



# Toward a New Politics of Intellectual Property

**PAMELA SAMUELSON**

UNTIL recently, copyright was on the periphery of law because it involved technical rules for a highly specialized industry. The politics of copyright largely focused on intra-industry bickering. The typical response of a legislature to these intra-industry struggles has been to propose that affected parties meet behind closed doors and hammer out compromise language that would thereafter become 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.

Two important legacies of the old politics of intellectual property are these: 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 these actors and they know how to get their messages across to these audiences 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 such changes will almost certainly have profound impacts on the public's use of information, they are so far from people's experience and expectations as to seem unreal. 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 will be less fruitful sources of campaign contributions.

Jack Valenti of the Motion Picture Association of America (MPAA) and Hilary Rosen of the Recording Industry Association of

America (RIAA) have certainly not confided in me their plans for the next few sessions of Congress. However, from the many millions of dollars copyright industry organizations have poured into political campaigns in the past political season, it would be fair for them to believe they helped elect persons receptive to their concerns.

RIAA will surely be hoping to defeat the bill proposed by Rep. Boucher to permit the owners of music to listen to the music via services such as those operated briefly by MP3.com. If the Ninth Circuit Court of Appeals reverses the injunction against Napster, RIAA will also advocate legislation to overturn the decision. This might involve narrowing the "safe harbor" rules for ISPs (which the content industry always thought too generous to ISPs). It might also involve reconsideration of the Audio Home Recording Act if the court of appeals agrees with Napster that this law exempts non-commercial exchanges of digital music. The recording industry would like nothing better than to close this exemption and while Congress is at it, why not amend the provision that was too narrowly crafted to stop sales of devices such as the Rio player?

If the Secure Digital Music Initiative (SDMI) is being undermined by too much competition, it would be logical for the RIAA to ask Congress to mandate installation of SDMI technology to protect digital music. If this effort proved successful, a wider effort to mandate trusted systems would likely follow. The European Union has already raised the possibility of mandating trusted systems across the board in its copyright policy documents. The plain truth is that technical protection systems will never be truly safe until they are built into every part of the information infrastructure.

One reason to form a new politics of intellectual property is 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 (for example, the marginal cost of copying is effectively zero), the economics of distribution (the cost of transmission via the Internet is also effectively zero), and the economics of publication (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 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

protect it. Boyle hopes to ignite 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 it should.

So who might participate in a new politics of intellectual property aimed at promoting a bal-


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 needs to have a set of affirmative policy objectives of its own. Articulating a positive case for an open information environment is probably the single most important thing the new politics of intellectual property might do. The robustness and efficiency of the Internet as a communications medium is a product of its present end-to-end, open, nondiscrimina-

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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." He points out that in the 1950s there was no concept of the natural environment. Logging and mining companies thought they alone were affected by legislation concerning natural resource issues and they lobbied for policies that sometimes caused erosion, pollution, and killed off wildlife. It took a while for society more generally to realize they had a common interest in the preservation of nature. They invented the concept of the environment that enabled a powerful political movement to pro-

anced 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 groups, 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), economists, consumer groups, 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.

tory 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 that 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." 

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