

## TOWARD A NEW POLITICS OF INTELLECTUAL PROPERTY

by  
Pamela Samuelson,  
University of California at Berkeley

Until very recently, copyright has been on the periphery of law and public policy concerns because it provided highly technical rules to regulate a specialized industry. The politics of copyright largely focused on intra-industry bickering. The typical response of the legislature to such intra-industry struggles has been to propose that affected parties meet behind closed doors and hammer out compromise language that would thereafter become enacted into law. It didn't matter much if the language negotiated in the heat of the night was incomprehensible (as has so often been the case) because the affected parties understood it, and that was all that mattered. Copyright law has, as a consequence, become highly complex and effectively unreadable.

One reason why a new politics of intellectual property is necessary is that copyright now affects everyone. Advances in information technology and digital networks allow everyone to become a publisher. Under the Clinton Administration's "White Paper" on Intellectual Property and the National Information Infrastructure, every access to and use of digital information was a copyright-significant act because they involve temporary copying of the information in the random access memory of a computer, which the White Paper said violated the reproduction right of copyright owners unless authorized by them. While this interpretation of existing law is highly controversial among copyright lawyers, there is some caselaw support for it in the U.S. and the European Union's recent Directive on Copyright for the Information Society adopts it as the right rule for the future.

Because copyright infringement by individuals is so difficult to police in a distributed networked environment, copyright owners are increasingly going after technologies that enable copyright infringement. One strategy is very expensive litigation, such as the lawsuits against Napster and other makers of peer-to-peer software. Another is by support for new legislation such as Senator Hollings' Consumer Broadband and Digital Television Promotion Act (S. 2048). The Hollings bill would outlaw the general purpose computer and open source digital media players. It would require all makers of digital media devices to install technical protection measures vetted by the Federal Communications Commission. Those who violated this law could go to jail for a very long time. European Union officials have expressed sympathy for mandating technical protection measures as well, although they have not yet formulated legislation to require this.

The Hollings bill is unlikely to pass during the current legislative session but it should be taken very seriously. Hollywood won't be satisfied until and unless general purpose computers have been tamed and the Internet has been rearchitected to make it safe for their products. Quite possible in the near term are little "mini-Hollings" bills focused on specific technologies (e.g., requiring makers of digital televisions to build sets

to respond to broadcast “flags” which would allow or disallow copying of particular programs). Once several of these bills have passed, the momentum for more general legislation is likely to build. To oppose such legislation, it is not enough to say that the Hollings bill or little mini-Hollings bills are brain-dead or unenforceable. If you think general purpose computers and open information environments such as the World Wide Web are valuable, you are going to have to help build a new politics of intellectual property that will preserve these devices and infrastructure.

This will not be easy because of two important legacies of the old politics of intellectual property: First, copyright industry groups have cultivated relationships with policymakers in the executive and legislative branches over a long period of time. They have built up trust with policymakers, and they know how to get their messages across to this audience very effectively. Second, the public has gotten used to the idea that copyright doesn’t concern them. It is, as a consequence, virtually impossible to mobilize the public when changes to copyright law are proposed. Even though changes such as the Hollings bill will almost certainly have profound impacts on the public’s use of information, it is difficult for most people to realize what’s at stake. Even when some members of the public, such as USACM’s public policy committee, do become engaged in the policy debates about copyright, they lack the political heft of industry counterparts, not the least because they are less fruitful sources of campaign contributions.

A new politics of intellectual property is needed to counteract the content industry’s drive toward ever stronger rights. More importantly, a broader awareness is needed that copyright deeply affects the information environment for us all. The digital networked environment has surely changed the economics of production of intellectual property (e.g., the marginal cost of copying is effectively zero), the economics of distribution (e.g., the cost of transmission via the Internet is also effectively zero), and the economics of publication (e.g., posting information on the web is also radically cheaper than in the print environment). This means, among other things, that the actions of individuals can have the same potential market-destructive impact as those of commercial counterfeiters in the olden days. This helps to explain why the content industries have been so anxious about computers and why they favor moving to a pay-per-use or mandated trusted system policy for all commercially valuable information in digital form. Without imaginative proposals for more balanced solutions and without a political movement to support and sustain such proposals—in other words, without a new politics of intellectual property—there will be little to stop the current politics from having its high protectionist way.

James Boyle has argued for a new politics of intellectual property in his essay “Environmentalism for the Net.” This essay points out that in the 1950’s there was no concept of the “environment.” Logging and mining companies thought that they alone were affected by legislation concerning natural resource issues and they lobbied for policies that sometimes caused erosion and pollution to ruin streams and lakes, scar the landscape, and kill off of fish and other wildlife. It took a while for bird-watchers and hunters (as well as society more generally) to realize they had a common interest in preservation of nature. Together they invented the concept of the environment, and this

concept enabled a powerful political movement to protect it. What is needed is a similar movement to protect the intangible interests we all have in an open information environment, in robust public domain, and in balanced intellectual property law. It will sound strange perhaps to put it this way, but our information ecology really will be disrupted if intellectual property rights get too strong. So far Greenpeace hasn't taken up the cause, but maybe they should.

Here are some thoughts about who might participate in a new politics of intellectual property aimed at promoting a balanced information ecology. Obvious candidates include authors and artists (who need access to information, a robust public domain, and meaningful fair use rights), educational institutions, libraries, scholarly societies, computing professionals, computer manufacturers and other equipment providers who don't want Hollywood to be in charge of their research and development divisions, telecommunications companies and Internet service and access providers (who want to serve their customers and not become a new branch of the police), consumer groups, civil liberties organizations, and digital media companies who may have some radical business models that just might work if not shut down through litigation by established copyright industry groups who want to protect preferred business models.

The agenda of a new politics of intellectual property obviously needs to be about more than just opposing the high protectionist initiatives of copyright industry groups. It should, of course, oppose legislation such as the Hollings bill, but the new politics needs to have a set of affirmative policy objectives of its own. The new politics might, for example, propose legislation to protect consumer rights, such as fair use, under copyright law. Digitalconsumer.org has made a good start on such a project by formulating a users' "bill of rights." A new politics might also support legislation to require digital rights management systems to protect the right of consumers to read and listen anonymously. It might also support changes to the Digital Millennium Copyright Act anti-circumvention rules so that researchers like Edward Felten and his colleagues don't need to worry about getting sued when they do scientific research and publish the results. And it should also take an international perspective because as we all know, the Internet and the World Wide Web are inherently international in character. It is necessary to care about the intellectual property rules of every nation because overly strict rules in one jurisdiction can mean that no one will be safe posting information on the Web without fear of liability. Recall that Dmitri Sklyarov was arrested in Las Vegas, Nevada, for having written a program in Russia that was available on the Web because Adobe persuaded the Justice Department it violated the DMCA anti-circumvention rules.

Articulating the societal benefits of an open information environment, such as the World Wide Web, is probably the single most important thing that the new politics of intellectual property might do. This is an activity that participants in this conference are eminently capable of doing. The robustness and efficiency of the Internet and the Web as a global communications medium is a product of its present end-to-end, open, nondiscriminatory architecture. Computers are not only more valuable to people because they can so quickly and easily copy information from disk to disk, but the ease of copying enables many beneficial new uses of information which copyright owners

neither need to nor ought to be able to control. Innovation and competition would be stifled if mandated trusted systems became the law. Moreover, the market for digital information products may well be vastly smaller if every piece of information must be tightly locked up at all times. Branko Geravac once recommended that publishers “protect revenues, not bits.” Maybe a new politics of intellectual property could help copyright industries get re-focused on providing content that a wide array of the public might want to enjoy instead of putting so much effort into suppressing innovation and competition in the information technology industry and the digital networked environment through lawsuits and unsound legislative initiatives.

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