitimate or worthwhile.¹⁵⁷

154. See Cooter, *supra* note 18, at 1583-84 (noting that economists describe intrinsic values as “tastes” or “preferences”).

155. See *id.* (explaining that, in economic terms, “intrinsic value implies a ‘taste’ for obeying the norm”).

156. See, e.g., Marilyn Wheeler, *Has Metallica Misjudged Napster?*, ZDNet, at <http://zdnet.com/2100-11-520410.html?legacy=zdn> (last visited July 30, 2002) (quoting James Hetfield) (“We are going after Napster, the main artery here. All the people doing illegal things here, whether with good or bad intentions, we are not going after individual fans. Metallica has always felt fans are family.”). But see, Rueters, *RIAA Assists in Student’s Probe*, WIRED (Sept. 18, 2000), at <http://www.wired.com/news/print/0,1294,38863,00.html> (noting that Oklahoma State University student had his personal computer and CD recorder seized after university officials were notified by Recording Industry Association of America that he may have downloaded as many as 1,000 Internet music files). The unnamed student was not arrested, and there was no evidence that he was selling the files or profiting in any way from the downloads. See *id.* (discussing outcome of investigation).

157. The Federal Bureau of Investigation, Justice Department and Information Technology Association of America, a trade group, are engaged in initiatives to educate children about cyber ethics, and apparently equate making unauthorized copies of MP3 files with hacking and other cyber crimes. See Associated Press, *FBI Pushes For Cyber-Ethics Education*, USA TODAY (Oct. 9, 2000), at <http://www.usatoday.com/life/cyber/tech/cti640.htm> (last visited July 30, 2000) (discussing online piracy and hacking).

In recent infringement actions aimed at file sharing technologies, content owners have been wildly successful at painting copying technologies as “contributory infringers,”¹⁵⁸ yet there is little indication that these actions are increasing overall societal respect for copyrights.¹⁵⁹ The development likely most noticeable to average content consumers is that the courts are responding to copyright owners’ concerns by legally disabling innovative technologies and making them unavailable to everyone,¹⁶⁰ copyright infringer and copyright-respecter alike. The outcomes of these court cases are undoubtedly signaling something to individual content consumers, but whether that message is effectuating the copyright use norm shifts that copyright owners desire is unclear.

b. Coercion

Many copyright holders have adopted a curious strategy of castigating their potential customers for unauthorized copying, but stopping short of actually suing them.¹⁶¹ The prevailing assumption seems to be that no one would voluntarily choose to pay for copyrighted content, so everyone must be coerced into doing so. According to Robert Cooter:

Economics models of law typically accept the “bad man” approach and add an element to it: rationality. A bad man who is

158. See, e.g., Mann, *supra* note 34, at 41-44 (noting that music industry has induced Congress to revamp unfavorable laws, and that some music industry lawsuits have been successful).

159. See, e.g., Joseph P. Liu, *Owning Digital Copies: Copyright Law And The Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1365 (2001) (discussing impact of unauthorized copying). Lui noted:

If the concern is the increased potential for piracy presented by digital copying, then surely increasing the already underenforced substantive rights will have little impact on reducing piracy. Rather, it will only have the impact of making infringing much activity that was previously not infringing, thereby leading to increasing disrespect for existing copyright laws.

Id.

160. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 430 (2d Cir. 2001) (disabling decryption program which circumvented encryption technology that prevented copying DVDs); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001) (affirming district court’s preliminary injunction on Napster’s file sharing operations); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 353 (S.D.N.Y. 2000) (finding that defendant infringed plaintiffs copyrighted works by copying their recordings onto computer servers and replaying them for subscribers); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 226-27 (S.D.N.Y. 2000) (ordering preliminary injunction on decryption program which decoded DVDs); King & Terraciano, *supra* note 3 (explaining that Scour, Inc.’s financial troubles began when copyright infringement suits were filed against company, forcing them into bankruptcy); Scarlet Pruitt, In US Case, *KaZaA Surrenders to Paper Tiger*, *Itworld.com* (May 24, 2002), at <http://www.itworld.com/Net/4087/020524kazaa> (stating that KaZaA could not afford lawsuits brought against it by music and motion picture industry).

161. For a discussion of the music industry’s attack on its customers, see *supra* note 153 and accompanying text.

rational decides whether or not to obey the law by calculating his own benefits and costs, including the risk of punishment. The rational bad man breaks the law whenever the gain to him exceeds the risk of punishment.¹⁶²

Large-scale content owners seem to hold the view that most consumers are “bad but rational men” who will infringe copyrights at every opportunity unless they are dissuaded from doing so by the fear of punishment.¹⁶³ There certainly seems to be empirical evidence that some acts of unauthorized copying are not easily dissuaded, but whether this makes the copiers “bad men” depends on one’s perspective. Content owners would certainly like unauthorized copiers to believe themselves bad, but they appear to realize that achieving this objective alone will not be enough to realize “copyright absolutism” among consumers.

The music recording industry has tried to thwart the unauthorized sharing of digital music with every means at its disposal, yet it has apparently accomplished little in the way of engendering reverence for copyrights among certain song-trading sectors of the populace because a substantial portion is still engaging in peer-to-peer music file trading.¹⁶⁴ Ostensibly fearing the copyright evil that consumers may do, they and

162. Cooter, *supra* note 18, at 1591.

163. See Ann Bartow, *Arresting Technology: An Essay*, 1 BUFF. INTELL. PROP. L.J. 95, 118 (2001) (“Most Americans are probably not the scofflaws that content owners make us out to be.”).

164. See, e.g., Expert Report of Prof. Lawrence Lessig Pursuant to Fed. R. Civ. Pro. 26(a)(2)(B) at ¶ 66, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *aff’d*, 284 F.3d 1091 (9th Cir. 2002), at <http://cyberlaw.stanford.edu/lessig/content/testimony/nap/napd3.doc.html> (explaining viability of stopping Internet file-sharing service web sites). In his expert report in the *Napster* case, Professor Lessig discussed the difficulties in stopping online piracy using the example of Gnutella:

Gnutella is a simple substitute for Napster. It facilitates a better peer-to-peer searching capability and is operated in a far more decentralized manner. Because of this architecture, there would be no way, under the present architecture of the net, for a court to stop the deployment of Gnutella without essentially shutting down a substantial portion of the Internet. Gnutella is simply an application that runs on the net; there is no central server for this application; links are made in a chain that itself is not consistent or easily tracked.

Id.

Other possible substitutes for Napster include Hotline, iMesh and KaZaA. See, e.g., *An Underground Guide to Napster Alternatives*, UnderGroundOnline, at <http://www.ugo.com/channels/music/features/napsteralternatives/imesh.asp> [hereinafter *Underground Guide*] (last visited July 30, 2002) (evaluating various alternatives to Napster). Still others include AIM, ICQ and IRC. See Robert Vamosi, *Pirated Movies: Now Playing on a Server Near You*, ZDNet (May 8, 2002), at <http://www.zdnet.com/anchordesk/stories/story/0,10738,2864410,00.html> (last visited July 30, 2002) (describing ease of online piracy via “chat services”). Mojo Nation is yet another alternative. See, e.g., Damien Cave, *The Mojo Solution*, SALON (Oct. 9, 2000), at http://www.salon.com/tech/view/2000/10/09/mojo_nation/print.html (describing Mojo Nation as “nothing short of the first-ever encryption-protected, user-run, open-source, file-sharing marketplace. It essentially takes the decentral-

other content owners have convinced Congress to make circumventing “copy control” devices illegal, and to make the criminal penalties for some acts of copyright infringement greater than those for armed robbery.¹⁶⁵ They purport to believe that committing substantial acts of copyright infringement is so inherently logical, reasonable and attractive that even with the obvious self-help option of implementing technological barriers to unauthorized copying, the legal strictures against performing such activities must be rigorous and the consequences for flouting them severe.

c. Potential Effects of Norm Shifting

Attempts by content owners to proselytize and coerce adherence to copyright holder friendly norms represent the convergence of two important phenomena. First, content owners are pushing for greater respect for copyright laws, based on the premise that greater respect for copyrights is necessary given the “dangers” posed by new technologies, particularly the Internet. They want internalized respect for copyrights to spread among the populace and the closure of norm gaps, and hope to achieve these goals by convincing consumers that “copyright-respectful” norm adherence is socially responsible and morally correct.

Second, however, is the fact that content owners are simultaneously using certain features of digital formats to strengthen their ability to control distribution of works, and to fundamentally change the nature and scope of unauthorized use and access privileges accorded by longstanding precepts of copyright law as applied to analog works. Real space formats allow unfettered non-permissive use and access through libraries, personal sharing, first sale doctrine, fair use and limitations on scope of copyrights imposed by the idea/expression dichotomy. Digital formats, however, raise the possibility of tracking, controlling and profiting from every use of a work, and narrowing the scope of (or even eliminating) unauthorized uses whether they are infringing or not.¹⁶⁶

Only the first goal, encouraging respect for copyrights, is legitimate and deserving of assistance, though only to the extent that the new social norm recognizes appropriate limits on the scope of copyrights. The second objective is unequivocally improper, as curtailing unauthorized but fair uses will be detrimental to society and contrary to the very goals of the

ized model of other Napster alternatives like Freenet and Gnutella and adds on a layer of laissez-faire experimentation.”).

165. Civil damages are available under § 1203 of the DMCA; the criminal provision, § 1204, permits fines of up to \$500,000 and prison terms of up to five years for the first offense, and up to \$ 1 million and ten years for any subsequent offense. *Compare* 17 U.S.C. § 1204 (1998) (describing criminal penalties for copyright infringement), *with* MASSACHUSETTS COURT SYSTEM, *Sentencing Guidelines Grid*, at <http://www.state.ma.us/courts/formsandguidelines/sentencing/grid.html> (last visited July 30, 2002) (mandating eight to twelve years for manslaughter; five to seven years for armed robbery or rape).

166. *See, e.g.*, Hamilton, *supra* note 29, at 615 (explaining concepts of “Copyright Norms” and “Freedom Imperialism”).

copyright laws.¹⁶⁷ Codifying real space norms such as fair use, thereby imperializing and importing them into the sphere of digital formats, can advance the potentially beneficial aspects of the first goal of copyright owners, while thwarting the counterproductive second one.

Copyright holders would have individuals obey a social norm in which only authorized and permissive uses are made of copyrighted content. Conforming to any social norm may impose costs on individuals such as financial expenditures, inconvenience and lost opportunities, but coterminously may convey the benefits of group approval and a good reputation.¹⁶⁸ If respecting absolutist copyrights became a widespread social norm, exercising fair use rights could be seen as a deviation warranting sanction. This would serve the short-term control and profit maximizing goals of content owners, but undermine the goals of information dispersal and access to ideas that fair use is intended to realize.

To illustrate, copyright holders are limited to statutory damages for acts of infringement committed by educators who believed in good faith that they were exercising fair use rights under section 504(c)(2) of the Copyright Act. Educators can therefore make unauthorized uses of copyrighted works knowing that, as long as they behave reasonably, the penalty for exceeding fair use will be modest. Social norms that discouraged any unauthorized uses of copyrighted works would add censure and other informal sanctions to these penalties, adding to the costs of exceeding fair use, and exacerbating the risks of exercising fair use rights at all.¹⁶⁹

Moreover, if the "public interest" justification for unauthorized uses of copyrighted materials is consistently and visibly invoked exclusively by "evil" infringement defendants, the concept of fair use may be tainted and ignored as the last refuge of scoundrels. Exercising fair use privileges could become something for which one felt the necessity to make excuses or apologize.

B. *"Use Norms" in the Correct Normative Framework: Copyright Infringements Are Injuries Rather Than Thefts*

The trend toward "prophetization" of copyrights is well chronicled by legal scholars and others.¹⁷⁰ In some respects and contexts, treating copy-

167. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 580 (1985) (Brennan, J., dissenting) (stating that challenge is to strike balance between interests of authors and free flowing ideas).

168. See Cooter, *supra* note 18, at 1584 (showing cost of obeying and willingness to pay norm).

169. See David Nimmer, Remarks at the Duke Law School Conference on the Public Domain (Nov. 9-11, 2001), available at <http://www.law.duke.edu/pd/realcast.htm> (last visited July 30, 2002).

170. See Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work"*, 68 CHI-KENT L. REV. 805, 827 (1993) (outlining objections to unauthorized deprophetization); Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605, 610-11 (2000) (describing concept of properitiza-

righted works like chattels, if not parcels of land, has become almost a norm, but one that is challenged by a divergence of opinion as to how allegations of infringement ought to be characterized and disposed of. An act of copyright infringement is, at its essential level, most accurately described as a tort. Copyrights come under the rubric of “intellectual property,” and many commentators rhetorically equate unauthorized uses of copyrighted works with property takings and theft.¹⁷¹ Nevertheless, infringing acts actually inflict injuries that are closer to trespass or nuisance than to property theft, because nothing tangible is taken or withheld from a copyright owner.¹⁷² Rather, the value of the copyrighted work is diminished (and a copyright holder is consequently injured) only to the extent that the copyright owner’s right to control and exploit the work is compromised by acts that exceed fair use and reach the level of copyright infringement.¹⁷³

Divining the extent of injury to a copyright occasioned by an act of infringement such as the making of three unauthorized copies is difficult and speculative, but a more doctrinally coherent approach than automatically concluding that the existence of three unauthorized copies means the work was stolen three times. Were the three unauthorized copies sold, and therefore substituted for three sales of authorized copies? Or, have they been made and retained by the owner of an authorized copy? Were the copies made by a so-called pirate, who was hoping to sell them illicitly and reap an undeserved profit? Or were they made by a public school that was unable to purchase “authorized” copies due to budgetary constraints, or because the copied work is out of print? Was the unauthorized use unusual in nature, or a type of use that is commonly made, and therefore a norm?

A tort-based inquiry into the extent and reasons for the alleged injury wrought by the unauthorized copying or use is more likely to lead to a just outcome and fair award of damages, if any, to the complaining copyright holder. Copyright owners would usually prefer all unauthorized copies be

tion of information as “information that would be available if paid for”); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 *FORDHAM L. REV.* 1125, 1133 (2002) (stating that there is propertization by means of copyright and patent).

171. For a discussion of such equation in the music industry, see *supra* notes 152-53 and accompanying text.

172. See Dan L. Burk, *The Trouble With Trespass*, 4 *J. SMALL & EMERGING BUS. L.* 1, 15 (1998), available at http://papers.ssrn.com/paper.taf?ABSTRACT_ID=223513 (stating that “the elements of common law trespass to chattel fit poorly in the context of cyberspace”); Brief of Amici Curiae by Mark A. Lemley et al., at 13-19, *Bidder’s Edge, Inc. v. eBay, Inc.*, (No. 00-15995) (9th Cir. 2000), at <http://www.law.berkeley.edu/institutes/bclt/pubs/lemley/bedgeami.pdf> (analyzing injury requirement in common law trespass to chattels in context of cyberspace).

173. *But see* Lawrence Lessig, *Intellectual Property and Code*, 11 *ST. JOHN’S J. LEGAL COMMENT.* 635, 638 (1996) (“While we protect real property to protect the owner from harm, we protect intellectual property to provide the owner sufficient incentive to produce such property.”).

treated as similarly situated thefts, but a factual and situational inquiry is more appropriate, though it will not necessarily be more protective of the right to engage in unauthorized fair use copying.

1. *The Role of Custom*

In the context of ordinary negligence, Steven Hetcher analyzed the role that social norms and customs play in tort law, and asserted: "When people injure one another while conforming to social customs, it is the duty of tort law to determine which of these injuries merits legal redress."¹⁷⁴ Hetcher observed:

In negligence litigation, injurers attempt to establish their conformity to custom as evidence of due care while victims attempt to establish the injurer's failure to conform as evidence of negligence. When conformity is used defensively, the injurer in effect asks: "How could I have done wrong, as I was simply doing what others do in similar situations? How could all the conformers to this widespread social custom be negligent?" . . . When the rule of custom is used offensively, the victim in effect complains: "Surely the injurer was negligent as she failed to exhibit the degree of caution that is so obviously required that is has become customary."¹⁷⁵

This analysis is adaptable to copyright use cases, where it is the duty of copyright law to determine which unauthorized uses of copyrighted works constitute fair use, and which merit legal redress because a use has infringed a copyright. Fair use is by definition a defense to a claim of copyright infringement, and a defendant claiming fair use might assert that a particular type of unauthorized use was customary.

Custom appeared to play a significant part in several important copyright decisions by the Supreme Court, including the majority opinion in the *Sony* case.¹⁷⁶ In *Sony*, by the time the dispute was litigated up to the Supreme Court, the ownership of videocassette tape recorders (VCRs or VTRs) was widespread, and a large segment of the populace had grown accustomed to using them to tape and "time shift" television programs. The text of the majority opinion makes explicit and extensive reference to the fact that "Petitioner Sony manufacture[d] millions of Betamax video tape recorders and market[ed] these devices through numerous retail establishments,"¹⁷⁷ referenced "millions of owners of VTR's who make copies of tele-

174. Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 4 (1999).

175. *Id.* at 5.

176. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (discussing custom); see also LARDER, *supra* note 50, at 228-32 (recounting odd aspects of *Sony* decision).

177. *Sony*, 464 U.S. at 422 (emphasis added).

vised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood,"¹⁷⁸ and stated:

One may search the Copyright Act in vain for any sign that the elected representatives of *the millions of people who watch television every day* have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.¹⁷⁹

Copyright holders are likely to use custom offensively when it is advantageous to them such as when the defendant has been engaging in copying activities for which others customarily obtain permission and/or pay royalties.¹⁸⁰ Nevertheless, "market effect" is fortuitously invoked to overshadow or supplant custom to defeat fair use defenses raised by accused infringers.¹⁸¹ For example, in *Texaco v. American Geophysical Union*,¹⁸² the United States Court of Appeals for the Second Circuit found that the longstanding practice by researchers of photocopying articles of interest out of circulating scientific journals was not fair use, and was therefore copyright infringing. Unauthorized photocopying of articles of interest, though customary, was held to harm the nascent market for pho-

178. *Id.* at 446 (emphasis added)

179. *Id.* at 456 (emphasis added).

180. *See, e.g.,* Davis v. Gap, 246 F.3d 152, 161-62 (2d Cir. 2001) ("In rejecting the defendant's claim of fair use, we observed that while a finding of infringement would not necessarily prevent the defendant from publishing his expression, 'it does recognize that any such exploitation must at least entail "paying the customary price."'"); Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (quoting *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 562 (1985)); *cf.* Green Book Int'l Corp. v. Inunity Corp., 2 F. Supp. 2d 112, 115 (D. Mass. 1998) ("Consistent with custom and practice in the off-the-shelf software industry, each package of GBook, including the complimentary package that Sotirescu gave to Simmel and each of the three packages that InUnity purchased, contains within it a so-called 'shrink wrap' license."); *see also* Bartow, *supra* note 51, at 185 (discussing letter sent by publishers threatening universities and copy shops with copyright infringement suits following *Kinko's* decision). The *Kinko's* opinion contains language suggesting the defendant's actions were "grossly out of line with accepted fair use principles." *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991). Accordingly, the judge was apparently convinced that some norm or custom had been violated. *See id.* Additionally, in *Mich. Doc. Servs.*, the majority pointed to the fact that some Ann Arbor copy shops were paying permission fees as evidence that the defendant ought to do the same. *See Princeton U. Press v. Mich. Doc. Servs.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (noting common practice of permission payments by most copy shops in Ann Arbor area).

181. *See, e.g.,* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985) ("[A] fair use doctrine that permits extensive publication . . . from an unreleased manuscript without . . . consent poses substantial potential for damage to the marketability of the [original work]."); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 931 (2d Cir. 1994), *cert. dismissed* by 516 U.S. 1005 (1995) (stating that publishers demonstrated substantial harm to value of copyrights due to lost licensing revenues and subscriptions); *Kinko's*, 758 F. Supp. at 1534 ("Kinko's copying unfavorably impacts upon sales of books and collections of permissions fees.").

182. 60 F.3d 913 (2d Cir. 1994), *cert. dismissed* by 516 U.S. 1005 (1995).

tocopy royalties. The complaining copyright owners convinced the *Texaco* Court to embrace and judicially endorse a new norm that imposed on research institutions a duty to either pay photocopy royalties to publishers, or to obtain photocopy licenses from the Copyright Clearance Center.¹⁸³

2. *The Impact of Strict Liability*

Copyright infringement is a strict liability tort, which, as a doctrinal matter, explicitly takes account of the accidental or intentional nature of the infringing acts only in the calculation of statutory damages awards.¹⁸⁴ Such strict liability provides copyright owners with a broad scope of protection against direct infringement. If liability for infringement were limited to intentional conduct on the part of an alleged infringer, this would result in a significant narrowing of the tort when compared to strict liability.¹⁸⁵ An intermediate scope of protection for copyrighted works would result if infringement liability were premised upon a finding of negligent conduct by the entity accused of infringement.¹⁸⁶ Strict liability eliminates the need for plaintiffs to muster certain types of evidentiary proof.

In some copyright disputes, however, establishing liability for direct infringement will generally be facilitated by, and may even require, proof

183. *See id.* at 929 (affirming district court's finding that revenues would increase significantly because Texaco would pay royalties to publishers for right to photocopy, negotiate licenses or acquire some form of photocopying license from Copyright Clearance Center).

184. *See* 17 U.S.C. § 504(c) (1999) (providing remedies for infringement). Copyright owners who can prove that infringement was willful can boost statutory damages awards substantially (from between \$750 and \$30,000 to as much as \$150,000). *See id.* "Willfulness" in this context is generally defined as "knowing infringement," something more than a mere intent to infringe. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[B][3] (1999). Willful infringers can also be subject to criminal penalties under § 506(a) of the Copyright Act and 18 U.S.C. § 2319, even if the infringing acts are committed without a profit motive on the infringer's part. *See* 17 U.S.C. § 506(a) (1997) ("Any person who infringes a copyright willfully . . . (1) for purposes of commercial advantage or private financial gain . . . shall be punished as provided in section 2319 of title 18 . . .").

185. Strict liability is defined as "[l]iability without fault." BLACK'S LAW DICTIONARY 1422 (7th ed. 1999). Accordingly, intent plays no role under strict liability. Were copyright law to encompass only intentional acts of infringement, rights holders would be unable to recover damages where someone accidentally misappropriates their work and makes a profit from that mistake.

186. By contrast, the doctrine of contributory infringement has a "knowledge" requirement. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A][2][a] (1999). Contributory infringement empowers copyright owners to bring infringement actions against entities that (for example) distribute technologies that enable the copying of copyrighted works. *See id.* It requires copyright owners to prove that defendants have "knowledge" that the accused technology is being used extensively by others to commit commercially significant acts of direct copyright infringement. *See, e.g.,* Religious Tech. Ctr. v. Netcom, 907 F. Supp. 1361, 1373-74 (N.D. Cal. 1995) ("If plaintiffs can prove the knowledge element, Netcom will be liable since . . . [it failed] to stop an infringing copy from being distributed worldwide.").

of something very much resembling negligence or even intentional conduct. Mounting a successful copyright infringement claim requires, at a minimum, establishing that infringing unauthorized copying has occurred. Copyright owners can enjoy the benefits of strict liability when an infringer's motives appear pure,¹⁸⁷ and simultaneously reap the advantages of painting unauthorized copiers as bad actors where factual circumstances allow. Consider the scathing words of a judge who decided that a photocopy shop that was making "multiple copies for classroom use"¹⁸⁸ of educational materials (compiled and chosen by University of Michigan faculty members), and selling them to students, was a willful copyright infringer. Articulating a view of copyrights as chattels she wrote:

[T]he defendants have continued for an extensive period of time to take and use the property of others for their own personal gain. They excuse all of this by further suggesting that they do not agree with the law and asserting that they interpret the law differently than appellate courts that have addressed copyright infringement, and legal scholars who have counseled them against their practice. They would argue that their efforts to determine the law for themselves would excuse their conduct as it might be deemed willful. This court is compelled to see this practice for what it is. The defendant is taking the property of another without right or permission, using that property for personal gain. There simply is no excuse for this conduct. How often this court hears as an explanation for illegal conduct a statement or argument that "the law is wrong, so I just chose not to be bound by it." There are procedures to change the law; it is not to be violated.¹⁸⁹

The defendant photocopy shop was clearly making unauthorized photocopies intentionally, but was doing so believing this to be an exercise of copyright fair use. The legal dispute concerned whether or not this photocopying could be a fair use of the copyrighted materials at issue, given the doctrinal conflict between the profit-making nature of the photocopying, and the non-profit educational purpose to which the photocopies were put by the end users, who were students. The defendant faced precedent in the form of a district court opinion from another circuit in which the judge ruled against a copy shop in similar circumstances.¹⁹⁰ However,

187. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 181 (S.D.N.Y. 1976) (holding that defendant plagiarized song even though use was unintentional).

188. The term "multiple copies for classroom use" is an illustrative example of fair use listed in Section 107 of the Copyright Act. See 17 U.S.C. § 107 (1994) (providing examples of fair use).

189. *Princeton U. Press v. Mich. Doc. Servs.*, 855 F. Supp. 905, 908 (E.D. Mich. 1994), *aff'd in part and vacated in part*, 99 F.3d 1381 (6th Cir. 1996).

190. See *generally* *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (finding that copying of book excerpts, compiling excerpts

the defendant also reasonably, if not successfully, argued that because Section 101 of the Copyright Act specifically sets out “teaching (including multiple copies for classroom use)” as an illustrative purpose for which fair use could be made of copyrighted works, making course packs was fair use.¹⁹¹ Despite the plain words of the statute, the copyright owners were able to call forth the coercive power of the state with a vengeance by convincingly painting the defendants’ behavior as intentional, premeditated theft of another’s property.

In spite of the vitriolic tone of her words and the apparent certainty by this district judge that the defendant’s conduct was “inexcusable” and “illegal,” an appellate court later tacitly disavowed this qualitative assessment of the defendant’s actions by overruling the district court’s holding that the defendant’s activities rose to the level of willful copyright infringement.¹⁹² In addition, the appellate court required the district court judge to modify an overbroad injunction that barred the defendant from engaging in any unauthorized copying of the plaintiff’s copyrighted works altogether, even if the copying fell within the tiny realm of paradigmatic and virtually unequivocal fair use such as making a personal copy for scholarly purposes.¹⁹³ While the flawed nature of the injunction implies a lack of comprehension of the nuances of copyright law by the judge, it also suggests her perception that the defendant was intentionally engaging in something illicit and destructive that needed to be unambiguously halted. Most pertinently for the purposes of this Article, despite the strict liability framework, the behavior and motivations of an accused copyright infringer were clearly important factors in the liability inquiry when a fair use defense was raised. Other copy shops in the region were paying photocopy royalties to publishers when this suit was brought,¹⁹⁴ and the defendant was punished harshly for deviating from this norm.

C. *How a Copyright Norm Can Become Law: The “Teacher Exception” to the Work For Hire Doctrine*

Norms in the guise of past practices have already found their way into copyright jurisprudence. For example, prominent “law and economics”

into course packets and selling packets to college students without permission of publishers violated copyright law).

191. 17 U.S.C. § 101 (1994).

192. See *Princeton U. Press v. Mich. Doc. Servs.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (concluding that defendant’s belief that copying constituted fair use was not so unreasonable as to be deemed willful).

193. See *id.* at 1392-93 (remanding to district court for modifying order to allow fair use copying of works); *Mich. Doc. Servs.*, 855 F. Supp. at 913 (granting injunction from *any* reproduction of existing or future copyrighted works) (emphasis added).

194. See *Mich. Doc. Servs.*, 855 F. Supp. at 908 (noting that “other copy houses similarly situated recognize the copyrighted interests, the protected materials, the property of others, and pay the required copyright fee for use of copyrighted materials”).

scholar and former law professor Judge Richard Posner perceived a significant “teacher exception” to the Copyright Act’s work for hire doctrine that protects professors from being treated like ordinary employees.¹⁹⁵ The work for hire doctrine is set out in sections 101 and 201(b) of the Copyright Act, and designates an employer (rather than the actual human creator) the author of any copyrightable work created by an employee within the scope of his or her employment.¹⁹⁶ Application of the “work for hire” doctrine in an academic context would give universities and colleges the ability to claim both authorship and ownership of the copyrights in creative works prepared by faculty members within the scope of their employment. As a general matter, academia has never worked this way, but this case certainly represented an attempted move in that direction.

There is a complete dearth of textual support for the teacher exception divined by Posner in either the Copyright Act or its legislative history.¹⁹⁷ In fact, Posner overtly conceded that “[t]o a literalist of statutory interpretation, the conclusion that the [1976 Copyright] Act abolished the [teacher] exception may seem inescapable.”¹⁹⁸ Nevertheless, Posner determined that universities should not be deemed the authors of the copyrighted works created by the professors they employ because of the “havoc that such a [contrary] conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception.”¹⁹⁹ In other words, applying the work for hire doctrine to faculty members would be contrary to the norms of academia.

Posner’s analysis suggests a belief that these norms are widespread and entrenched, and that to disregard these norms by issuing a ruling that contravened them would be highly disruptive and counterproductive. He observed that authority supporting the notion that scholarly writing by teachers is presumptively *not* work made for hire was scanty “not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings.”²⁰⁰ In describing the history of the teacher exception, Posner wrote:

195. See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416 (7th Cir. 1988) (discussing “teacher exception”).

196. See 17 U.S.C. §§ 101, 201(b) (1994) (codifying work for hire doctrine).

197. See, e.g., *Weinstein v. Ill.*, 811 F.2d 1091, 1093-94 (7th Cir. 1987) (citing 17 U.S.C. § 201(b)) (“The copyright law gives an employer the full rights in an employee’s ‘work for hire’ . . . unless a contract provides otherwise.”). The *Weinstein* court noted that section 201(b) “is general enough to make every academic article a ‘work for hire’ and, therefore, vest exclusive control in universities rather than scholars.” *Id.* at 1094 (citing DuBoff, *An Academic’s Copyright: Publish and Perish*, 32 J. COPYRIGHT SOC’Y 17 (1984)).

198. *Hays*, 847 F.2d at 416.

199. *Id.*

200. *Id.*

Although college and university teachers do academic writing as a part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. There were good reasons for the assumption. A college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise²⁰¹

Posner concluded: "The reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were."²⁰²

Another former law professor identified with the law and economics viewpoint, Judge Roger Easterbrook, had reached an analogous conclusion in a similar case a year earlier, basing his ruling on a combination of rules (in the form of a university copyright policy) and the norm of allowing academics to be deemed authors for copyright purposes, which he believed the rules left intact.²⁰³ Easterbrook observed that allowing academics who created copyrightable works during the course of their employment to own the copyrights to these works "has been the academic tradition since copyright law began."²⁰⁴ Like Posner, Easterbrook clearly

201. *Id.*

202. *Id.* Later in the decision Posner, a former law professor who wrote prolifically, humorously observed:

At argument Sony tried to distinguish between the [word processing manual at issue] and what college and university teachers write on the ground that the manual is "boring," insignificant, and in short unworthy of legal protection. In making this argument Sony's counsel either betrayed a lack of familiarity with academic writing or was exhibiting an exaggerated deference for members of this panel.

Id. at 417. Judge Posner also issued a ruling in a trademark case that deferred to societal norms. See generally *Ill. High Sch. Ass'n. v. GTE Vantage*, 99 F.3d 244 (7th Cir. 1996). In *GTE Vantage*, Posner held that where the public appropriated the trademarked term "March Madness" from a high school basketball tournament and began using it to refer to the NCAA college basketball tournament, the trademark became susceptible to "dual use." See *id.* at 247 (holding that once trademark becomes generic, "trademark is dead"). In reaching this decision, Posner judicially created a wholly new category of trademark for the purpose of keeping trademark law from "interfering" with widespread public usage of the expression. See, e.g., MERGES, MENELL & LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 691 (2d ed. Aspen 2000) (explaining that in *GTE Vantage*, the public had appropriated trademark for use).

203. See *Weinstein v. Ill.*, 811 F.2d 1091, 1094 (7th Cir. 1987) (holding that manual created by teachers was not "work for hire").

204. *Id.* As Easterbrook noted:

A university "requires" all of its scholars to write. Its demands—especially the demands of departments deciding whether to award tenure—will be "the motivating factor in the preparation of" many a scholarly work.

found the importance of tradition in the intersection between academic writing and the copyright law dispositive.²⁰⁵ The teacher exception example thus serves as “precedent”²⁰⁶ for approaching copyright law through established real life behaviors and practices rather than strictly through statutory interpretation.

One wonders how these jurists might react to the wholesale downgrading of traditional access levels to information as copyright and digitalization curtail the distributive abilities of entities like libraries. Loss of customary access is arguably more chaotic, disruptive and unsettling than academic copyright ownership issues, in part because a major alteration in the fundamental terrain of fair use (to the extent there is such a thing) impacts a much larger cohort of people, though academics are clearly among this group. Given the opportunity, would Posner and Easterbrook act to preserve the copyright status quo for library patrons, as they did for academics? The second half of this Article is geared toward persuading the reader that this would be a very good idea.

D. *Toward a Taxonomy of Copyright Norms*

The overarching principle that should drive classification of real space copyright use behaviors is simple and straightforward: Privileges and obligations that consumers enjoy or recognize when accessing and using works embodied in analog forms are norms. These are the familiar practices worthy of codification and appropriately mandated into electronic

When Dean Manasse told Weinstein to publish or perish, he was not simultaneously claiming for the University a copyright on the ground that the work had become a “requirement or duty” within the meaning of paragraph (3) [of the University’s copyright policy]. The University concedes in this court that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof. This has been the academic tradition since copyright law began, see *M. Nimmer, Copyright* § 5.03[B][1][b] (1978 ed.), a tradition the University’s policy purports to retain. The tradition covers scholarly articles and other intellectual property. When Saul Bellow, a professor at the University of Chicago, writes a novel, he may keep the royalties.

Id.

205. See generally *id.* But see *Vanderhurst v. Colo. Mountain Coll. Dist.*, 16 F. Supp. 2d 1297, 1307 (D. Colo. 1998) (holding that professor’s creation of teaching outline, even though prepared on his own time and connected directly with work which he was employed to do, was fairly and reasonably incidental to his employment and, therefore, based on statutory and judicial precedent, constituted “work made for hire”).

206. *Weinstein*, 811 F.2d at 1094 (noting general rule that faculty members own copyrights to their academic work). But see Posner, *supra* note 13, at 1700 (stating that norms are not identical to common law doctrines because while judges may be self-conscious about making their decisions consistent with prior decisions, norm-producers are more likely to be swayed by their sense of justice).

formats. They are easily observable and ascertainable, and widespread without regard to implicit precepts of formal copyright law.²⁰⁷

Consider, for example, the contrast between “legal use” and common usage of ink and paper books. Joe Liu has observed:

Copyright law places a number of limits on what I can do with my dog-eared copy of William Faulkner’s *As I Lay Dying*. I cannot run it through the photocopier to make another copy. I cannot read from it aloud in a public place. Nor can I translate the book into a foreign language (assuming I could speak one). These are things that I simply cannot do with my book, at least not without permission from the copyright owner or some statutory privilege. At the same time, copyright law permits me to do many, if not most, other things with my copy of that book. I can read it as many times as I want. I can lend it to a friend. I can destroy it. I can sell it to a stranger. I can even rent it out for a fee. All these things I can do without asking the copyright owner for permission or relying on some notion of fair use.²⁰⁸

207. Copyright law as currently constituted does not directly address how consumers can use the copies of copyrighted works that they obtain. As Joe Liu very intelligently articulated, there is, for example, no specific or explicit “right” to re-read, or even read, a book that one has purchased:

The legal “source” of this unlimited ability to read, to the extent there is one, can be found in the gaps in the Copyright Act. Section 106 of the Act, as several commentators have noted, does not include in the bundle of copyright rights the right to control the reading of a given copy. Rather, section 106 confers upon copyright owners only the limited bundle of rights mentioned in the previous section. Rights that are not mentioned in section 106 are, by default, retained by the copy owner. So, by virtue of my ownership or possession of a physical copy of a book, I can read it as many times as I wish (until the book itself begins to deteriorate), and the Copyright Act says nothing that would prevent me from engaging in such an activity. The lack of a right to control reading, combined with the inherent attributes of the physical copy, gives rise to the copy owner’s ability to read or access the copy. The ability to read and access physical copies is thus part of the physical reality that copyright law takes for granted and upon which it operates.

At the same time, however, it is worth noting that the Act nowhere preserves or guarantees copy owners any right to read against other restrictions on reading. Therefore, for example, a book could be written in a special kind of ink that vanishes ten minutes after being exposed to the air, or a sound recording could be recorded in such a way that it automatically erases itself, *la Mission Impossible*, after a single playing. Nothing in the Act itself bars these potential (though unlikely) methods of limiting my access to a physical copy in my possession. Rather, my ability to access and read a book in my physical possession is a function of both the limited bundle of rights in section 106 and the physical characteristics of the copies themselves. The Act is simply silent on the issue.

Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1287-88 (2001).

208. *Id.* at 1247.

If end use purchasers customarily re-read analog books and loan them to friends, these are norms of use that should be protected legislatively when the works are embodied in electronic formats in which multiple readings could otherwise be technologically prevented. In this way consumer expectations will be met, access levels will remain constant and respect for copyrights, if not outright fostered, at least will not be undermined.

Conversely, if consumers do not typically destroy analog books nor rent them out for fees, it would be unnecessary to codify rights to do so specifically with electronic books. The rights would remain intact to the extent they exist as a general matter of copyright law, but if these rights are not commonly exercised in real space, there is no need to affirmatively require that they be easily or symmetrically exercisable with respect to works in digital forms.

This approach dramatically disengages end user accessibility and use levels from complicated economic and theoretical discourses about providing proper incentives for the creation and distribution of copyrighted works, or adequately protecting intellectual property rights. These are debates individual consumers largely lack the knowledge, resources or inclination to fully or effectively participate in. Instead, driven by empirical observation rather than advocacy, it simply codifies a pre-existing, balanced framework that both consumers and content owners understand, and have long functioned within.

In the next section of this Article, the adverse impact that abrogation of copyright use norms will have upon one particular subset of copyright consumers, library patrons, is described in detail. A specific legislative solution, the codification of the real space norms of library use, is also proposed.

III. THE NORMS OF LIBRARY USE IN THE CURRENT LEGAL ENVIRONMENT

Recall Ellickson's hypothesis that members of close-knit groups tend to govern their interactions by developing informal norms that maximized the objective welfare of group members, but that legal rules would become more important when the social distance between disputants increased, when the magnitude of the dispute increased and when the legal system allowed disputants to externalize costs to third parties.²⁰⁹ Whether or not libraries and copyright holders ever constitute close-knit groups is a complicated question. For some types of works, libraries stand squarely in the way of profit maximization by copyright holders. Because some fraction of the library patrons who check out a book, movie or computer game would have rented or purchased the work had the item not been made accessible through a library, libraries negatively impact copyright owners' revenue streams.

209. See ELLICKSON, *supra* note 10, at 123-37.

The purchases made by the libraries themselves to stock their collections benefit publishers financially, but, unless they pay premium prices, sales to libraries of some works probably generate royalties that are inadequate to compensate for the "lost sales" they cause. Though libraries are likely to purchase multiple copies of works for which high patron demand is expected or encountered, the royalties still may not be proportionate to a work's popularity.

For other works, such as reference books, libraries may be publishers' best customers, and publishers that target library markets with particular information products would no doubt like to increase the consumption of these works (and of updates to these works) by libraries. Given the consolidation among publishing entities that has occurred recently,²¹⁰ some companies happily market works to libraries from some subsidiaries while simultaneously cursing the very existence of libraries from other corporate divisions.

Assuming for the sake of argument that copyright owners and content-consuming libraries form something resembling a close knit community, one possible explanation for the increasing importance of copyright law to large scale content owners, as evidenced by the explosive rates of copyright infringement litigation and the increased congressional lobbying efforts by corporate copyright holders, is that relatively recent technological innovations that enable high quality, low cost copying of copyrightable works have triggered or exacerbated the factors identified by Ellickson as increasing the importance of legal rules. Digital copying technologies may have increased the social distance between copyright owners and content-consuming libraries by pitting them against each other in high stakes and/or antagonistic licensing negotiations. As discussed below, when libraries must license information products, they lose the autonomy over licensed portions of their collections that the first sale doctrine provides with respect to works that they can purchase outright. Libraries may not realize any concomitant gains, and resent the limitations that licensing regimes unilaterally impose.

The magnitude of any given copyright dispute is certainly increased when large numbers of infringing copies can be rapidly and inexpensively made. Additionally, certain copyright law precepts allow copyright owners

210. See, e.g., Michael Ginsborg, *Consolidation in the Legal Publishing Industry Mean Rising Costs for Attorneys*, at <http://www.nocall.org/dj02221.htm> (Feb. 21, 2001) (stating that 1990's witnessed unprecedented level of mergers including \$3.4 billion merger of West Publishing Company and Thomson Corporation of Canada); David D. Kirkpatrick, *As Publishers Perish, Libraries Feel the Pain*, N.Y. TIMES, Nov. 3, 2000, at C1, available at <http://www.nytimes.com/2000/11/03/business/03PUBL.html> (reporting that mergers of publishers of scholarly journals in fields of science, medicine, technology, economics and law has resulted in sharp rise in price for such works); Mark Walsh, *Houghton Mifflin Acquisition Extends Industry Trend*, EDUC. WK., June 13, 2001, at <http://www.edweek.org/ew/ewstory.cfm?slug=40biz.h20> (commenting on "wave of acquisitions of US educational publishers by global-media powerhouses").

to externalize costs to third parties such as the court system, customs agents and federal marshals and entities marketing copying technologies.²¹¹ With respect to libraries, restrictive licenses externalize some of the consequences of access compression to library patrons.

In the ink and paper context, the norms of Library Use of copyrighted works are arguably self-enforcing. A library purchases copyrighted works in quantities correlated with expected demand, and makes them available to patrons who may or may not have purchased copies of their own if the library did not have the work in its collection. Every instance in which a given book is checked out does not necessarily represent a lost sale any more than every child enrolled in public school represents "lost tuition" to private educational institutions. In the case of some works, such as inexpensive paperback copies of works of fiction, library copies very likely supplant some purchases library patrons might have otherwise made. However, even if copies of these works were purchased by individuals rather than borrowed from libraries, evidence suggests that people will still share the privately purchased books informally.²¹² In other cases readers would simply forgo exposure to the works rather than buy them.

Libraries pay hundreds of millions of dollars to publishers to provide patrons with access to books and other objects embodying copyrighted works.²¹³ Because patrons can borrow these books to use as their own for a reasonable length of time, they are intuitively less likely to make infringing copies of the works. Though libraries may very well cost publishers sales, it doesn't necessarily follow that libraries foster or enable copyright infringements that wouldn't otherwise occur. Libraries may actually reduce incentives for infringing copying, since they facilitate access to authorized copies of works.

If copyrighted works are lost or damaged, a library may procure replacement copies if the copyright owner continues to make the work available for purchase. If a given work is no longer in print, the library may resort to purchasing a used copy of the work, or to photocopying copies that remain available in its collections. If a library exceeds the scope of copying authorized by section 108 of the Copyright Act, it may be vulnerable to censure by the owner of the affected copyright. Alternatively, if the copyright owner reacts with excessive harshness, the library may be reluc-

211. Plaintiffs have to pay lawyers, but taxpayers must bear court costs, administrative and maintenance fees and the salaries/expenses of the federal agents who pursue alleged "criminal offenses" and confiscate allegedly infringing goods at the border. *See, e.g.*, 17 U.S.C. § 506 (1999) (discussing potential criminal offenses under Copyright Act); 17 U.S.C. § 509 (1978) (discussing seizure and forfeiture of infringing phonorecords or copies); 17 U.S.C. § 601 (1997) (discussing manufacture, importation and public distribution of certain copies).

212. *See, e.g.*, Mann, *supra* note 34, at 57 (noting that "editors often guess that four or five people read every 'hard' copy of most popular books and magazines").

213. For example, the Association of Research Libraries 122 members spend \$900 million a year on books and journals. *See* Kirkpatrick, *supra* note 210 (explaining how journal costs are rising because of mergers).

tant to purchase other works from that entity. Libraries and at least some publishers are locked into long-term mutually dependent relationships with each other. Nevertheless, it is apparent that publishers have been deeply dissatisfied with the extensive use that libraries and library patrons could make of copyrighted works in ink and paper formats after simply remitting the initial purchase price. Digitalization has given publishers an opportunity to restructure their relationships with libraries, and to force abandonment of all pre-existing norms in the new distribution mediums.

One academic librarian recently published an interesting article in which she explicated the values conflicts between librarians and copyright owners, observing at the outset that “[w]hile these conflicts have existed for centuries, they are escalating in the rapidly expanding digital environment, and the debate between the two groups is becoming increasingly acrimonious.”²¹⁴ While there may be equal amounts of acrimony on both sides of the debate, the power imbalance between the two groups is substantial. A set of norms pertaining to library usage of copyrighted written materials in analog formats evolved that displeased publishers in several respects. As a result, copyright owners challenged these norms whenever new copying technologies emerged, such as when photocopying technologies made copying paper onto paper cheap and efficient, but failed to significantly alter either the law or the norms. They did not go so far as to begin publishing books comprised of ink and paper that could not be photocopied, perhaps because this was cost-prohibitive, or because it would have alienated consumers. Digital technologies, however, present economically efficient opportunities for control of content that photocopiers, microfiche and similar copying mechanisms simply do not.

Copyright use issues that have arisen regarding “distance education” provide illustrative examples of how publishers have challenged educational use norms. Educators, educational institutions, students and librarians all have normative expectations pertaining to distance learning.²¹⁵ All

214. Gasaway, *supra* note 79, at 115.

215. See Gasaway, *supra* note 76, at 795-97 (discussing distance learning). As Gasaway explained:

Library staff anticipate that they will be able to meet the needs of distance learners by providing copies of materials under sections 108(d) and (e) of the Copyright Act. They expect that they can provide copies to these students obtained for them via interlibrary loan. Libraries expect that they can create electronic reserve systems that will be available to all students, including distance learners. They assume that they will be able to negotiate licenses for digital materials for students, faculty, and staff on campus as well as for enrolled distance learning students who are located off-campus. Libraries also expect that they will be able to implement authentication technology that will not require all users to have the same “edu” address but rather will authenticate them as having access under the license. They believe that license fees will be reasonable in comparison to license fees for printed works and that license terms will not be inordinately restrictive. Libraries expect that publishers will respond quickly to their requests and will respect the time-sensitive nature of these requests. They expect that the Copyright Clearance Center will cover an

of these stakeholders anticipated from the outset that they would be able to make real-space-equivalent uses of copyrighted works in distance learning courses, even though such equivalents necessarily required transmitting copies of the works over the Internet.²¹⁶ The example of the intuitively real-space rooted student expectations that Laura Gasaway articulated is particularly instructive:

Students in distance learning courses expect that they will not be treated differently than students who take the same course in a traditional classroom. They believe that their learning experiences will not suffer because of restrictions on the types of materials that are performed or displayed in the course, restrictions that do not apply to the traditional classroom. They expect that the school will provide course materials for them just as it does for local students through course packs, access to webpages, and through other materials. They also assume that access to these materials will not be more expensive than it is for on-campus students. Students expect that the library in the educational institution will provide copies of books, articles, and other materials needed for their research and study for the course. They also expect the library to provide access to electronic journals, which are available to other students enrolled in the school.²¹⁷

Nevertheless, it has become apparent that these user expectations contrast dramatically with copyright holders' expectations, which include the conviction that schools offering online courses should obtain licenses for providing digital access to textual materials, should restrict access to course materials to enrolled students and should "implement technological controls to prevent downstream copying."²¹⁸ Copyright holders have also assumed that they are free to offer licenses on a "take it or leave it" basis,²¹⁹ or to decline to license a particular work at all,²²⁰ even if a consequence is that distance learning students are completely denied access to certain materials.²²¹

increasingly larger number of publishers and types of materials for digital copying.

Id.

216. *See id.* at 797 (noting expectations of library staffs, educational institutions and distance learning students).

217. *Id.*

218. *See id.* at 798 (discussing restrictions on user access).

219. *See id.* at 817-18 (discussing copyright user options).

220. Gasaway has observed that "there may be little motivation for certain copyright owners to license their works for distance learning because 'it may not be a remunerative market.'" *Id.* at 813 (quoting U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION 165 (1999)).

221. *See* Tom Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 798-800 (2001) (noting that those seeking access to copyrighted works must go through copyright owner or be denied access).

Thus, the expectation by several groups of copyright users that real space usage norms would move seamlessly into cyberspace proved unfounded. Instead copyright owners used the control mechanisms enabled by digital technologies to unilaterally alter the rules of use and access.

A. *E-Book Borrowing in Cyberspace and in Person: "Library Use"*

New technologies can facilitate unprecedented distribution of new creative works and access to information. Trends in the development and application of copyright and "copyright-related" laws, however, are bolstering business practices by content owners that may undermine or virtually incapacitate the ability of non-profit libraries to maintain the level of access to electronic copyrighted content that is provided by traditional paper-and-print books and periodicals. The goal of this section of the Article is to articulate the necessity, importance and rectitude of establishing for individual library patrons the electronic equivalent of "real space access" as the minimum standard of a free, unfettered and unmonitored entrée to information contained in digital form within the collections of non-profit libraries, whether accessed in person or via the Internet, herein designated "Library Use."²²²

Library Use, as proposed here, would be an explicit constraint on copyright exploitation giving library patrons the right to access and use the digital works owned by libraries, with no more constraints than have historically been placed upon ink-and-paper publications. Library Use will neither enlarge nor restrict the doctrine of fair use, nor affect the legality of excessive or extra-library copying. It will simply allow access to the works in the first place, to the extent rising prices allow libraries to maintain and add to their holdings, electronic or otherwise.²²³

222. See Ann Bartow, *Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access Through Changing Technologies*, 62 OHIO ST. L.J. 821, 822-31 (2001) (proposing concept of "Library Use").

223. See, e.g., Peter Givler, *Scholarly Book, the Coin of the Realm of Knowledge*, CHRON. OF HIGHER EDUC., Nov. 12, 1999, at A76 (explaining that while publishers are charging more for scholarly books, research libraries are faced with declining budgets and therefore are unable to purchase books); see also Marjolein Bot, Johan Burgemeester & Hans Roes, *The Cost of Publishing an Electronic Journal: A General Model and a Case Study*, D-LIB MAGAZINE (Nov. 1998), at <http://www.dlib.org/dlib/november98/11roes.html> (discussing Tenopir and King's study of development of scholarly publishing in United States). The study presents evidence that the institutional price of a scholarly journal subscription increased from \$39 in 1975 to \$284 in 1995, a factor of 7.3 in just twenty years. See *id.* (analyzing price increase for scholarly journals). Tenopir and King concluded that "traditional scholarly publishing is in serious economic difficulty." *Id.* The authors stated that general inflation and increase in size of the journals accounted for 52 percent of the price increase. See *id.* (noting reasons for increase in price of scholarly journals). Tenopir and King explained that the remaining 48 percent of the price increase was due to the dramatic decrease in personal subscriptions. See *id.* (same). The authors surmised that publishers responded to the decrease in personal subscriptions by increasing institutional subscription rates. See *id.* (drawing conclusion for gradual increase in subscription rates for institutions). This, in turn, resulted in more

The statutorily constructed right to Library Use proposed is directly intended to counter access restrictions imposed by content owners, both those implemented to control use of copyrighted works in electronic formats generally, and those specifically aimed at curbing the ability of non-profit library patrons to access and use copyrighted information. These restrictions are intended to reconfigure the norms of information access available through libraries. To prevent narrowing the portals of access to informational works that libraries provide, either Congress or the courts must step in to preserve pre-existing library use norms associated with ink and paper and Congress is better situated than the courts to address norm preservation in an immediate and consistent manner.

The exemplar Posner “teacher exception” pronouncement demonstrates that courts can preserve copyright norms based on past practices if they are so inclined.²²⁴ That judgment, however, was not rendered in the context of an orchestrated attempt to challenge and alter a preexisting norm by well-funded norm opponents. Nor would courts ordinarily have had the first hand experience with the customs at issue that Posner had with academia.²²⁵

Real space Library Use norms are functionally under attack by license-based restrictions imposed as conditions for access to information products. Even if libraries or library patrons are willing and able to litigate access compression issues, content owners are likely to have far better resources, and to the extent that they are defending their licensing practices, will benefit from “freedom to contract” jurisprudence that appears far clearer, better established, more consistent and easier to apply than the complex vagaries of copyright’s fair use doctrine.²²⁶ Even if fair use

cancellations of subscriptions and a corresponding increase in institutional subscription rates. *See id.* (discussing “vicious cycle of cancellations and further increases” in rates).

224. *See Hays v. Sony Corp. of Am.*, 847 F.2d 412, 417 (7th Cir. 1988) (noting existence of “teacher exception” to copyright law). For a further discussion of the “teacher exception”, see *supra* notes 195-206 and accompanying text.

225. *See Richard A. Posner, Senior Lecturer of Law*, at <http://www.law.uchicago.edu/faculty/posner-r> (last visited July 30, 2002) (noting that Posner has been professor for thirty-four years). *But see* Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2080 (2000) (discussing role of judges and legislature). Benkler opines:

Increasing excludability enhances the welfare of owners of information goods, and these owners lobby for expanding rights. Those whose welfare is adversely affected are usually too diffuse to represent the full measure of the social loss, thereby presenting legislatures with a skewed picture of the social effects of perfecting the excludability of information goods. Perhaps, then, it is up to publicly spirited legislators, but even more so to judges, to serve as counterweight to these political imbalances, to review very carefully, and with a skeptical eye, proposals for further enclosure of the public domain.

Id.

226. *See, e.g.*, THE EMPIRE RETURNS: THE FALL AND RISE OF CONTRACT (F.H. Buckley ed., Duke University Press Sept. 1999); Robert Merges, *Expanding Boundaries of the Law: Intellectual Property and The Costs of Commercial Exchange: A Review*

was held to trump content owner imposed licensing terms, it would take a

Essay, 93 MICH. L. REV. 1570, 1571-72 (1995) (stating that federal body of intellectual property law should exist so that rules will be coherent); Joel Rothstein Wolfson, *Contract and Copyright Are Not at War: A Reply to "The Metamorphosis of Contract into Expand"*, 87 CAL. L. REV. 79, 79 (1999) (arguing that state law proposals are ineffective in light of fast-growing and complex copyright industry); see also generally Tamar Frankel, *The Legal Infrastructure of Markets: The Role of Contract and Property Law*, 73 B.U. L. REV. 389, 390 (1993) (noting that desire for efficient markets requires use of property law over contract law). As Frankel explained:

The guiding value of contract law, subject to few exceptions, is that society supports individuals' freedom to interact by mutually consenting to binding exchange relationships—free of coercion, and free of law's (government's) interference. The government intervenes in the contract relationship only upon the request of a party to enforce the bargain, and bargains are generally enforced if made under the conditions assumed in the contract prototype—that is, the parties consent freely to enter into the relationship, that they can fend for themselves, and that they have capacity to enter into the relationship.

Id. at 393. But see, e.g., Gillette, *supra* note 18, at 828-29 (discussing use of legal system to circumvent legislature). Gillette notes:

A legal entrepreneur who wanted to modify an existing rule to make it more pro-consumer, on the other hand, would tend to proceed through the judicial process, even if the initial rule was promulgated by the legislature. By proceeding through the courts, any single consumer (or attorney) could mount a challenge without incurring the significant costs necessary to lobby the legislature. Although class action litigation may require coalitions among and significant investment by attorneys, in all but the most complex cases those costs are likely to be less than the costs related to organizing interest groups, drafting legislation, and approaching legislatures. In fact, even in the most complex cases, the organizational costs of litigation may still be less than the costs of pursuing the same result through legislation. Plaintiffs' tort lawyers, for example, may join forces in litigation to share expertise and realize economies—but they have less capacity to lobby legislators, with whom they have less contact. Further, the need for greater numbers in order to lobby effectively for legislative change would reduce the lawyers' capacity to monitor and prevent shirking by coalition members. Individuals who have difficulty coalescing into groups because potential members are geographically diffuse or have insufficient individual stakes might find it costly to approach legislators relative to courts. Thus, we should not be surprised to find that tobacco reform and civil rights and anti-death-penalty movements take the form of litigation campaigns rather than legislative campaigns. The result is that whether lock-in occurs more readily in courts or in legislatures will depend to a significant extent on which forum is more amenable to the legal entrepreneurs who seek to modify the status quo. Entrepreneurs who face low organizational costs and little opposition from other organized groups or who are repeat players in the market for legal rules and thus more able to amortize investments in relationships with rulemakers can be expected to address the legislature both to obtain their initial objectives and to modify existing rules. If these entrepreneurs would be the predominant beneficiaries of legal change, we could expect to see more lock-in with respect to common law than statutory law. If, on the other hand, legal entrepreneurs tend to be poorly funded and face organizational barriers, we can expect them to seek their reforms through the courts and, as a consequence, we could expect to see relatively more lock-in with respect to statutory law.

Id.

while for a consistent body of like decisions to emerge across jurisdictions. An imperial defense of real space copyright use norms through legislation is therefore preferable.²²⁷

Structural interventions by the government that impose real space access norms on cyberspace are justifiable as a general matter because they will improve the quantity and diversity of information that is available to all citizens, facilitating the prime directive of copyright law. Copyright protections (indeed copyrights themselves) depend for their very existence on government action, primarily through extensive legislative and judicial apparati. Congress has been willing to pass laws that protect copyrights, and must legislate to protect users' rights to access and make fair use of copyrighted works. As Diane Zimmerman has observed, "the advent of law-backed self-help to assert and enforce copyright owners' interests also demands that lawmakers engage in an affirmative rebalancing of interests as between users and owners to assure that crucial social policy objectives are not lost in the shuffle. . . ." ²²⁸

Except where sexual content²²⁹ or copyrights are involved, federal officials have generally preferred a "hands-off" approach to the Inter-

227. See, e.g., *id.* at 831-32 (noting differences between ability of judiciary and legislature to affect social change).

A judge who shares the interests of a group that wishes to maintain the status quo can do little more than render decisions that maintain the existing rule. The zero-sum nature of litigation and the inability to decide issues not presented to them provide courts little opportunity to trade away social gains in favor of preventing those losses that would be imposed on the groups that prefer to lock in the existing regulation. Legislators have more flexibility in effecting tradeoffs. Legislators need not deal solely with discrete, individual decisions; instead, they can buy out those who lose in one piece of legislation by granting them an offsetting benefit in some other legislation. In this manner, legislators can more easily avoid lock-in at a suboptimal point because they can simultaneously vote in a manner that facilitates a socially optimal solution while granting those who oppose the measure an offsetting benefit in some unrelated matter.

Id.

228. Zimmerman, *supra* note 84, at 284.

229. The federal government is reluctant to (for example) tax the Internet. See, e.g., *Zeran v. Am. Online*, 129 F.3d 327, 331 (4th Cir. 1997) (discussing legislative history of 47 U.S.C. § 230 and noting that Internet regulation would have chilling effect on free speech caused wholly by specter of tort liability); Declan McCullagh, *Wrong Time for Net Tax?* WIRED (Mar. 15, 2001), at <http://www.wired.com/news/print/0,1294,42442,00.html>. Nevertheless, federal officials are much more enthusiastically "hands on" about sex on the Internet. See, e.g., 47 U.S.C. § 231 (2001) (regulating access of minors to adult material on Internet). Cyberspace Law authority Robert W. Hamilton has humorously (and yet with startling accuracy) observed:

I have two syllogisms that produce rules for me, the rules that I use to analyze any legal question involving the Internet. The first one starts from a proposition that's really beyond genuine dispute: all lawyers are inherently evil. It therefore follows, it seems to me, that if all lawyers are inherently evil, what they practice must be inherently evil as well, i.e., that the law is inherently evil. And, as we all know, money is the root of all

net.²³⁰ Consider the rationalizations Congress used to justify granting ISPs immunity under the Communications Decency Act,²³¹ finding that the Internet and interactive computer services “have flourished, to the benefit of all Americans, with a minimum of government regulation,”²³² and further stating that it is “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”²³³ Though reluctant to tax e-commerce,²³⁴ or to consider legislation pertaining to online data privacy,²³⁵ Congress has been perfectly willing to interfere with the otherwise ostensibly laissez-faire commercial environment in cyberspace in the context of copyrights, as evidenced by passage of the Digital Millennium Copyright Act.

evil. The logical conclusion: money is the root of all law. So analytical rule number one is: follow the money. If you follow the money, you will find the answer to your question on virtually any legal issue.

The second syllogism that produces my two rules of analysis is derived from the quotation that I believe is attributable to George Gilder: Back in the early days on the Internet law lecture circuit (say, three or four years ago), the popular quip we heard was: “Soon, all law will be Internet law.” In fact, we heard a variant of that quip from Mr. Shapiro this morning, in which he repudiated the notion of some distinction between cyberspace and real space and instead suggested that soon it will all be considered the same space. So the first premise is: “All law will be Internet law.” To this premise I add what I believe is equally indisputable: “Soon, all Internet law will be pornography law.” It therefore follows, then, that soon, all law will be pornography law. Thus, my two analytical rules for all Internet law questions are: (i) follow the money, and (ii) figure out what pornography law has to say about the issue, and you’ll get your answer.

Hamilton, *supra* note 146, at 735.

230. See, e.g., Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447, 449 (2000) (reviewing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) and ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING PEOPLE IN CHARGE AND CHANGING THE WORLD WE KNOW* (1999)) (noting that government’s view stems from Internet’s “decentralized nature and tradition of bottom up governance”).

231. Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996).

232. 47 U.S.C. § 230(a)(4) (2001).

233. 47 U.S.C. § 230(b)(2) (2001).

234. See, e.g., Internet Tax Freedom Act, Pub. L. No. 105-277, § 1101, 112 Stat. 2681, 2681-719 (1998) (providing moratorium on taxation of Internet until November 1, 2003).

235. See, e.g., Dick Arme, *Privacy: For Those Who Live in Glass Houses*, (Apr. 9, 2001), at <http://www.freedom.gov/library/technology/memo/privacy3.asp> (last visited July 30, 2002) (urging Congress to consider online computer privacy legislation); see also John L. Micek, *U.S. Urged to Focus on Consumer Privacy*, E-COMMERCE TIMES, (Apr. 11, 2001), at <http://www.ecommercetimes.com/perl/story/8871.html%20> (discussing electronic privacy debate).

In fact, Congress has a tradition of reacting to technological changes by adding to or altering the Copyright Act.²³⁶ Many of the amendments to the Act have been largely aimed at protecting certain categories of copyrightable content from the potential risks of excessive unauthorized copying posed by emerging technologies. For example, the first sale doctrine in section 109 of the Copyright Act was explicitly circumscribed by an amendment that made it a copyright infringement to engage in the “rental, lease or lending” of copies of computer software and sound recordings embodied in phonorecords for “direct or indirect commercial advantage.”²³⁷ This prohibition was intended to protect certain content owners from having their wares leased and copied outside the scope of their control and profit streams.²³⁸ Yet, even this targeted content owner protective amendment sought to preserve for libraries the benefits of the first sale doctrine, at least as applied to sound recording bearing phonorecords. Accordingly, section 109(b)(1)(A) of the Copyright Act reads in pertinent part: “Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for non-profit purposes by a non-profit library or non-profit educational institution.”²³⁹

Furthermore, Ruth Okediji has persuasively argued that legislative intervention with respect to fair use in cyberspace can be problematic, because rules that emerge can be complex or difficult to follow.²⁴⁰ She also warned that legislating exemptions for specific uses must be accompanied by room for evolution of the Internet, as even the framework and design elements currently integral to the functioning of cyberspace are not necessarily immutable.²⁴¹ Both libraries and copyright holders have incentives to misunderstand or willfully misconstrue copyright law to further their own ends,²⁴² and they can be expected to pursue self-serving agendas in ways that could distort or complicate any statutory framework.

236. See, e.g., *Adapting Copyright Law to the Digital Environment of the National Information Infrastructure: Hearing on S. 1284 and H.R. 2411 Before the House Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary and the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Bruce Lehman, [then] Assistant Secretary of Commerce and Commissioner of Patents and Trademarks) (discussing amendments to Copyright Act).

237. See, e.g., 17 U.S.C. § 109(b)(1)(A) (1997) (providing restrictions on unauthorized use of computer programs).

238. Other content owners whose works are not covered by this statutory provision (such as motion picture producers) had to find their own paths within the constraints of the first sale doctrine to maximize profitability and minimize infringement of their copyrighted works. It is important to note that most in fact did; the lack of statutory protection may have resulted in changed business method models, but it did not discernibly impact artistic creativity in a negative manner.

239. 17 U.S.C. § 109(b)(1)(A).

240. See Okediji, *supra* note 127, at 173-74 (discussing online fair use legislation).

241. See *id.* (analyzing mutability of Internet).

242. See, e.g., Gasaway, *supra* note 79, at 115, 160-61 (observing that both librarians and copyright holders often misunderstand copyright law and sometimes engage in fairly gross overstatement).

Richard Pildes has made a similar point, although more generally, by asserting that laws can act destructively with social norms if lawmakers fail to appreciate the complexity of the ways in which given norms are created, enforced and altered.²⁴³ Certainly, the codification of copyright use norms will need to be finely calibrated, yet it is hard to believe these laws could put copyright users at more of a disadvantage than typical copyright licenses do. As Mark Lemley has noted:

[I]ntellectual property rules may not always be pretty, or easy to determine, and they certainly aren't perfect descriptions of an optimal incentive structure. But they are at least an effort to arrive at the right balance of incentives—an effort that would never even be made were we to leave social ordering entirely in the hands of private parties.²⁴⁴

Library Use will have the most dramatic and unequivocal impact if it is straightforwardly defined by making explicit, unambiguous and detailed reference to minimum standards of access derived from traditional real space rights and privileges. Content owners could be required to concede to library patrons the electronic equivalent of checking out books, with the imbedded ability to read the works multiple times over a period of several weeks, and to print out portions of the work or even the work in its entirety just as a book could be photocopied. This guaranteed minimum would preserve the ability of library patrons to use electronic books essentially as they had used ink-and-paper books, but would deny them most of the advantages of digitalization, with the exception of remote access.

Alternatively, the access standard promulgated by Library Use could be elevated to allow patrons to download electronic content, electronically “cut and paste” portions of digital works and otherwise share in the benefits of digital media. It could also imbue libraries with the authority to digitalize pre-existing analog works to make them susceptible to remote access via the Internet. Simplicity, clarity, straightforwardness and easy comprehensibility should be the guiding principles, whatever the particulars of Library Use are ultimately chosen to be. This movement toward transparency and specificity must, however, preserve a sufficient flexibility and adaptability in the law so that it can accommodate the future evolution of technologies and consequent use behaviors.

243. See Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2073 (1996) (discussing lawmakers' use of social norms).

244. Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 169-71 (1999); see also Benkler, *supra* note 225, at 2079 (“There is . . . no general theoretical reason to think that private ordering of information transactions will systematically enhance aggregate social welfare, relative to public ordering of such transactions. There are, on the other hand, many reasons to think that increasing the excludability of information goods will impose significant costs on public discourse and on personal autonomy.”).

1. *Imposing Norm-based Limits on Libraries as Well as Publishers*

Congress could construct Library Use to place limitations on libraries and patrons as well as copyright owners. For their part, libraries might be compelled to limit perusal of information units to one user at a time, again using past practices involving books as norm models, though it is unclear why it would ultimately make a difference to the content copyright owner if two patrons access an electronic document sequentially rather than simultaneously. If libraries limit themselves to granting book-like access, both patrons and libraries will lose some of the advantages of electronic mediums. Other advantages may be maintained, such as the amount of physical storage space required, maintenance, searchability, preservability and ease of acquisition.²⁴⁵

2. *The WTO/GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

There are also various international considerations, as the United States will need to remain in compliance with the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which largely incorporated the principles of the Berne Convention.²⁴⁶ Article 13 of the TRIPS Agreement obligates member states of the World Trade Organization (WTO) not to adopt exceptions or limitations except in "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."²⁴⁷ At a macro level, simply codifying real space library usage and access norms and importing them into the digital environment would not appear to be a new exception or limitation. However, to the extent that other signatory nations hold the expectation that digital works will be accorded higher levels of copyright protection than works in analog form, adhering to TRIPS may pose difficulties. Marci Hamilton has asserted that TRIPS was outdated at its inception because it did not address the issues posed by online distribution of intellectual property,²⁴⁸ and that the task of constructing an appropriate fair use zone

245. See, e.g., Kent Milunovich, *Issues in Law Library Acquisitions: An Analysis*, 92 LAW LIBR. J. 203, 205 (2000) ("Technology provides a potent tool in matters related to data handling: storage, access, searching, relating, and retrieval. As such, it enhances the library's role as an information center and as a research support resource.").

246. See, e.g., Hamilton, *supra* note 29, at 625 (1996).

247. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

248. See, e.g., Hamilton, *supra* note 29, at 614-15 (discussing faults of TRIPS agreement). Hamilton argued:

Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a

in an online world still lies ahead of national and international policymakers.²⁴⁹ Both Congress and the U.S. courts must be cognizant of TRIPS obligations when drafting and interpreting statutory Library Use,²⁵⁰ but should not be dissuaded by them.

B. *Why a Statutory Right of "Library Use" is Necessary*

A statutory right of Library Use is necessary for many reasons, including preserving the right to share, avoiding the pitfalls of fair use, giving libraries the scope of immunity accorded commercial ISPs, preventing replacement by for-profit E-Libraries and preventing the evisceration of the First Sale doctrine. Each of these will be discussed in turn. Finally, this section will illustrate select paradigmatic examples of the need for Library Use.

1. *To Preserve the Right to Share*

Copyright law has never given copyright owners control over all uses of their works. Rather, it gives copyright owners exclusive rights and expressly subjects those rights to a host of exceptions.²⁵¹ *The Digital Dilemma* authors articulated seven categories into which exceptions and limitations to copyright owners' rights seem generally to fall:²⁵²

- Those that are based on fundamental human rights such as free speech and privacy interests;²⁵³

nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.

Id.

249. See *id.* at 625-29 (discussing difference between hackers' view and publishers' view of fair use zone).

250. See DIGITAL DILEMMA, *supra* note 74, at 139 ("The U.S. Congress will need to keep TRIPS obligations in mind when it contemplates adopting new exceptions and limitations to copyright law, including those that might apply to digital works. Judicial interpretations of exceptions and limitations will also need to be consistent with TRIPS obligations.").

251. See 17 U.S.C. §§ 106-122 (2001) (listing exceptions to rights of copyright holders).

252. See DIGITAL DILEMMA, *supra* note 74, at 136 (discussing exceptions and limitations to rights held by copyright owners).

253. See *id.* at 137 (discussing human rights).

A number of fundamental human rights might provide a basis for a limited exception to copyright owner rights, including freedom of speech, freedom of the press, freedom of expression, freedom of information, democratic debate, and privacy or personal autonomy interests. A literary critic for a print magazine, for example, can republish a portion of another author's work in order to develop her critique of that author's work. A reporter for a print newspaper can publish some portions of a politician's speech in order to show the errors it contains. Copyright laws in some countries have specific "rights of fair quotation" to provide for legitimate copying for purposes of criticism and news reporting. In the United States, these concerns are generally dealt with through the fair use doctrine. Given the robustness of criticism, news reporting, and pub-

- Those that are based on public interest grounds such as insuring access to information for non-profit education purposes, and in libraries;²⁵⁴
- Those that arise from competition policy such as compulsory licensing and findings of fair use for reverse engineering for compatibility purposes;²⁵⁵
- Those that promote flexible adaptation of the law to new circumstances such as the development of technologies that can copy, but also have substantial non-infringing uses;²⁵⁶

lic debate on the Internet, it would seem that fair quotation/fair use rules would likely have some application in the digital world, just as they do in the print world.

Id.

254. *See id.* (discussing public interest).

Public interest exceptions to copyright vary to some degree from country to country. Among those that could arise under the laws of the United States and some other nations are those that permit performance of copyrighted works in the course of face-to-face instruction in nonprofit educational settings; those that enable libraries and archives to make copies for preservation, replacement, and other legitimate purposes; and those that enable the creation of derivative works for the blind. It is worth noting that the Digital Millennium Copyright Act seeks to maintain an appropriate balance between the rights of rights holders and the needs of others and contains a provision to enable libraries and archives to make digital, as well as print and facsimile, copies for these purposes. It also mandated a study to help Congress consider what copyright rules might be appropriate to promote distance learning. Fair use may sometimes be invoked on public interest grounds to justify some copying of copyrighted articles in legal proceedings (e.g., as evidence relevant to a contested issue of fact) or to satisfy some administrative regulatory requirements (e.g., to demonstrate the efficacy of drugs).

Id.

255. *See id.* (discussing competition).

Competition policy concerns underlie some exceptions to and limitations on copyright owners' rights. Two examples of competition policy-based limitations in U.S. law are rules that impose compulsory licenses on owners of musical copyrights to enable further recordings of those musical works and on owners of rights in broadcast signals for passive retransmissions of the broadcasted material by cable systems. The U.S. fair use defense is sometimes employed to promote competition policies, as in the *Sega v. Accolade* case, which upheld the legality of unauthorized decompilation of computer programs for the legitimate purpose of developing a compatible but noninfringing program. As the *Sega* case demonstrates, competition policy issues may arise at times when information is in digital form.

Id. at 138.

256. *See id.* at 137 (discussing rapid technological change).

In times of rapid technological change, it may be difficult for legislatures to foresee what new technologies will arise, how they will be used, and what copyright rules ought to apply. Courts in the United States have often employed the fair use doctrine as a flexible mechanism for balancing the interests of rights holders and of other parties in situations in which the legislature has not indicated its intent. These include not only the *Sony v. Universal City Studios* decision about home taping of television

- Those that arise from perceived market failures such as when the transaction costs of negotiating a license far outweigh the benefits derivable from the transaction;²⁵⁷
- Those that are the harvest reaped from successful lobbying endeavors;²⁵⁸ and
- Those that cover situations in which uses or copying of protected works are *de minimis*, incidental to otherwise legitimate activities or implicitly lawful given the totality of circumstances.²⁵⁹

programs for time-shifting purposes, but also a number of cases involving digital information. These include the *Galoob v. Nintendo* case, which upheld Galoob's right to distribute a "game genie" that enabled users to make some temporary alterations to the play of certain Nintendo games, and the *Religious Technology Center v. Netcom* case in which automatic posting of user-initiated Internet messages by an online service provider was found to be fair use.

Id. at 138.

257. *See id.* at 137 (discussing market failure).

Exceptions and limitations may arise from a perceived possible market failure. One argument for fair use may be that a market cannot effectively be formed when the transaction costs of negotiating a license far outweigh the benefits derivable from the transaction (whether they be licensing revenues or some other benefit, such as enhanced reputation or goodwill). To the extent that a fair use defense arises, at least in part, from market failure considerations, the scope of the fair use may be affected by changed circumstances that enable new markets to be formed effectively. As noted above, this view is expressed in the *Intellectual Property and the National Information Infrastructure* (IITF, 1995) white paper, specifically in relation to the digital environment. To some degree, the exception aimed at promoting publication of works for visually impaired persons reflects market failure, as well as public interest, considerations.

Id. at 138-39.

258. *See id.* at 137, 139 (stating that in situations such as copyright privileges for veteran's groups, successful lobbying has created exceptions or limitations to copyright owner's rights).

259. *See id.* at 137 (discussing *de minimis* copying).

Finally, some exceptions and limitations to copyright owners' rights would seem to be the result of successful lobbying or of a legislative perception of the *de minimis* or incidental character of a use. In Italy, for example, military bands are exempt from having to do rights clearances for music they perform in public. In the United States, a number of exceptions, such as those creating special copyright privileges for veterans' groups, are the result of successful lobbying. Whether they can be justified on *de minimis* grounds or are pure pork barrel politics is perhaps debatable. Better examples of *de minimis* or incidental uses for which special copyright exceptions have been created are those in the Digital Millennium Copyright Act, which provides some "safe harbor" rules for certain copies in the digital environment, such as those made in the course of a digital transmission from one site to another where the transmitting intermediary (e.g., a telephone company) is merely a conduit for the transmission and not an active agent in it. It is conceivable that other such exceptions will need to be devised for incidental digital copying in the future, or that fair use law will be used to exempt incidental or *de minimis* copying.

Id. at 139.

The copyright law allows unauthorized copies, downloads, uploads, transmissions or distributions that might be fair use under section 107 of the Copyright Act, lawful noncommercial consumer copies under section 108 and private performances and transmissions over which the statute gives the copyright owner no control. Most pertinently here, section 108 explicitly permits photocopies of articles and other short works for library users, whether the user is on location or has made a request through another library.²⁶⁰ As Laura Gasaway explained:

Section 108 contains three subsections dealing with the reproduction and distribution of copies to library patrons. Section 108(d) states that the rights of reproduction and distribution apply when the user requests no more than one article from a periodical issue or other collective work, or a “small part of any other copyrighted work.” For example, when a patron asks the library to provide a copy of an article, the library may supply the request if three conditions are met: (1) the copy becomes the property of the user, (2) the library has no notice that the copy will be used for other than fair use purposes, and (3) the library places the register’s warning on copy order forms and prominently displays the same warning at the place where orders are made. . . . [If a patron] identifies him or herself as a student, the library usually presumes that the use is for a course or for other research. All the statute requires is that the library have no actual notice that the copy will be used for other than private study, scholarship, or research.²⁶¹

As a practical matter, the norms of Library Use of bound books and periodicals favor the access rights of library patrons over profit maximizing by copyright owners. Communities act collectively to found and maintain non-profit public libraries as a venue through which purchased or donated copies of copyrighted works are shared among community members. Similarly, educational organizations develop and sustain libraries for the benefit of their institutional communities, largely students and faculty members, and also sometimes allow their libraries to be utilized by outsiders as well. Libraries insure that individuals can have access to large numbers of books and periodicals without purchasing or subscribing to them.

Because activities over digital networks can be tracked and recorded, library activities involving the accessing and copying of copyright-protected works that were essentially unmonitorable in the offline world become ascertainable and quantifiable when conducted online. Moreover, the nature of digital technology means that many activities analogous to non-infringing acts in the offline world become putatively technical in-

260. See 17 U.S.C. § 108 (1998) (allowing unauthorized photocopying by library users).

261. Gasaway, *supra* note 76, at 793.

fringements if conducted over the Internet, because some degree of content copying is a functional requirement of using a computer.²⁶² In real space, libraries can provide access to a book by acquiring only one copy, and extensive sharing of the book is accomplished through serial loans, without copying that purchased copy. In the digital world, however, even routine access to information requires “making a copy,” both as a technological issue, and as a legal matter.²⁶³ “Copying” is a touchstone of copy-

262. See, e.g., Needham J. Boddie, II et al., *A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. 193, 225 (1998) (“The end result of virtually every transmittal of a work across the Internet will involve the exclusive right to copy. Printing to paper, copying to disk, and loading into memory all amount to reproduction.”); Lemley, *supra* note 27, at 555 (explaining the multitude of copies made when downloading material).

Obviously, each act of uploading or downloading makes a RAM copy in the recipient’s computer, but that is only the beginning. When a picture is downloaded from a Web site, the modem at each end will buffer each byte, as will the router, the receiving computer, the Web browser, the video decompression chip, and the video display board. Those seven copies will be made on each such transaction. Further, since most Internet transmissions do not travel directly between sender and receiver, more copies will be made of the individual packets at each node they pass through on their way to the end point.

Id.

263. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (holding that unfixed, ephemeral RAM use of digital work is copying); cf. Lemley, *supra* note 27, at 550-52.

Generally speaking, RAM and screen copies exist only while the computer or monitor are turned on; they are erased when the computer is turned off. Clearly, this fact does not prevent such copies from being “perceived, reproduced or otherwise communicated” with the aid of a computer—data loaded in RAM can be viewed on a computer screen, printed onto paper, saved to magnetic storage, or transmitted via a computer network. Rather, the question is whether the RAM copies themselves exist “for more than a transitory duration.”

The legislative history accompanying the “fixation” language in the 1976 Copyright Act strongly suggests that Congress did not consider such copies to be “fixed.” The House Report provides: “[T]he definition of ‘fixation’ would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the ‘memory’ of a computer.” Several cases have suggested that RAM copies and screen copies are not fixed.

In 1993, however, the Ninth Circuit decided *MAI Systems Corp. v. Peak Computer*. In that case, the court held that loading a computer operating system from magnetic storage into RAM (by turning the computer on) violated the Copyright Act because it made a fixed RAM copy of the program. There are a number of problems with the *MAI* opinion—it does not refer to the legislative history, it does not discuss the “transitory duration” prong of the fixation test, and the sources it cites are generally inapposite and many commentators have been quite critical of it. Nonetheless, courts both in and out of the Ninth Circuit have taken the same approach as *MAI*, and the government’s NII White Paper has enthusiastically endorsed it as settled law. Further, legislation recently considered by the House of Representatives would reverse the *MAI* decision on other grounds, but might be read to agree implicitly with the court’s

right infringement even if the supposed copies are intangible and fleeting, such as in the random access memory (RAM) of a computer. As a result, functionally identical uses of books may be legally disparate. Serially loaning an ink-and-paper book to twelve eager readers is acceptable, but serially loaning an electronic book online to even half that number is potentially a copyright infringement because the library has enabled the making of six “unauthorized copies” of the work even if readers never print the work or save it to their hard drives.

Traditionally, loaning a book, compact disc or videocassette to a library patron infringed no rights under copyright law. The right to share or dispose of a purchased copy of a copyrighted work fell within the first sale doctrine.²⁶⁴ In cyberspace, however, a library cannot “share” material over the Internet without reproducing and transmitting it.²⁶⁵ It is therefore necessary as well as expedient to make multiple copies of copyrighted digital works to facilitate any sort of sharing. This fast, facile and inexpensive copying enables (if a library were so inclined) broad sharing with many people simultaneously, on a scale not possible with a real space book, compact disc or videocassette. Such “sharing” at some point admittedly begins to look less like acts of altruism and more like incidences of copyright infringement, especially to copyright holders.

To prevent wide spread sharing, content owners are attempting to use contracts, courts and laws to render it legally and technologically impossible for libraries to share even one legitimate, authorized copy of a work. Though the Internet makes sharing information faster and easier than ever, some content owners would have all unauthorized digital sharing rendered copyright-infringement.²⁶⁶ Such action is neither possible nor generally even attempted in real space, in part because preventing sharing of analog works would run contrary to longstanding conventions of everyday use. Content owners are thus leveraging new technologies to change

holding that copies in RAM are fixed. At the very least, there is some authority for the proposition that every time digital information is recorded in RAM memory, a reproduction of the work is made that implicates [section] 106(1) of the Act.

Id.

264. See 17 U.S.C. § 109 (1997) (codifying doctrine of first sale). In 1984, Congress enacted the Record Rental Amendment of 1984. See Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amended at 17 U.S.C. §§ 109, 115) (prohibiting commercial record rental, but placing no restrictions on resale, loan or gift).

265. See 17 U.S.C. § 115 (1997) (prohibiting reproducing and transmitting material without compulsory license).

266. See generally, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (discussing music industry’s attempt to permanently enjoin Napster’s peer-to-peer file-sharing service); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (enjoining publication on web site of computer code for decryption of DVD technology preventing unauthorized copying); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (finding that copying of copyrighted works onto computer servers and replaying those works for “customers” infringed copyright).

the norms of sharing and other uses of copyrighted material well beyond the context of libraries. Jane Ginsburg explained the new options available to copyright owners by contrasting Napster and VCRs as follows:

There is an important difference between the Napster technology and the Sony videotape recorder. Videotape recorders are a free-standing technology; as the District Court in Napster recognized, once a machine was sold, its producer could no longer follow up how consumers employed it. As a result, the determination of contributory infringement entailed an all-or-nothing outcome: if the manufacturers were held liable, then no machine could be distributed, despite its capacity for non-infringing uses; if no liability, then the machine can be distributed, despite its capacity for infringing uses. Splitting the difference by limiting distribution of the machine to a class of non-infringers was not a possibility. Whether as a matter of judicial political instinct, or of technology policy considerations, when the choice is all or nothing, those who end up with nothing are not likely to be the producers and consumers of a vastly popular new device that is susceptible of legitimate applications. With Napster, by contrast, the difference could be split; the online technology makes possible the confinement of the service to a class of non-infringers. The user class will be restricted to non-infringers because, with the implementation of notice and take down, only authorized files will remain available for "sharing."²⁶⁷

The underlying assumption here seems to be that any distributive act not expressly authorized by copyright owners is infringing. Libraries, meanwhile, are veritable cultural icons of sharing, providing access to works that are copyright protected as well as works that are in the "public domain," and in so doing, facilitating a significant amount of public domain treatment of copyrighted works. Sharing copyrighted works with the populace is the mission of non-profit libraries, and has long been part of the culture of information distribution, but is jeopardized by restrictions on sharing.

Patron access is also affected by the ability of libraries to share with each other. Books and journals are expensive, which is one of the reasons patrons seek access to them in libraries in the first place.²⁶⁸ Since 1986, the average journal price has tripled, forcing libraries to drastically cut the

267. Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 37 (2000).

268. See, e.g., Larry Keller, *Looking It Up*, (CNN television broadcast, Nov. 28, 2000), at <http://www.cnn.com/2000/CAREER/trends/11/28/librarians/index.html> ("One incentive for Internet users to tap into their local library: cost. Large library systems . . . subscribe to online journals and data bases that charge fees.").

number of books they buy and serials they subscribe to.²⁶⁹ Major commercial academic publishers, in particular, tend to increase their prices every year and charge almost six times as much per page as non-profit publishers.²⁷⁰ Patrons can only be assured of access to a broad range of books and journals if their “home libraries” can assist them by supplementing their collections by borrowing works they lack from peer institutions.

a. Sharing and the Shadow of Napster

To the extent that content sharing is demonized, and library access is viewed as indistinguishable from “common” sharing, library content users risk being analogized to Napster users, who in turn have been accused in legal documents of exhibiting “the moral fiber of common looters.”²⁷¹ When it was launched, Napster did not charge for its services.²⁷² Napster users didn’t make any more money when they made a song available to other Napster users than a non-profit library would have, and in fact Napster users who downloaded songs could have, at least theoretically (though with less convenience), obtained the songs from libraries that maintained music collections.

Libraries start to look even more like Napster when library collections are accessed remotely. Library patrons who access digitalized works from home necessarily make copies of the work, either ephemeral or permanent.²⁷³ If libraries made optimal benefit of the advantageous properties of digital formats, many patrons could access (and therefore “copy”) the same copyrighted works within a very short time span, much as multiple Napster users accessed a single electronic copy of a song quickly and efficiently.

269. See, e.g., Kirkpatrick, *supra* note 210 (discussing effect of journal price increases). Members of the Association of Research Libraries report increasing their spending on collections by 130% over the past 15 years, cutting their number of journal subscriptions by 6% and the number of books they buy by 26%. See *id.* (same).

270. See Kendra Mayfield, *Publish, Perish or Pay Up?*, WIRED (Mar. 15, 2001), at <http://www.wired.com/news/print/0,1294,42377,00.html> (noting traditional price increase by commercial publishers).

271. Plaintiff’s Complaint at 2, *Metallica v. Napster, Inc.* (C.D. Cal. 2000) (No. 00-03914), *transferred to* *In re Napster, Inc. Copyright Litig.*, 2000 U.S. Dist. LEXIS 15493 (N.D. Cal. 2000) (No. 1369).

272. See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (noting that Napster’s services are free of charge); see also Aimee Picchi, *Creating Napster Competitors Record Labels, Publishers Reach Web-music Accord*, SEATTLE TIMES, Oct. 10, 2001, at E3 (describing Napster as “the free music-swapping service that won millions of fans and angered songwriters and music publishers”).

273. Computers make ephemeral copies in their random access memories (RAM) and permanent copies in cache files and when information is affirmatively copied or downloaded. See, e.g., *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1333-34 (9th Cir. 1995) (noting how information is stored and files are shared through computers).

While it might seem unlikely that content owners will begin the wholesale litigation campaign against libraries they crippled Napster with, the more that electronic library access begins to resemble peer-to-peer file sharing, the more hostility content owners will begin to express toward libraries. Recently, for example, Patricia Schroeder, a former Congressional Representative, stated that her employing organization, the Association of American Publishers (AAP) has "very serious issues with librarians" because a library that buys electronic journals may give them to other libraries.²⁷⁴ As a result, according to Schroeder, the AAP is looking for ways to charge library patrons for information.²⁷⁵ Similarly, Bruce Lehman, former Assistant Secretary of Commerce, Commissioner of Patents and Trademarks and author of the Digital Millennium Copyright Act, stated: "The law just never said that information should be free, it just said that information (should) be available on a vast scale for a reasonable fee—hence the library system."²⁷⁶

Napster effectively made a wide selection of music available to millions of individuals without cost, offering unique selection and control options that ordinary radio broadcasts had never made possible. Content owners such as those represented by Schroeder, however, seek to impose charges on library patrons for access to information that has traditionally been available for free. This would represent a significant norm shift with serious repercussions for libraries. According to Laura Gasaway, librarians are resisting this, as they emphatically want information to be free to library patrons after libraries have paid for access, as it has always been. She observed:

What librarians staunchly advocate is that individual users should not have to pay for information obtained from their public libraries. Libraries should be able to negotiate licenses to provide access for users in their companies, academic institutions, and public libraries. They fear the threat that information will become pay-per-view and that the library will no longer be able to negotiate appropriate terms and fees to make a database available to its users. So, statements such as "information wants to be free" may simply mean free to the individual, not free to the library. If database proprietors charge too much for the license fee, then the library will not be able to purchase access for its users. This will mean that patrons with economic means will be able to afford individual access to the data while the masses will not. The idea of "information have-nots" provides a direct clash

274. See Linton Weeks, *Pat Schroeder's New Chapter*, WASH. POST, Feb. 7, 2001, at C1 (expressing discontent over librarians' use of electronic journals).

275. See *id.* (discussing patron payment for use of online journals).

276. Brad King, *Copyright: Your Right or Theirs?*, WIRED (Jan. 19, 2001), at <http://www.wired.com/news/print/0,1294,41199,00.html> (last visited July 30, 2002).

with the core values of librarians. Librarians deeply believe that information should be available to everyone who chooses to come to the library to use it, and that access by individuals should not be determined by their ability to pay. This likely originates with the idea of free public libraries and universal service.²⁷⁷

If libraries are forced to operate under Napster-like restrictions,²⁷⁸ patron access to information may deteriorate well below “pre-Internet” levels, losing rather than gaining from technological innovations in information distribution. For example, libraries generally oppose “pay-per-view” access schemes because it is too hard to predict or estimate demand for a given resource accurately enough for a realistic budgeting process.²⁷⁹ As a result, works available only on that basis may not be accessible through libraries. With respect to other works in electronic format, content owners may permit libraries to allow extended access, but probably only to the extent that such access does not involve any printing or other copying of the work. Content owners empirically oppose patron copying of electronic works and even attempt to restrict archival copying by libraries, rigidly limiting them to what is permitted by statute.²⁸⁰

Before widespread, inexpensive photocopying technology emerged, researchers and scholars had to laboriously hand-copy excerpts and quotations out of texts.²⁸¹ Researchers and scholars of the future may face the

277. Gasaway, *supra* note 79, at 134.

278. This point has not escaped the American Library Association, which filed an amicus brief in the *Napster* case, arguing that a ruling adverse to Napster could have chilling consequences for entities such as libraries and search engines that catalog information for others to use. See Lisa Bowman, *Filter This! Librarians to Sue Over New Law*, ZDNet (Jan. 18, 2001), at <http://www.zdnet.com/zdnn/stories/news/0,4586,2675701,00.html> (criticizing software filtering).

279. See Gasaway, *supra* note 79, at 134 (“Libraries must have a ‘sum certain’ in the budget Negotiating for a year’s access, not on a per search basis, but on a flat rate permits the library greater flexibility even if it then has to narrow access to everything in the database as a way to reduce its costs.”).

280. See, e.g., 17 U.S.C. § 108 (1998) (providing limitations on patron copying); see also generally Crews, *supra* note 72 (reviewing guidelines that attempt to define scope of fair use for library services).

281. See *Princeton U. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1394 (6th Cir. 1996) (Martin, Jr., C.J., dissenting). As one Judge in reaching the decision fondly recalled:

When I was in school, you bought your books and you went to the library for supplemental information. To record this supplemental information, in order to learn and benefit from it, you wrote it out long-hand or typed out what you needed—not easy, but effective. Today, with the help of free enterprise and technology, this fundamental means of obtaining information for study has been made easier. Students may now routinely acquire inexpensive copies of the information they need without all of the hassle. The trend of an instructor giving information to a copying service to make a single set of copies for each student for a small fee is just a modern approach to the classic process of education. To otherwise enforce this statute is nonsensical. I therefore dissent.

Id.

same fate if content owners make information products unprintable as a technological matter, by using distribution software that disables print capabilities. Additionally, content owners may attempt to make information products unavailable as a legal matter, by pursuing or at least threatening to pursue vicarious or contributory copyright infringement actions against libraries. Lastly, owners of copyrighted content may be able to prohibit even scholarly use of information products as a matter of contract, forbidding libraries—and in turn, patrons—from acquiring or accessing information unless they agree that there will be little or no downloading or printing of content, under penalty of loss of access or breach of contract suits.

Libraries are the ultimate sharers—a fixed geographic or cyber location to which an individual can go to access a wide range of copyrighted materials. As the authors of one copyright law textbook noted:

Once [a] manuscript has been commercialized or otherwise disclosed to the public . . . library patrons can read the work, libraries can lend it, critics or scholars can quote from it, teachers can photocopy it for classroom use or read it, students and actual or potential competitors can analyze it—all without obtaining permission or paying license fees, thanks to traditional limiting doctrines such as “first sale” and “fair use.” Such a published work is not in the “public domain,” in the technical sense of that term, but it is available to the public as part of the general “informational commons”—the existence of which has been regarded as crucial to the “Progress of Science and useful Arts.”²⁸²

As generous and inveterate sharers of content, libraries are thorns in the sides of content owners, who believe or at least purport to fear that access to an electronic work in a library somehow has a more deleterious effect on profits than ink-and-paper library availability does. In short, content owners assert that library patrons are pirates-in-waiting. Jack Valenti of the Motion Picture Association of America expressed his purported fear of libraries as follows:

[S]ome libraries and some universities want to be given a pass-key to unlock the shielding technology for what they describe as “fair use.” That is, all libraries and their employees would have unlimited entry into copyrighted encrypted movies, with the additional power to copy at will. To allow this unlimited pass-key entry would entice massive piracy. It would vanquish the technological guardians, which preserve copyright integrity. Everyone knows this.²⁸³

282. JOYCE, *supra* note 118, at 57.

283. Jack Valenti, *Protecting America's Most Prized Export in the Digital World*, at http://www.mpaa.org/jack/98/98_7_16b.htm (July 16, 1998) (making remarks before Summer Internet World 1998).

Yet the public has long had the ability to copy audiovisual works at will by using videocassette recorders. The assumption that new and emerging digital technologies would encourage library patrons who have checked out “authorized” copies of movies to make more unauthorized copies than they have before is unsupported and illogical. Certainly higher quality copies can be made more quickly, but if a library patron has had a week or more in which to view the library’s authorized copy, how often would she truly bother making a copy for herself? And if she is running a massive piracy-based business out of her home, would she really endure the inevitable waiting list for library copies of recently released movies rather than simply buying an authorized copy of the movie she intended to pirate?

One could see how the fact that libraries can loan patrons videocassettes of movies without charging rental fees or remitting royalties must be galling to the movie trade, but that is what the Copyright Act provides. The movie industry has apparently invested a lot of resources into making sure that unlike videocassettes, digital copies of motion pictures cannot be treated like books.²⁸⁴ More disturbingly, publishers are attempting to insure that electronic versions of literary works cannot be treated like books either.

Trepidation that the unauthorized dissemination of digitalized versions of creative works made possible by the Internet will decimate the marketplace for authorized ink-and-paper or electronic books appears overstated to date. Even the average person has the ability and equipment to scan analog books into digital form and distribute them widely over the Internet. Yet, there is no evidence of this occurring to any significant degree, and millions and millions of books are still being sold. Americans are probably not the copyright-infringing scumbags that content owners self-interestedly make us out to be.²⁸⁵ In cyberspace as in real space, most of us are generally law-abiding.²⁸⁶ Moreover, as long as library collections

284. See, e.g., Halpern, *supra* note 35, at 577 (“Digital technology has significantly enhanced the ability of copyright owners of digital material to encrypt the material. Where the material is distributed digitally . . . such encryption can effectively not only prevent copying in the traditional sense, but can . . . limit access to the material itself, even for otherwise lawful purposes.”).

285. See, e.g., Janelle Brown, *Ethical Music Piracy*, SALON (October 5, 2000), at <http://www.salon.com/tech/log/2000/10/05/fairtunes/print.html> (discussing voluntary donations by Napster users); see also Janelle Brown, *The Jukebox Manifesto*, SALON (Nov. 13, 2000), at <http://www.salon.com/tech/feature/2000/11/13/jukebox/print.html> (quoting Rob Reid, CEO of Listen.com) (“If people can pirate for free, but it’s hard to find things and it’s hard to get good quality, most people who have more money and less time than they used to have will feel fine paying \$10 [for an industry-approved service] and getting a better experience.”). But see Jack Valenti, *Valenti Urged Congress to Support Copyright Protection in Internet Age*, (June 15, 2000), at http://www.mpa.org/jack/2000/00_06_15.htm (asserting that Internet is invested with thievery).

286. My focus is on U.S. residents since these are the folks that U.S. courts can realistically exercise jurisdiction over. I certainly don’t mean to suggest other nations have either greater or lesser concentrations of scumbags within their borders. But see Jack Valenti, *If You Can’t Protect What You Own—You Don’t Own Anything*

remain legal, available and comprehensive, they actually reduce incentives for individuals to invest time and energy in obtaining counterfeit copies of copyrighted works, or to gain unauthorized access to any copies.

Now that cyberspace is the repository of all manner of art, literature, history and scholarship, the real space attributes of public and private, academic libraries matter little, but the access to information that libraries provide is as critical as ever. Emerging data technology has greatly enhanced the speed and efficiency with which information can be distributed. Nevertheless, access to information through non-profit libraries has not only failed to be significantly enhanced, but in some contexts has actually been reduced as new technologies, copyright law and licensing regimes give content owners the ability to control and restrict paradigmatic library-to-patron sharing of information.

Thus, digitalization undermines the ability of non-profit libraries to maintain the level of access provided by traditional paper-and-print books and periodicals. This trend will continue as digitalization becomes the preferred method of preserving the contents of modern paper-and-print books, which are subject to physical deterioration over time, and have a useful life of about fifty years. This means that actual books last a far shorter time period than the copyrights in the works these books contain, and they will not even last that long if expansively used, misused or stored under improper conditions.²⁸⁷

A library ordinarily provides access to a work in its collections to everyone in its constituent community, regardless of whether there are alternative means of access to the work. Additionally, a library may sometimes serve as an "intermediary," demonstrating its faith in the value (or at least "worthwhileness") of a book or journal with its decision to add the work to its collection. As Lawrence Lessig observed in another context:

Historically, libraries have always had to choose what materials to bring into a library. That choice has been influenced in part by the interests of the community served, in part by budget constraints, and in part, no doubt by the values of the person making the selection.²⁸⁸

(Sept. 16, 1997), at http://www.mpaa.org/jack/97/97_9_16b.htm ("In China, in Russia, in Italy, in scores of other countries, video pirates steal more than \$2 billion of our intellectual property each year Russia . . . is literally infested with pirates . . .").

287. See Harry S. Martin III, *From Ownership to Access: Standards of Quality for the Law Library of Tomorrow*, 82 LAW LIBR. J. 129, 130 (1990) (stating that most of books in large research libraries of this country are physically dying because they were printed on highly acidic paper and stored in less-than-ideal physical environments for bulk of their shelf lives).

288. Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 656 (1998); see generally Junichi P. Semitsu, Note, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509 (2000) (exploring use of Internet filters to restrict library patron access to certain material).

While libraries are subject to market forces to some extent, and are intuitively more likely to stock works that patrons demand than those that will be of little or no interest, they offer an alternative to the more strictly market driven “gate-keeping” intermediation of bookstores and video rental establishments and are more likely to provide patrons with access to works undiscovered by, or unimportant to, the mainstream.

Current copyright laws make it possible for libraries to provide any works they desire as long as the work can be procured in ink-and-paper format,²⁸⁹ yet the same is not true for electronic content.²⁹⁰ Libraries licensing digital content must comply with any use restrictions contained in the license, and are vulnerable to any decision made by publishers to remove the work from the library’s online collection if the publisher has reserved that right. Some libraries have already experienced the consequences of ceding this power to publishers in the context of digital journals. For example, when companies supplying the libraries with e-periodicals decided to drop titles from their databases, libraries were left completely without access to journals for which they had been paying if they did not have analog ink-and-paper backups (which required an additional remittance).²⁹¹

Library Use in the digital context should be coterminous with accessibility, usability and core library values such as patron privacy in real space.²⁹² Digital rights management systems that rely on tracking programs to discern authorized access from non-permissive use create databases of file names and IP addresses that can be sent to an accused

289. See Boddie, *supra* note 262, at 223 (stating that under first sale doctrine, “a library which has acquired ownership of a copy of a book is entitled to lend it under any conditions it chooses to impose without violating the copyright owner’s distribution rights”).

290. See Gasaway, *supra* note 79, at 134 (asserting that intermediary role of librarians is one of information filtering rather than censoring, and is threatened by “pay-per-view” models of electronic information distribution).

291. See Goldie Blumenstyk, *Companies Find Academic Libraries a Key Target and a Tough Sell*, CHRON. OF HIGHER EDUC. (May 18, 2001), at <http://chronicle.com/free/v47/i36/36a03701.htm> (discussing publishers’ powers in licensing digital content).

292. See generally, e.g., Susan Herman, *The USA PATRIOT Act and the US Department of Justice: Losing Our Balances?*, Jurist, at <http://jurist.law.pitt.edu/forum/forumnew40.htm> (last visited July 30, 2002) (noting that new law may give government access to email and Internet activities of people not specifically targeted by law enforcement agencies); see also Cohen, *supra* note 24, at 1031-32. Cohen states that comprehensive federal legislation to safeguard reader anonymity can be based on the multitude of state statutes that protect identities of library patrons. See *id.* (listing various state statutes protecting anonymity of library patrons). Cohen identified a myriad of such prophylactic statutes. See *id.* (same); see also POLICY ON CONFIDENTIALITY OF LIBRARY RECORDS SOURCE: HANDBOOK OF ORGANIZATION 1990/91, AMERICAN LIBRARY ASSOCIATION 256, Chicago, IL, 1990, available at <http://www.cni.org/docs/infopols/ALA.html#pcpr> (discussing library confidentiality).

infringer's Internet Service Provider.²⁹³ Disreputable content owners could track and collate information about how even "authorized" patrons use their information products—without the knowledge and consent of patrons and despite any contrary representations that they have made to the library itself—if the content owners are confident that libraries are unlikely to have the ability, resources or technological proficiency to ascertain their treachery. Content owners may also use "push" technologies to try to steer patrons toward certain works and away from others for monetary gain. To the extent these technologies are less than transparent, content owners can at least attempt to surreptitiously shape the scholarly investigation agendas and research outcomes of library patrons.

2. *Avoiding the Pitfalls of "Fair Use"*

Fair use is, as explained above,²⁹⁴ a limitation on the exclusive rights of copyright owners, codified at section 107 of the Copyright Act of 1976. All library users, particularly researchers, educators and scholars, are at least somewhat protected from use restrictions imposed by publishers through the doctrine of fair use, limited and uncertain though it may be. Nevertheless, law professor and librarian Kenneth Crews has trenchantly observed: "[f]air use is both a privilege, and a source of confusion. Nearly everyone will disagree on what is 'fair,' and no one has a definitive, legally binding 'answer.'"²⁹⁵ This sort of sinister ambiguity creates incentives to avoid litigation by erring on the side of denying access in any questionable situation. This is bad for patrons, and contrary to the mission of a library.

The Digital Millennium Copyright Act (DMCA)²⁹⁶ particularly impedes the public's ability to exercise the right of fair use with respect to digital works.²⁹⁷ The DMCA "makes it illegal to manufacture or distribute

293. See, e.g., Brad King, *Digital Rights Gain a Foothold*, WIRED (May 30, 2001), at <http://www.wired.com/news/print/0,1294,44153,00.html> (discussing use of digital rights management systems).

294. For a discussion of the "fair use" doctrine, see *supra* notes 37-60 and accompanying text.

295. Kenneth Crews, *Copyright Law, Libraries, and Universities: Overview, Recent Developments, and Future Issues*, at <http://palimpsest.stanford.edu/bytopic/int-prop/crews.html> (last visited July 30, 2002) (noting that "many fair use rights are not well identified, and those voids in the law are invitations for diverse interest groups to propose and negotiate guidelines"); see also Crews, *supra* note 72, at 658 (analyzing divergent views on fair use doctrine).

296. 17 U.S.C. §§ 1201-1205 (2000).

297. The Librarian of Congress and Copyright Office were given the opportunity by Congress to issue rules governing the access provisions of the DMCA that established an enhanced right of copyrighted works fair use access. They chose not to do so. See, e.g., Oscar S. Cisneros, *Fear of a Pay-Per-Use World*, WIRED (Oct. 9, 2000), at <http://www.wired.com/news/business/0,1367,39330,00.html> (explaining that Librarian of Congress had two years to study access provisions of DMCA); see also American Library Association, *New Digital Copyright Rules Bad for the American Public* (Oct. 26, 2000), at <http://www.ala.org/washoff/alawon/alwn9085.html> (noting ALA's discontent with new digital copyright rules from Librarian of Congress allowing only two exceptions to access provision of DMCA).

devices designed to bypass technology that protects copyrighted material.”²⁹⁸ The DMCA also makes it illegal for an individual seeking to make a back-up copy of a digital work for herself—the type of copying that is almost universally viewed as allowable under copyright law—to use such devices with digital works.²⁹⁹ As a result, while making the copies does not violate the Copyright Act, breaking through the copy-protection measures to make perfectly legal copies violates the DMCA.³⁰⁰ Moreover, individuals can legally copy portions of a work for purposes of parody, scholarship, news reporting or criticism when they are engaging in fair use of copyrighted works, but circumventing copy prohibition technologies to exercise this right is illegal under the DMCA, as are software tools that make such circumvention possible.³⁰¹ As Diane Zimmerman has written, it is a statute with a sense of humor,³⁰² albeit a very cynical and malevolently droll one.

The DMCA, like the Copyright Act, does provide exemptions for libraries.³⁰³ For example, libraries may circumvent copyright protection measures if the reason they do so is to make a determination about whether to acquire a particular work.³⁰⁴ In addition, a library may make three non-permissive copies of a work, and the statute specifically permits copies to be in digital format.³⁰⁵ Nevertheless, these exemptions also contain some alarming restrictions. For example, the statute states that if a copy that is reproduced is in digital format, the digital copy may not be “made available to the public in that format outside the premises of the library”³⁰⁶ Laura Gasaway has explained that prior to this amend-

298. See, e.g., Amy Harmon, *Software Double Bind*, N.Y. TIMES, Aug. 13, 2001, at C4, available at <http://www.nytimes.com/2001/08/13/technology/ebusiness/13NECO.html?pagewanted=print> (noting several practices now illegal under DMCA).

299. See *id.* (discussing limitations imposed by DMCA).

300. See, e.g., *id.* (explaining confusing “double bind” in DMCA).

301. See *id.* (describing various exceptions to DMCA suggested by Library of Congress).

302. See Zimmerman, *supra* note 84, at 279 (questioning whether DMCA actually helps educational institutions’ special needs).

303. See Gasaway, *supra* note 79, at 161 (noting exceptions for libraries provided in DMCA).

An unusual part of the DMCA is found in section 1204, which states that nonprofit libraries, archives, and educational institutions are exempted from the criminal provisions for anti-circumvention or removal of copyright management information. Subsection (b) states that neither the large fines nor federal prison terms will be assessed against libraries. Note that the library will not go to jail—the statute does not say “librarian” but “libraries.”

Id.

304. See *id.* at 161 (noting means in which DMCA extends fair use).

305. See *id.* at 138 (stating that under DMCA, libraries are no longer limited to making only one copy of work); see also 17 U.S.C. § 1201(d) (2000) (allowing three copies of work to be made “in digital format” for replacement or preservation).

306. Gasaway, *supra* note 79, at 138.

ment, a library could treat the reproduction just as it did the original work, lending the reproduction to library patrons for home use, and providing it to others through interlibrary loans.³⁰⁷ The new restriction, however, seems to state that if the work is preserved in digital format, it cannot be used outside the library building.³⁰⁸

Because of the new restrictions it imposed, librarians publicly (and vehemently) expressed concern that the DMCA negatively impacted libraries' abilities to make interlibrary loans, provide off-site access to digital materials and to use donated digital copies of works.³⁰⁹ The Copyright Office's response was the discouraging statement that it hoped and expected that "the marketplace will respond to the various concerns of customers in the library community."³¹⁰ Imposition on digital content providers of real space access obligations for libraries is, therefore, unlikely to be attained through bare persuasion or lobbying by librarians. This is especially true after the Copyright Office deemed the librarians'

307. See *id.* at 139 (contrasting pre- and post-DMCA copyright restrictions).

308. See *id.* at 138-39 (discussing limitations of provision).

While these three changes broaden the preservation exemptions for libraries, each subsection also contains a new limitation. If the copy that is reproduced is in digital format, the digital copy may not be "made available to the public in that format outside the premises of the library . . ." This may narrow the library's rights even though a library now may make a digital copy for on-premises use. However, the library could also then make a printed copy from that digital copy and loan the printed one since it is allowed to make up to three copies of a work. Prior to the amendment, a library that reproduced a work under these subsections could treat the reproduction just as it did the original work. It could lend the reproduction to users, provide it through interlibrary loan, and the like. This new restriction may mean that if the work is preserved in digital format, it cannot be used outside the library buildings, and this is much more restrictive. Surely what Congress must have meant was that if the reproduction was digital and was available on the library's network, then it could be used only within the premises and not on a campus network or the World Wide Web. In using the term "digital copy" Congress may actually have narrowed the exemption for works that were originally in digital format. For example, if the original work was a CD-ROM, which now is lost and is not *available* at a fair price, a library may create another CD, which also happens to be a digital copy. But the language of the statute says that digital copies cannot be used outside the premises even if the original was a digital copy that could have been outside the premises of the library. This is more restrictive than the previous version of the statute, and likely is not what Congress meant to accomplish by the amendment.

Id.

309. See, e.g., Reuters, *No Need to Alter the DMCA—Yet*, WIRED (Aug. 30, 2001), at <http://www.wired.com/news/print/0,1294,46440,00.html> (listing concerns of libraries over DMCA's provisions restricting fair use).

310. United States Copyright Office, Executive Summary Digital Millennium Copyright Act Section 104 Report, at http://www.loc.gov/copyright/reports/studies/dmca/dmca_executive.html (last visited July 30, 2002) [hereinafter Copyright Office, *Report*]; see also, e.g., Reuters, *supra* note 309 (discussing import of digital copies on copyright law).

arguments that relied on analogies to the physical world “flawed and unconvincing.”³¹¹

3. *Giving Libraries the Scope of Immunity Accorded Commercial Internet Service Providers*

Internet Service Providers (ISPs) recognized early on that fair use was an uncertain and doctrinally complex defense to assert, should any infringing materials be introduced into cyberspace through the portals and speech platforms they provided. They realized that relying on a fair use defense could easily bankrupt them, because even if they won a copyright infringement suit, the litigation preceding what might ultimately prove a pyrrhic victory would be lengthy, disruptive and hideously expensive.

With substantial lobbying money at their disposal, commercial ISPs such as America OnLine were able to convince Congress to build ISP immunity into section 230 of the Communications Decency Act.³¹² Later, they persuaded Congress that ISPs should be provided with immunity to copyright infringement suits in the Digital Millennium Copyright Act. ISPs are shielded by this immunity as long as they agree to take certain actions against service users accused of infringement pursuant to the DMCA’s notice and “take down” provisions.³¹³ This frees an ISP from burdensome monitoring of its customers, and the conflicts and responsibilities that could arise out of such monitoring.³¹⁴ The specific mechanics of the DMCA encourage and reward risk averse “take down now, ask questions later” behavior by ISPs, raising serious freedom of expression concerns that need to be addressed.³¹⁵ Nevertheless, at least this immunity admirably insures that, for ISPs, copyright issues can be consistently and predictably dispatched without wasting resources.

Libraries would benefit from a similar reduction in the risks and uncertainties that copyright issues currently pose. Rather than a doctrinal test that isolates “factors for consideration” in establishing the parameters of electronic works exploitation in library contexts—an approach that has failed so miserably in the context of fair use—straightforward codification

311. Copyright Office, *Report*, *supra* note 310; *see also, e.g.*, Reuters, *supra* note 309 (reporting findings of Copyright Office’s study).

312. Under Section 230 of the Communications Decency Act, even when an ISP has notice of a defamatory third party posting it is entitled to immunity, as section 230 expressly bars “any actions.” *See, e.g.*, 47 U.S.C. § 230 (1996) (providing immunity to ISPs); *Jane Doe v. Am. Online*, 783 So. 2d 1010, 1018 (Fla. 2001) (noting that “section 230 expressly bars ‘any actions’ and we are compelled to give the language of this preemptive law its plain meaning”). For a further discussion of 47 U.S.C. § 230, *see supra* notes 229-33 and accompanying text.

313. 17 U.S.C. § 512(g) (1999) (establishing “take down procedure” which removes infringing material without risking liability).

314. It should be noted that ISP immunity in this context specifically applies to computer services offered by libraries. *See* 47 U.S.C. § 230(f)(2) (1996) (placing services offered by libraries under definition of “interactive computer service”).

315. *See, e.g.*, 17 U.S.C. § 501 (1999) (providing civil remedies for violations of copyright).

of a right to use digital documents as if they were constructed of ink and paper would promote uniformity and stability. This would statutorily import behaviors and practices into the digital realm, allowing libraries to continue to rely on established norms regardless of the work's format.³¹⁶

Ironically, when libraries provide patrons with access to the Internet they actually qualify for ISP immunity, which gives libraries qualified protection from copyright suits that could arise if patrons post copyrighted materials using library computers.³¹⁷ It is when patrons access and use digitalized materials from library collections that libraries remain exceedingly vulnerable to accusations of copyright infringement, even though providing access to information is arguably a more critical function of libraries than facilitating patron communications over the Internet. Libraries need statutory protection from copyright suits through a limited immunity framework so that they can provide access to information without undue fear of litigation and are not burdened with extensive patron monitoring responsibilities.

4. *Preventing Replacement by For-Profit "E-Libraries"*

For-profit electronic library services generate an estimated \$250 million annually, and one industry estimate suggests this figure will triple over the next three years.³¹⁸ Online library services are spending years and hundreds of millions of dollars to build digitalized collections of books. They postulate that consumers (largely students at present) will pay for Internet-enabled access to books, journals and reference materials, despite the fact that most of the same information can be obtained from a non-profit library free of charge.³¹⁹ Publishers will favor for-profit libraries because they will create a new revenue stream, as if they did not obtain permission from (and remit royalties to) copyright holders, for-profit electronic libraries would doubtlessly be sued with at least as much energy and passion as Napster was. Ultimately, these so-called "e-libraries" will

316. Cf. Crews, *supra* note 72, at 658 (noting that CONTU Guidelines have great authority and legal credibility and, together with section 108, evidence weight that Congress places on interlibrary services and conservation of collections).

317. See, e.g., Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 778 (Cal. Ct. App. 2001) (stating public library is eligible for Communications Decency Act defense); see also Arnold P. Lutzker, *The Digital Millennium Copyright Act: Highlights of New Copyright Provision Establishing Limitation of Liability for Online Service Providers*, MLANet, at <http://www.mlanet.org/government/dmca/ospanalysis.html> (last visited July 30, 2002) (explaining that libraries and other online service providers function as common carriers under DMCA, therefore escaping liability if third party material infringes on someone's copyright).

318. See Kendra Mayfield, *The Quest for E-Knowledge*, WIRED (Feb. 5, 2001), at <http://www.wired.com/news/print/0,1294,41543,00.html> (quoting E. Yegin Chen: "[t]he market for e-library services totals approximately \$250 million annually and is expected to triple over the next three years to over \$850 million annually").

319. See *id.* (describing business activities of Questia to build online product).

have incentives to endorse and support any actions content owners take to limit patron access to information in traditional libraries. Consequently, constraining the electronic access that non-profit libraries can provide will enhance the demand for for-profit online library services.

Some courts³²⁰ and copyright scholars³²¹ have advocated a “market value” theory of fair use, which configures the scope of fair use for any given copyrighted work in inverse proportion to the ease with which the work (or rights to use the work) can be licensed or purchased in an open market. This view of the fair use doctrine suggests that in the absence of a new statutory right of access such as Library Use, the existence of affordable for-profit e-libraries undermines the doctrinal justifications for according non-profit libraries and their patrons broad fair use privileges.

320. See, e.g., *Princeton U. Press v. Mich. Doc. Servs.*, 99 F.3d 1381, 1386 (6th Cir. 1996) (adopting test to negate fair use based on proving diminution in potential market value); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994), *cert. dismissed* by 516 U.S. 1005 (1995) (discussing fourth factor of section 107, “the effect of the use upon the market for or value of the copyrighted work”).

321. The seminal article expostulating this theory is Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982). Gordon discusses it further in Wendy J. Gordon, *Asymmetric Market Failure and Prisoners Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 858-59 (1992) (discussing strategic behaviors that may prevent licensing in a range of contexts); see also, e.g., Edmund W. Kitch, *Can the Internet Shrink Fair Use?* 78 NEB. L. REV. 880, 880 (1999) (explaining Gordon’s theory of fair use). Kitch noted:

The conception of fair use that has made the Internet relevant to fair use was set out in an influential 1982 article by Wendy Gordon. She suggested that the fair use doctrine is and should be available to protect an infringer from liability only when the infringer’s use is one that is socially beneficial and would be authorized by the copyright owner except for the fact that transaction costs make it too costly to seek and obtain permission for the copying. “Fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner.” An illustration of this test as it might be applied to a traditional form of fair use—the quotation of a copyrighted work in another work—is as follows. The use of the quotation in the second work is of such little value to the second author that it is not worth his time to locate and communicate with the copyright owner. Yet the use of the quotation helps the second author make the point, while it may help the first author by acting as publicity for his work. Everyone is better off if the quote is used, yet if permission is required the quote will not be used. The fair use doctrine enables this use to occur, leaving everyone better off.

The connection between this conception of fair use and the Internet is the possibility that the Internet will make it easier for users of copyrighted work to communicate with, and obtain permission from, the copyright owner. As a result, there will be fewer situations in which there is the market failure that in Gordon’s view justifies the fair use doctrine.

Id.

Though the acquisition decisions of non-profit libraries are undoubtedly determined by patron demand to some degree, the collections of for-profit libraries are likely to be much more "market driven." For-profit e-libraries will have much stronger incentives than non-profit libraries to stock only popular, mainstream works likely to be attractive to large numbers of users. If they become the primary venue through which content is accessed by patrons, access to less conventional content will begin eroding and works targeted at narrow, specialized audiences will become less profitable and, therefore, less "incentivized."

Some for-profit entities are beginning to provide electronic books to academic, public and corporate libraries, rather than directly to individuals.³²² A patron of a subscribing library is typically allowed to "check out" an electronic book for forty eight hours via the World Wide Web as long as the patron's library has bought that particular e-book, and no one covered under the same library subscription is using it contemporaneously.³²³ While remote access may be convenient to the user, the e-book is likely to be configured so that the ways in which the user can make use of the work are very constrained³²⁴ such as by preventing a user from printing or downloading text.

Electronic books obtained from for-profit library intermediaries generally do not save libraries money or solve storage or shelving issues. This is because libraries will, whenever possible, purchase the work in print as well as in electronic form to ensure that the work will still be available to patrons if it is removed from the online collection by the e-book company, or if the e-book company discontinues its relationship with the library or goes out of business.³²⁵ Sometimes, however, an e-version of a work is all that is made available.

Anyone who doubts that for-profit libraries can displace or reconfigure non-profit ones should consider the effect that legal databases such as Lexis and Westlaw have had on the ink and paper collections of law libraries. As one librarian observed:

Facing shrinking or static budgets, law school libraries *have* indeed cancelled or stopped acquiring materials that are duplicated on legal research databases. This practice is so prevalent

322. See, e.g., Mayfield, *supra* note 318 (noting entrepreneurial impulse to capitalize on digital collection use).

323. See Lucia Snowhill, *E-books and Their Future in Academic Libraries*, D-LIB MAGAZINE, at <http://www.dlib.org/dlib/july01/snowhill/07snowhill.html> (July/August 2001) (summarizing status of current e-book market, technologies and libraries' experiences with e-books). But see M.J. Rose, *The Library That Keeps On Giving*, WIRED (Aug. 21, 2001), at <http://www.wired.com/news/print/0,1294,46160,00.html> (stating that normal procedure for e-libraries would allow e-books to be borrowed by one reader per check-out).

324. See Blumenstyk, *supra* note 291 (noting that netLibrary, world's largest provider of e-books, lends e-books that cannot be saved to user's computer).

325. See *id.* (discussing unfulfilled promise of e-libraries).

that law libraries are even considering selective cancellations of Shepard's citators because shepardizing is so readily available on LEXIS and WESTLAW. Resistance to what is perceived as unnecessary duplication of information is so rampant that a new law school seeking accreditation is suing the American Bar Association for, among other things, insisting that material on the databases also be maintained in hard copy . . . [L]ibraries increasingly rely on LEXIS, WESTLAW, and other databases as the sole sources for certain materials.³²⁶

Patrons that do not have LEXIS, Westlaw or other necessary passwords conferring authorization to use these databases are excluded from the informational resources they provide and are unable to use them even to discover what information they are being denied.³²⁷ Those of us with ready and unlimited access to well-resourced libraries and expensive on-line legal databases are the lucky few. Most people working in the legal field or in areas heavily impacted by law, such as police officers, public sector workers and even judges and their clerks are confronted with space, budgetary and geographic constraints that impede their ability to perform broad based legal research.³²⁸

In addition to online databases, law libraries are increasingly dependent on full-text resources available through the Internet, and document-on-demand services that may be the only sources of certain materials.³²⁹ Eventually, access to all legal information could require royalty payments. Peter Martin has explained that in 1997 Microsoft began an ongoing initiative to set up electronic filing systems in courts, and to link law firms to courts, and to each other.³³⁰ While this may improve communications in the legal field, he expressed fear that if courts and agencies do not insist that the standards for data interchange are open and non-proprietary, Microsoft and its allies will gain control over the flow of data into and out of the government. Ultimately, he warned, this "would give Microsoft a monopoly position over the tools of communication . . . that it could use to get both the public and lawyers to pay for again and again, either directly or indirectly."³³¹

326. Gail M. Daly, *Bibliographic Access to Legal Research Databases Reconsidered*, 87 LAW LIBR. J. 192, 199 (1995) (citations omitted).

327. *See id.* at 201 (discussing access problems concerning legal databases).

328. *See, e.g.*, Peter W. Martin, *The Internet: "Full and Unfettered Access" to Law-some Implications*, 26 N. KY. L. REV. 181, 194 (1999) (discussing cumbersome quality of print copies).

329. *See* Daly, *supra* note 326, at 199 (expressing concern over problems facing law librarians resulting from increasing numbers of certain Internet-only sources, rendering single comprehensive catalogue "outmodled").

330. *See* Martin, *supra* note 328, at 204-05 (setting up chilling scenario where Microsoft monopolizes legal communication).

331. *Id.* As Martin described:

In December of 1997, Microsoft announced a strategic alliance with several other vendors to "promote an electronic legal and justice system that

5. *Preventing the Complete Evisceration of the First Sale Doctrine*

The first sale doctrine is set out in section 109 of the Copyright Act.³³² It guarantees to purchasers of “hard copies” of copyrighted works such as books, the right to sell or “otherwise dispose of” that copy of a work that has been straightforwardly purchased, regardless of whether the purchasers are individuals or libraries.³³³ As a general matter, depending on how one looks at it, first sale doctrine either reflects or legitimizes traditional “book behaviors.” People who buy books can re-read them, loan them to others, trade them, give them away or even rent them out without violating the copyright laws. First sale doctrine is a bedrock principle upon which non-profit libraries are built.³³⁴

First sale doctrine mandates that, for copyright owners, profiting from a physical article embodying a copyrighted work is a one time only pro-

will digitally link law firms to courts, as well as law firms to each other.” The press release spoke of setting “up electronic filing systems in courts through the United States” and offering law firms of all sizes a document management system that “will integrate with the [court] systems” thereby realizing the full potential of “electronic filing.” Nevertheless, it is current and past corporate practice, and not paranoia, that suggests a contrasting vision. The Internet browser competition and the constant addition of hitherto discrete applications to Windows “operating system” provide inescapable evidence of Microsoft’s willingness to give away technology products and services in order to secure market dominance. With billions of dollars in reserve Microsoft should have no trouble dominating the market for electronic legal data interchange—that is, the means of communication between lawyers, courts and other public bodies, and ordinary citizens.

The scenario is straightforward. Imagine the Microsoft alliance offering a free or chillingly inexpensive, fully functional and secure “legal data interchange” and “electronic filing” system to courts and public agencies at all levels of government, few of whom are prepared to be technology leaders, yet all of whom feel resource constraints. Integrated smoothly with Microsoft Word, Internet Explorer, or the ubiquitous Windows operating system, and supported with ample training, this would be a package that courts and agencies moving into the digital environment might be hard pressed to refuse. However, if they accept such an offer without insisting that the resulting standard for data interchange be an open, non-proprietary one, they will have given the alliance control over the flow of law data both into and out of government. That decision would give Microsoft a monopoly position over tools of the communication that it could use to get both the public and lawyers to pay for again and again, either directly or indirectly.

Id.

332. 17 U.S.C. § 109 (1997) (providing limitations on exclusive rights of owners with respect to transfer of particular copies or phonorecords).

333. *See* § 109(a) (“[T]he owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).

334. Individuals are, by statute, restricted in what they may do with computer programs or sound recordings. *See* 17 U.S.C. § 109(b) (providing that owners of sound recordings or computer programs cannot dispose of them “by rental, lease, or lending”).

position. Copyright owners are precluded from regulating or restricting distribution of a book or periodical after it is sold. Therefore, among the other functions it serves, section 109 enables students to sell textbooks back to bookstores, and bookstores to resell the textbooks to other students, without transmitting additional royalties to entities that own the copyrights in the texts.

First sale doctrine is the statutory foundation of many copyright use norms. Before it was codified, copyright owners tried to coerce and proselytize alternative use norms more favorable to themselves. According to Pamela Samuelson:

Book publishers and sound-recording companies once tried to restrict what purchasers could do with their products by licenses, but fortunately the courts didn't let them get away with it. (Take a look at an old Victrola recording jacket and you'll see it purports to license use of the recording to one Victrola machine and to deny authority to retransfer one's copy of the recording.)

One important case was *Bobbs-Merrill v. Straus*. Publisher Bobbs-Merrill sued . . . Straus . . . because he sold copies of Bobbs-Merrill books in violation of a license restriction that conditioned the right to retransfer copies of the books on an agreement to charge at least \$1 per copy. The U.S. Supreme Court treated the license restriction as ineffective as a matter of copyright policy. The *Bobbs-Merrill* decision contributed to the emergence of the "first-sale" or "exhaustion-of-rights" doctrine in copyright law, under which publishers lose authority to control redistributions of copies of their works when, in commercial reality, the transaction is a sale. In the aftermath of this and similar cases, publishers and sound recording companies abandoned these practices.³³⁵

Having failed to convince the courts that the first sale doctrine would sumarily bankrupt them, they turned to business solutions. For example, publishers blunt the effect of the first sale doctrine by issuing revised editions of textbooks. This renders used copies of "old" editions less attractive and shrinks the market for used texts,³³⁶ but publishers cannot do so without giving the world an updated and at least hypothetically improved information product.

Among its other advantages for libraries, the first sale doctrine helps prevent price discrimination, because it allows those who buy a work at a low price to resell it to an entity that otherwise may have been targeted for

335. Pamela Samuelson, *Legally Speaking: Does Information Really Have To Be Licensed?*, COMMUNICATIONS OF THE ACM, (Sept. 1998), available at http://sims.berkeley.edu/~pam/papers/acm_2B.html.

336. See, e.g., Bartow, *supra* note 51, at 214 (detailing publishers' alternative measures of countering first sale doctrine).

a high price. In other words, publishers cannot effectively tack surcharges onto books they sell to libraries, even though those copies are likely to be read by more people than copies sold to individuals, because libraries can “arbitrage” books from those who are able to purchase them at lower prices. When the first sale doctrine is circumvented through contract provisions governing licensing, reselling can be prevented (since there was never a “first sale” to engage the eponymous doctrine) and libraries become vulnerable to price discrimination.³³⁷ In addition, certain kinds of multiple uses can be prevented, and contract terms can be automatically enforced, with technology that meters digital access, or by the use of computer discs that self-destruct after a certain amount of time, number of users or attempts to print.³³⁸

a. Licensing Alters Library Functionality

As described above, section 108 of the Copyright Act places “library oriented” limits on a copyright owner’s exclusive rights, enabling libraries (and archives) to make limited numbers of copies of copyrighted works to replace, preserve or supplement market-acquired copies in a library or archival collection.³³⁹ Section 108(f)(4), however, expressly states that

337. See James Boyle, *Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2010-11, 2027 (2000) (discussing how licensing will strip people of privileges now taken for granted with printed material); Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 861, 877-79 (1997) (discussing profitability of leases to content owners because leases skirt around first sale, thus creating potential for consumer price discrimination).

338. See, e.g., Andy Patrizio, *DVDs That Self-Destruct*, WIRED (Jan. 20, 2000), at <http://www.wired.com/news/print/0,1294,33781,00.html> (describing attempt by Spectra Science to introduce coating on DVDs limiting use of product); Bob Tedeschi, *On-line Publishing Ventures are Still Looking for a Way Around Readers’ Sales Resistance*, N.Y. TIMES, Oct. 4, 1999, at C14, available at <http://www.nytimes.com/library/tech/99/10/cyber/commerce/04commerce.html> (noting that certain technologies “allow publishers to sell information online to one user, and have that information encrypted on the hard drive of the user’s computer. Software that the user downloads with the document controls the information, so it cannot be digitally reproduced, forwarded via e-mail or even, in some cases, printed.”); Peter Wayner, *To Cover Electronic Tracks, E-mail That Self-Destructs*, N.Y. TIMES, Oct. 12, 1999, at <http://www.nytimes.com/library/tech/99/10/cyber/articles/13mail.html> (“Several companies are exploring ways to control the copying and dissemination of electronic documents with their own versions of self-destructing e-mail. They aim to make it possible to send a message or document that will become unreadable after a predetermined period so that companies and individuals can keep their information on a short leash.”).

339. More specifically:

Section 108 permits a library, under certain circumstances, to make a single copy of a periodical article or small excerpt of a larger work (such as a book chapter) upon request of the library’s patron or in response to a request from another library on behalf of *that* library’s patron. This right is subject to two conditions. Subsection (g)(1) of section 108 prohibits a library from engaging in related or concerted copying or distribution of either single or multiple copies of the same material on one occasion or

nothing in section 108 “in any way affects . . . any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.”³⁴⁰

This legislative loophole makes libraries vulnerable to private ordering through contract that can hamper a library’s ability to provide patron access. Specifically, content owners can refuse to sell digital books or periodicals to libraries, instead requiring them to “license” copyrighted works, often on nonnegotiable terms.³⁴¹ As Anne Klinefelter has observed:

Licensing avoids the first sale doctrine by characterizing the exchange as a purchase of rights to use the electronic product in certain ways rather than as a sale of a copy. The language of the copyright law provides first sale rights only to an owner of a copy. So, is there is no sale, there is no owner; and if there is no owner, there are no first sale rights.³⁴²

Though courts have equivocated about the enforceability of some shrink-wrap and click-wrap licenses and license terms, the trend seems to be toward enforcing them.³⁴³ Moreover, states that adopt some permutation of

over a period of time. Subsection (g)(2) prohibits a library from engaging in the systematic reproduction of single or multiple copies of articles or short excerpts. Libraries may, however, participate in interlibrary arrangements that do not have as their purpose or effect the receipt of copies in such aggregate quantities as to substitute for a subscription to or purchase of a work. Section 108, therefore, allows isolated and unrelated copying and distribution of single copies of the same or different materials on separate occasions, but interlibrary lending that is systematic may be viewed as substituting for a subscription or the purchase of the work.

James S. Heller, *The Impact of Recent Litigation on Interlibrary Loan and Document Delivery*, 88 LAW LIBR. J. 158, 160 (1996) (citations omitted).

340. 17 U.S.C. § 108(f)(4) (1998).

341. See Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 LEGAL REFERENCE SERVICES Q. 175, 178 (2001) (“The point of licensing is to allow software providers to sell copies of their information products without the attachment of the first sale doctrine.”).

342. *Id.* at 178-79.

343. See, e.g., *Hill v. Gateway 2000*, 105 F.3d 1147, 1149-50 (7th Cir. 1997) (finding shrinkwrap license valid and binding); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-50 (7th Cir. 1996) (finding shrinkwrap agreements enforceable). But see, e.g., *Vault v. Quaid Software Ltd.*, 847 F.2d 255, 268-79 (5th Cir. 1988) (finding shrinkwrap agreement unenforceable). See generally, e.g., Francis M. Buono & Jonathan A. Friedman, *Maximizing the Enforceability of Click-Wrap Agreements*, 4 J. TECH. L. & POL’Y 3, 5-6 (1999) (noting that most courts have upheld shrinkwrap agreements provided they meet principles of valid contract); Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 477-80 (2002) (analyzing shrinkwrap caselaw and means by which courts have found such agreements enforceable); Margaret Jane Radin, *Humans, Computers, and Binding Commit*, 75 IND. L.J. 1125, 1134 (2000) (discussing predecessors to clickwrap and noting that courts have authorized shrinkwrap agreements).

the Uniform Computer Information Transaction Act (UCITA)³⁴⁴ are codifying the legality and enforceability of non-negotiated licenses for information products. As one commentator noted: “[UCITA], currently under discussion for passage in the individual states, if passed, likely will make the licensing issue even more difficult for libraries as the ability to negotiate may be subsumed into standard licensing terms for many products.”³⁴⁵

To the extent any negotiation with copyright owners is possible, large, well-funded libraries or library systems will have huge advantages over smaller libraries or those with fewer financial resources. For example, one electronic book provider concentrated its initial sales efforts on the ten largest library consortia because these entities spend \$600 million on books annually.³⁴⁶ This enabled the libraries with the richest collections to become information-wealthier still, while smaller, poorer libraries fell further behind. Libraries with the sparsest resources are likely to serve communities that have the fewest alternative information sources available to them. If libraries are to fulfill the mission of delivering information access to those who do not have the means to purchase such access independently, at a minimum lesser-funded libraries need to be able to license information on terms that are at least equivalent to those available to wealthier institutions.

United States Register of Copyrights, Marybeth Peters,³⁴⁷ has asserted that the government is considering ways to adapt the first sale doctrine to the digital age including insuring that content is destroyed on a hard drive when a secondary sale of the content is made.³⁴⁸ However, it is difficult to believe that content owners would voluntarily forgo the advantages of a licensing format, and return to selling works outright, simply because the government helps them eliminate some unauthorized copies of digital works.

Substitution of “freedom of contract” for the first sale doctrine will work exclusively to the advantage of content owners: libraries usually have inferior bargaining power and generally will be presented with standard

344. UNIF. COMPUTER INFO. TRANSACTIONS ACT, 7 U.L.A., pt. II, at 9, (Aug. 2001), available at <http://ucitaonline.com/ucita.html>.

345. Gasaway, *supra* note 79, at 154. See Klinefelter, *supra* note 341, at 177 (discussing UCITA and “one-sided contracts” that will result from its enactment by states).

346. See Vincent Kiernan, *An Ambitious Plan to Sell Electronic Books*, CHRON. OF HIGHER EDUC., Apr. 16, 1999, at A29 (discussing venture allowing educational institutions to form consortia for purchasing electronic books, permitting libraries to acquire books that they would otherwise be unable to afford).

347. For a biography of Marybeth Peters, see UNITED STATES COPYRIGHT OFFICE, *Marybeth Peters, Register of Copyrights Biographical Information*, at <http://www.loc.gov/copyright/docs/mbpbio.html> (detailing Peters’ legal career) (last accessed July 30, 2002).

348. See King, *supra* note 73 (noting attempts by government to amend first sale doctrine).

license agreements on a take-it-or-leave-it basis.³⁴⁹ When libraries submit to restrictive licensing regimes, they do so with the highest motives (providing patrons entrée to the licensed information), but simultaneously become complicit in access compression by tolerating limitations on otherwise legitimate uses of the licensed works.

Licensing reconfigures digital information as a service rather than a product, and renders it potentially subject to use restrictions, or even termination, over which a library has little if any control. As copyright owners write contracts granting themselves greater rights than the copyright laws provide, and libraries fewer privileges, copying-related activities such as archiving and preservation can be limited or prohibited³⁵⁰ through a judicious combination of contract terms and technology. This undermines an important traditional role of libraries.³⁵¹ Pure duplication as an end, in and of itself, is the type of copying least likely to be found to be fair use under section 107 of the Copyright Act,³⁵² which is in fact the rationale behind giving libraries an explicit right to do some unauthorized copying in section 108. Licensing regimes that require libraries to forgo section 108 rights make it difficult for libraries to perpetuate the long-standing and beneficial norm of archival preservation.³⁵³

Additionally, libraries have long relied on older technologies like microfiche and microfilm to retain archival copies of certain types of copyrighted works such as newspapers and periodicals, and usually make them available to researchers on an unrestricted basis. Future access to such works may be compromised if archival copies are seen as revenue-producing commodities to be stored, retrieved and distributed only under the aegis of “digital asset management,” and accessible only on a pay-per-view basis.³⁵⁴

349. *But see* Rose, *supra* note 323 (finding that California State University System used its size—23 campuses and 370,000 students—to persuade netLibrary to allow California State system libraries to lend e-books to unrestricted number of borrowers at one time, representing significant change in how subscription models generally work).

350. *See* Lemley, *supra* note 244, at 128-29 (noting that some contracts provide that licensee may not make any copies of licensed work, whether or not copying would be fair use).

351. *See* Klinefelter, *supra* note 341, at 179 (“[The] archiving function has been an important traditional role of libraries.”).

352. Duplicative copying is less likely to be fair than transformative copying. For a further discussion of transformative use, see *supra* note 41 and accompanying text. *But see* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449-51 (1984) (concluding that use of Betamax to record television programs does not violate copyright law).

353. *See* Gasaway, *supra* note 79, at 142 (citing DIGITAL DILEMMA, *supra* note 74, at 9-10, 206-10) (discussing problems concerning libraries’ ability to preserve electronic material and its effect on cultural record).

354. *See, e.g.*, Susan Stellin, *CNN Video Archives to Become Digital Database*, N.Y. TIMES, Apr. 23, 2001, at C8, available at <http://www.nytimes.com/2001/04/23/technology/23SEAR.html> (detailing CNN’s drive to archive 115,000 hours of videotape in digital format).

Licenses could also force librarians into becoming gatekeepers of copyrights. As a condition of acquiring copyrighted works, libraries could be compelled to police how patrons get access to digital publications based on who patrons are, the reasons patrons desire access, the ways patrons expect to use the publication or the nature of the publications at issue. One privilege that library patrons have long enjoyed, access to photocopiers, could be functionally taken away from them in the digital environment.

Before the advent of photocopiers, "it was a customary fact of copyright life that individuals could make entire handwritten copies of copyrighted materials for their own use and that secretaries could make typed copies for the use of their employers."³⁵⁵ With the advent of photocopiers, making copies of library holdings became faster and easier, to the consternation of copyright owners. Libraries, however, have never been required to monitor patron use of photocopiers, and as long as library photocopiers carry appropriate notices, libraries are immune from liability as contributory infringers, regardless of how egregiously patrons may exceed the bounds of fair use.³⁵⁶ Making copies of portions of copyrighted works will continue to be important to patrons accessing digital works. Unless Library Use prevents it, however, publishers can contract around the fair use doctrine, forbidding even modest copying, and requiring librarians to be their enforcers. If copyright owners are so panicked about possible acts of infringement, and so determined to reap a profit from every use of a work, library users could be put in the position of hand copying excerpts from a computer screen. This relegates patrons to a "pre-photocopying" level of access of usability, which will arguably slow scholarly output and discourage research. Nevertheless, hand-copying still enables, however onerously and inefficiently, circumvention of copy controls, a fact content owners highlight to rebut claims that they prevent fair use of their works.³⁵⁷

355. Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey*, 84 LAW LIBR. J. 341, 350 (1992).

356. See 17 U.S.C. § 108(f)(1) (1998) (stating that liability shall not be imposed on libraries, provided that displays are affixed announcing that copying of material may be subject to copyright laws).

357. See, e.g., Appellate Reply Brief of Movie Industry Plaintiffs-Appellee in *MPAA v. 2600*, officially *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. Feb. 28, 2001) (No. 00-9185), at http://www EFF.org/IP/Video/MPAA_DVD_cases/20010228_ny_op_reply_brief.html (arguing that trafficking proscriptions do not eliminate fair use of films delivered on DVD).

A movie released on DVD and in no other format could be the subject of innumerable uses potentially qualifying as fair use. Its plot and characters can be imitated or spoofed; its language can be quoted; and it can be shown on a DVD player in a classroom. Further, nothing in the DMCA, for example, would prohibit taking a brief snapshot from a TV or video display, that otherwise meets the statutory fair use criteria, of the content on a DVD (which would not, to be sure, be a perfect digital copy, but that is precisely the point of the trafficking proscriptions). In short, rigorous enforcement of the anti-circumvention provisions would impair, at most,

Libraries could also be contractually compelled to collect and monitor data about the use of library assets on behalf of copyright owners, or to allow content owners to collect data and monitor usage directly. Content owners can assert a right to perform this monitoring to track whether use of the copyrighted work is allowed under the terms and conditions of the pertinent license. This would compromise patron privacy, and thereby eviscerate a core library value.³⁵⁸ Contract provisions pertaining to monitoring use can be enforced by virtue of technologies with the ironic moniker “trusted systems.” Such technologies would enable a content owner real space control over how often a work was accessed, whether the user had the ability to cut parts of the text and paste them into other texts and how many times a work could be printed (if at all).³⁵⁹

the marginal quality of the image available for certain kinds of exotic fair uses. However, § 107 of the Copyright Act does not afford a “privilege” to make perfect digital copies of DVD movies; it merely provides a defense in infringement actions for certain permissible uses.

Nothing in the DMCA or the First Amendment gives courts the duty or power, in the abstract, to create a new fair use “right” to *optimal copies* of a copyright owner’s works, when Congress already has weighed the competing interests and come to a different balance.

Id.; see also *WIPO Copyright Treaties Implementation Act*; and *Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 229, 235-36 (1997) (testimony of Michael K. Kirk, executive director, American Intellectual Property Law Ass’n); see also *id.* at 78-82 (1997) (statement of Jack Valenti, President and CEO, Motion Picture Ass’n of America); Associated Press, *Free Speech Defense Questioned in DVD Trial*, USA TODAY, May 2, 2001, at <http://www.usatoday.com/life/cyber/tech/2001-05-02-dvd-copying-suit.htm> (reporting Judge Newman’s opinion that fair use doesn’t necessarily apply to digital formats when other formats such as videotape, are available); Declan McCullagh, *DVD Piracy Judges Resolute*, WIRED (May 1, 2001), at <http://www.wired.com/news/digiwood/0,1412,43470,00.html> (noting that Judge Newman claimed fair use was still possible if lower quality copy was made and that fair use does not require using only most technologically modern means).

358. See, e.g., American Library Association, *Statement on Core Values*, ALA, at <http://www.ala.org/congress/corevalues/draft5.html> (Apr. 28, 2000) (discussing core values). The American Library Association states that the “Core Values of Librarianship” include the:

- Connection of people to ideas
- Assurance of free and open access to recorded knowledge, information, and creative works.
- Commitment to literacy and learning
- Respect for the individuality and the diversity of all people
- Freedom for all people to form, to hold, and to express their own beliefs
- Preservation of the human record
- Excellence in professional service to our communities
- Formation of partnerships to advance these values

Id. The statement explains that “[r]espect for the individuality and the diversity of all people” means to “honor each request without bias and . . . meet it with the fullness of tools at our command.” *Id.* Additionally, it entails respecting the “individual’s need for privacy” and for confidentiality in their search or study. *Id.*

359. See, e.g., Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137, 139 (1997) (describing basics of trusted systems).

The Librarian of Congress and the Copyright Office were given the opportunity by Congress to issue rules governing the access provisions of the DMCA that established an enhanced right of fair use access to copyrighted works via unauthorized (but legal) circumvention of “trusted system” type technologies. They chose not to do so,³⁶⁰ and thus monitored access may be on its way to becoming a norm. Already “[t]he licenses for some electronic products ask for individual accounts that can provide tracking of each participating patron’s research habits.”³⁶¹ For example, when law libraries assign passwords as a condition of access to electronic databases, unless a library negotiates to protect the privacy of its patrons, the research patterns of individuals associated with each password can be collected and studied by these database publishers in a personally identifiable manner.³⁶²

Even more alarmingly, content owners could try to use licensing frameworks to regulate qualitative usage of works by placing terms in licensing agreements that prohibit public criticism or comment about the underlying work. While some courts may be reluctant to uphold such terms because they are in conflict with the First Amendment, if non-profit libraries do not have the resources to challenge outrageous license terms, they become *de facto* enforceable and could eventually constitute new and arguably undemocratic norms.

Finally, licensing works is more expensive and time consuming for libraries, meaning that ultimately libraries have fewer acquisition resources available, and can make fewer works accessible to patrons.³⁶³ Library staff members have to review individual licenses, perform any monitoring required by the license and develop and manage institutional mechanisms for license administration and compliance.³⁶⁴ This is labor and resource intensive, and potentially diverts time and energy away from other worthy projects.

360. For a further discussion of the Copyright Office’s decision not to issue rules governing the access provision of the DMCA, see *supra* note 297 and accompanying text.

361. Klinefelter, *supra* note 341, at 187.

362. See *id.* (noting that at millennium, publishers were asking for contact information of users).

363. See *id.* at 176 (“[T]he licensing process can become quite burdensome and can involve entities normally outside of the print material purchasing process Librarians have no choice but to redirect staff energies to licensing because what happens at the contract level affects almost all library support efforts and services to patrons.”).

364. See, e.g., *id.* at 177 (describing increased responsibility of libraries in response to licensing under UCITA).

b. Licensing Substitutes Breach of Contract for Torts-based Liability Analysis

As discussed above, a copyright infringement suit is an action in tort.³⁶⁵ As such, common practice plays a role, admittedly only obliquely at times, in judicial application of the fair use defense. For example, the Supreme Court's ruling in *Sony* rested in part on the fact that "free television" was a longstanding norm.³⁶⁶ In other situations, however, new norms that threatened the profit streams of content owners were judicially squelched. In *Kinko's*, an emerging norm of selling fair use "course packs" to students was stopped in its tracks, based on the perception that course packs prepared by photocopy shops were dislodging norms of textbook purchasing.³⁶⁷ By the time the same issue arose in *Michigan Document Services*,³⁶⁸ a new social norm was in place, one of photocopy shops in the course pack business obtaining permissions and paying photocopy royalties to publishers.

While "practice in the industry" may have some vague applicability in the context of gleaning the meaning of contractual terms, when works are licensed rather than sold, for all practical purposes longstanding norms of library usage will have no role or meaning whatsoever. Licenses that preclude any copying whatsoever of the licensed work come directly into conflict with the public policy goals of section 108 of the Copyright Act. They are also inconsistent with the right to make section 107 fair use of the copyrighted work, as sections 108 and 107 are intentionally designed to make certain nonconsensual uses non-infringing, and therefore beyond the control of the copyright holder. If publishers can "contract around" library exceptions and fair use, the normative aspirations of the copyright law are frustrated.³⁶⁹ If libraries can be denied affordable access,³⁷⁰ or

365. For a discussion of the treatment of copyright infringement suits as torts, see *supra* notes 152-53, 170-72 and accompanying text.

366. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (finding that copyright holders who license television programs for free would not object to private recordings of those programs).

367. See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) (showing effect on market of textbook sellers by Kinko's copy actions).

368. *Princeton U. Press v. Mich. Doc. Servs.*, 855 F. Supp. 905 (E.D. Mich. 1994), *aff'd in part and vacated in part*, 99 F.3d 1381 (6th Cir. 1996).

369. See Lemley, *supra* note 244, at 169-71 (noting conflict between contract and copyright norms). As Lemley observed:

To be sure, not everyone is happy with the idea that public policy overrides contract. Judge Easterbrook has suggested that it should do so only rarely, and advocates of a strong form of private ordering often suggest that "the market" will do a better job of determining public policy than "the law." Robert Gomulkiewicz derides this effort to balance between policy and freedom of contract as "over-regulating" by the government.

Id.

370. For a further discussion of the denial of affordable access to libraries, see *supra* note 279 and accompanying text.

access at any price, the objective of the copyright laws are undermined even more dramatically. Mark Lemley has observed:

[I]ntellectual property is a prime example of an area in which we cannot simply rely on “the agreement of the parties” to choose our public policy. This is true partially because intellectual property licenses are notoriously fallible as indicators of the “intent” of the parties; as we proceed to remove all trace of assent from the notion of contract, the philosophical basis for private ordering disappears as well. But the problem is more fundamental than this. Intellectual property is a deliberate, government-sponsored departure from the principles of free competition, designed to subsidize creators and therefore to induce more creation. This departure from the competitive model affects third parties who are not participants in the contract.³⁷¹

The externalities Lemley refers to will clearly impact students, scholars, researchers and library patrons generally if the licensing of copyrighted informational products is allowed to evolve unfettered into a full blown social norm.

6. *Select Paradigmatic Examples of the Need For Library Use*

a. Indexes, Codes and Laws

i. indexes

In analog real space, indexes and abstracts have traditionally been published by neutral third parties, and were therefore outside the control of those who owned the copyrights in the underlying indexed and abstracted works.³⁷² Libraries have to purchase these copyrighted indexes, and presumably seek out the best ones available, regardless of who publishes them.

Neutral third party index compilers do not have monetary incentives to direct index users to any particular works. Quite the contrary: efforts to produce a high quality index would logically focus on thoroughness, accuracy and objectivity. However, the norm of neutral, independent indexes is being obliterated by the confluence of copyright law and digitalization. Publishers are adopting a system of digital object identifiers (DOIs) to attach to digital content so that it can be abstracted and indexed with links to the full text of a given work.³⁷³ This gives publishers control over access to the indexes in addition to control over access to the digital works themselves.

371. Lemley, *supra* note 244, at 169-71.

372. See Gasaway, *supra* note 79, at 123, 156-58 (explaining history of indexing as being radically altered by digital object identifiers).

373. See *id.* at 156-57 (discussing benefits of digital object identifiers (DOIs) as replacements for Uniform Resource Locators (URLs), which merely state location on a server and do not specify content as DOIs do).

This means that not even the indexes would be available to potential users of the works, absent licensing arrangements.³⁷⁴ Publishers will increasingly control information about the existence of works and any summaries of them.³⁷⁵ As a result, “scholars will not be able even to determine whether a particular paper or article exists unless they have a license to use the publishers’ system or access through a library license that provides access.”³⁷⁶

Thus, the new norm that publishers are imposing requires libraries or library patrons to remunerate publishers for entrée to the indexes and summaries of works they own the copyrights in, creating control mechanisms and profit streams for publishers that would be unavailable absent digitalization. A related, consequential new norm involves the mindset with which researchers must approach “non-neutral” abstracts and indexes. If abstracts and indexes are written and compiled by publishers who have financial stakes in which works a user chooses to access in full text form, the scholar must approach these research tools fully cognizant of these publishers’ directive agendas, and somehow attempt to ignore or control them.

ii. codes and laws

When governments enact laws that have been written and copyrighted by private entities, the private entities generally claim ownership in the copyright to the laws they have authored.³⁷⁷ For example, the copyright in California’s Building Code is owned by a private company that does not allow California to post the Code on the state’s website, where most of California’s laws are available to the public. Instead, one must either purchase a copy of the Building Code, the only complete version of which is in print and costs \$738,³⁷⁸ or seek out a copy available for public viewing at a library.³⁷⁹

Meanwhile, the legal system depends upon assumed knowledge of the law and legal notice. Those governed by the law are presumed to know it, and lack of awareness of the law, or the inability to afford access to the

374. *See id.* at 123 (summarizing benefits and disadvantages of switching from third party indexing to attaching DOI indexes).

375. *See id.* at 158 (“There will no longer be publications of abstracts and indexes by third party publishers, as the linking of DOIs among publishers will subsume this activity.”).

376. *Id.*

377. *See Veeck v. S. Bldg. Code Cong. Int’l*, 241 F.3d 398, 411 (5th Cir. 2001) (holding that private entity that developed model code may maintain copyright in it despite that code being adopted in globo as law); Kathryn Blaint, *Public Laws Owned By The Public? Think Again, Copyright Rulings Show*, S.D. UNION TRIB., May 13, 2001, at A1 (reporting controversy and holding in *Veeck*).

378. *See Blaint, supra* note 377 (noting that CD-ROM of code is available, but does not include laws covering plumbing or electrical work).

379. *See id.* (explaining that code is available at public libraries).

written law, is not a defense for failure to obey or conform to it.³⁸⁰ When the operative philosophy is “ignorance of the law is no excuse,” citizens ought to have free and unfettered access to the laws that bind them, and libraries’ efforts to provide it should be encouraged and supported.

b. Preserving Reserves

Maintaining a reserve collection of materials that are in high demand is a practice academic libraries have been engaging in since the early 1900s.³⁸¹ Reserves offer faculty members the ability to assign supplemental readings without requiring students to purchase additional books or expensive course-packs.³⁸² Students benefit from these savings, and from having reserve collections that are easily and broadly accessible. To simultaneously provide broad access and perhaps mitigate demand for personal copies, however, libraries generally will have to make some copies of the reserve works in order to meet student demand and prevent (or at least reduce) damage to the original if it is in bound form.

If a student feels confident that she can expediently read a reserve copy of the material assigned for a class in the library, she is unlikely to make a personal copy of the work. However, accessing traditional “analog” ink and paper reserves requires students to be physically present in a library, and may entail a wait for materials to become available. Often, reserve works can only be checked out for short (two to four hour) intervals.³⁸³ These inconveniences are exacerbated when large numbers of students put off reserve reading until the last minute, either attempting to read assigned materials immediately before class, or shortly before an examination.

Electronic reserves offer numerous advantages. Digital works can be read by a large number of people simultaneously; they can be accessed from anywhere if available through the Internet; and extensive usage does not damage or degrade the works. The materials may be searchable, better organized and more easily edited. Use of the works may be tracked so that faculty members can see how many students access given materials and with what frequency (though presumably this would be aggregate rather than personally identifiable data, as library circulation records are generally confidential.³⁸⁴ It is also faster, cheaper and easier for students

380. See Martin, *supra* note 328, at 200 (recognizing standard of “assumed” knowledge of law).

381. See Steven J. Melamut, *Pursuing Fair Use, Law Libraries and Electronic Reserves*, 92 LAW LIBR. J. 157, 158 (2000) (citing Scott Seaman, *Copyright and Fair Use in an Electronic Reserves System*, 7 J. INTERLIBR. LOAN, DOC. DELIVERY & INFO. SUPPLY 19, 19 (1996)) (giving brief introduction to resources in academic law libraries).

382. See, e.g., Melamut, *supra* note 381, at 158 (exalting qualities of academic law library reserve collections).

383. See *id.* at 159 (detailing general limitations on reserve collection use).

384. See *id.* at 161 (noting that “[a]lthough aggregate data provided to faculty members may help guide what to place in reserve in future semesters, the same

to make personal copies of reserve works by downloading and printing than by photocopier.

At present, serious copyright questions are raised if a library converts print works into electronic form for the purposes of developing and maintaining electronic reserve collections. For works that are already digital in nature, in addition to copyright concerns, the terms of any licensing agreement between the library and/or academic institution and the publisher will be implicated as well.³⁸⁵ Some publishers will refuse to license their works for electronic reserve purposes altogether.³⁸⁶

None of the section 108 library exceptions apply to reserve copying, so the copyright issues are evaluated in the context of section 107 fair uses. However, publishers have argued that digital versions of a work distributed under the guise of "library lending" compete so directly with "original copies" that there can be no fair use of them whatsoever. Attempts to work out a compromise between libraries and publishing companies on the issue of electronic reserves have failed so far.³⁸⁷

confidentiality normally accorded to library circulation records is likely to protect the records of individual students").

385. See, e.g., *id.* at 162 (discussing LEXIS and Westlaw software, which allow schools to use materials online that they already have in their own reserves).

386. See Gasaway, *supra* note 76, at 819 (explaining difficult situation educational institutions face when publishers refuse to negotiate e-reserve licenses).

387. See Melamut, *supra* note 381, at 185-86 (discussing talks between libraries and publishers concerning electronic reserves).

Beginning with a public hearing in November 1993, the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force sought to have copyright stakeholders negotiate guidelines for the fair use of electronic materials in nonprofit educational contexts. Before the first meeting of the Conference on Fair Use (CONFU), which it had convened, the working group released the preliminary draft of its report (popularly known as the *Green Paper*) on July 7, 1994. In it, the working group expressed the belief that it would be difficult and inappropriate to apply the specific language prepared for print media to digital works and online services. The *Green Paper* appeared to be calling for a reexamination of fair use, and many parties rejected it as overreaching its mandate. At the first CONFU meeting in September 1994, working groups were established on Intellectual Property Rights in the Electronic Environment, Distance Learning, Multimedia, Electronic Reserves, Interlibrary Loan, and Image Collections.

The Electronic Reserves group included representatives of copyright holders, educational institutions, and the library community. The committee discussed the issues of fair use involved in digital reserves in nonprofit educational institutions: storage, access, display, and downloading. The negotiations reached an impasse in the fall of 1995. Some members of the committee continued to work, however, preparing a draft proposal entitled "Fair Use Guidelines for Electronic Reserve Systems" in March 1996. Finally, in November 1996, "at the plenary session of the Conference on Fair Use, participants concluded that there was insufficient support for the March 5, 1996 draft. CONFU participants agreed that the March draft would not be submitted for consideration as a proposal for CONFU fair use guidelines or included in the final CONFU report."

Id.

c. Enabling Remote Access Libraries

Evidence suggests that people will continue to venture out to real space libraries even if remote access to electronic collections is available.³⁸⁸ According to one academic librarian:

There are more public libraries in the United States than McDonald's restaurants. Americans make 3.5 billion visits to school, public and college or university libraries every year—three times more than visits to the movies. Children and young adults go to school libraries 1.7 billion times during the school year—two times more visits than to state and national parks.³⁸⁹

Libraries often function as community centers, and the increasing use of computers as communication tools may make the real space meeting places that libraries provide more important than ever. However, anyone who has geographic or temporal impediments to visiting real space libraries would benefit from being able to access library collections through cyberspace, and many other people would simply value the convenience.

At present, however, libraries are unable to serve patrons via the Internet as they do in person, and copyright laws pose some of the barriers that will prevent them from doing so in the future. The Library of Congress has so far put five million historical items online as part of its American Memory Project, carefully choosing mostly works that were not copyrighted, or in which the copyright has expired, though some copyrighted works (those for which permission to digitize could be obtained from copyright owners) were also included.³⁹⁰ Given the lengthy duration of copyrights, one can expect routine time lags of 100 years or more before modern creative and informational works can become part of the online "American Memory."³⁹¹ Despite being curtailed by copyright considerations, however, the American Memory website has been enormously popular, receiving (as of January 2001) 18 million page views per month,

388. See Dean E. Murphy, *Queens Library Moves Past "Shh" (and Books)*, N.Y. TIMES, Mar. 7, 2001, A1, available at <http://www.nytimes.com/2001/03/07/nyregion/07LIBR.html> (describing innovative ways of keeping Queens borough libraries modern, resulting in more than 500,000 people participating in 30,000 programs at libraries in Queens, NY last year); see also *id.* (noting that North Shore Library System near Chicago has seen resurgence in library usage, despite prevalence of home computers).

389. Wayne Weigand, *Librarians Ignore the Value of Stories*, CHRON. OF HIGHER EDUC., Oct. 27, 2000, at B20; see also Gasaway, *supra* note 79, at 126 (citing Wayne A. Weigand, *The Structure of Librarianship: Essay on an Information Profession*, Samuel Lazerow Memorial Lecture at Florida State University (November 23, 1998) (forthcoming, 2003)) ("In mid-1998, a Gallup poll showed that 67% of Americans visited a public library within the last year, 54% checked out a book, and 21% checked out other materials, like a CD or a video.").

390. See Kendra Mayfield, *Library of Congress Goes Digital*, WIRED (Jan. 19, 2001), at <http://www.wired.com/news/print/0,1294,41166,00.html> (noting efforts to digitalize items with mass-market appeal).

391. <http://memory.loc.gov>

while the website of the Library of Congress receives 80 million page views each month.³⁹²

Similarly, the School of Information at the University of Michigan hosts the Internet Public Library, described as “the first public library on the Internet,”³⁹³ but its collections are limited to “any online text that resembles a traditional non-online text, and is available in its entirety for free.”³⁹⁴ Excluded is anything covered by copyright for which free permission cannot be obtained, which rules out almost everything published after 1923 and even works not covered by copyrights that have not been converted from print to digital form.³⁹⁵

Meanwhile, the National Science Foundation, in conjunction with teams of computer scientists and librarians from several major research universities, is constructing a National Science Digital Library to enable users to browse digital resources from libraries around the country.³⁹⁶ It is intended to be “one library with many portals” that enables searches through numerous digital library collections in science, mathematics, engineering and technology education from a centralized site.³⁹⁷ However, copyright concerns are greatly complicating this undertaking, which would benefit greatly from an appropriate Library Use doctrine and the lowered transaction costs that the associative clear rules would make possible. Unless the legal regime governing rights in digital works is reconfigured to support online library lending as an expressly chosen social priority, remote access libraries will never reach their full potential.

IV. CONCLUSION

The fundamental notion that has been proposed here is that iterated widespread past practices keyed to particular uses of works available in ink-and-paper form could provide a sound basis for normative paradigms for the fair use, and (more specifically) Library Use of digital materials in analogous electronic contexts. These real space use norms could be easily adapted to digital formats, and codified with a high degree of specificity to insure permanent, consistent and predictable levels of access to electronic materials.

392. *See id.*

393. AMERICAN BAR ASSOCIATION, *Reference Materials Online*, at http://www.abanet.org/lpm/bestpractices/articles/bparticle11754_front.shtml (last visited July 30, 2002).

394. THE INTERNET PUBLIC LIBRARY, *Books Help & Frequently Asked Questions*, at <http://www.ipl.org/reading/books/help.html> (last visited July 30, 2002).

395. *See id.* (answering the frequently asked questions “[w]hy can’t I find a book by my favorite author? Why can’t I find a specific book?”).

396. *See* Katie Dean, *This Library’s “Born Digital”*, WIRED (June 18, 2001), at <http://www.wired.com/news/print/0,1294,44554,00.html> (describing Natural Science Foundation’s desire to open educational opportunities to variety of individuals).

397. *See id.* (noting functions available on National Science Digital Library).

Copyright law has long been driven by pragmatism rather than morality. When large content owners or government representatives hypocritically pretend otherwise, they only undermine their own self-serving attempts to foster “copyright respect” as an ethical imperative. A copyright-respectful social norm will not be “enforced” unless there is a general consensus about the norm among copyright consumers.³⁹⁸ Codifying a normative framework for copyright use behavior by individuals could reduce uncertainty and lead to enhanced compliance with copyright laws, but only if the copyright laws on which it is premised reasonably comport with ordinary understandings and widespread norms of copyright use.

Because copyright owners can exert more control over copyrighted works in digital formats, requiring them to provide ink and paper levels of access would somewhat diminish their ability to maximally control and exploit their copyrights. The idea of codifying real space copyright use norms cannot be implemented unless these norms can be distilled from consistent and widespread past practices such that they are virtually undeniable and irrefutable, because they flow from constructions of fair use and related doctrines that copyright holders will find objectionable and indeed have battled vigorously to narrow or eliminate. The fairness and legitimacy of these norms as they are reconfigured into laws is imperative to their acceptance and ultimate success in achieving the objectives of preserving access.

Providing the end users of creative works with some consistency of access could also lead to emergence of more societal respect for copyrights, which would be very beneficial to content owners in the long term. If, in the norms of real space, experiential access is preserved and respected in the electronic environment, certain precepts of copyright law may attain enhanced legitimacy and adherence, and social norms of making authorized rentals or purchases may be imported into the digital world as well. A shared acceptance of the lines between fair use and infringement could then emerge between copyright owners and copyright consumers.

It is important to note that making it easier to comply with the law does not guarantee improved compliance.³⁹⁹ If the expressive powers of copyrights law can be improved, however, the response may be that blatantly infringing copyright use behaviors are reduced without the need for increased attempts at legal coercion. Individuals may very well live up or down to the copyright laws’ perceived expectations of them.

Finally, whether the approach suggested by this Article or another is attempted, action needs to be taken quickly. The closer that large content owners come to obtaining the holy grail of absolute power over their copy-

398. See, e.g., Chong, *supra* note 82, at 2079 (“Social norms depend for their enforcement on widespread recognition within one’s social group that a general consensus exists around the norm.”).

399. See DIGITAL DILEMMA, *supra* note 74, at 125-27 (arguing for simplification of copyright laws).

righted content, the less willing they will be to relinquish any semblance of control. Among other consequences of limitless and unconditional copyrights, the information flowing fluidly through the “fountains of fair use” that non-profit libraries represent will quickly evaporate.