

7-10-2013

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Recommended Citation

Guo, Chad. "Copyright's Online Destiny, or: How to Stop Worrying and Love the Net." *Intellectual Property Brief* 4, no. 3 (2013): 8-18.

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Copyright's Online Destiny, or: How to Stop Worrying and Love the Net

COPYRIGHT'S ONLINE DESTINY, OR: HOW TO STOP WORRYING AND LOVE THE NET

by Chad Guo¹

INTRODUCTION

The controversy surrounding the Stop Online Piracy Act (SOPA) and the PROTECT Intellectual Property Act (PIPA) served both as the latest in a long line of conflicts between technology and copyright holders and also as an indication of things to come. While the need to reconcile the copyright interest of content producers with the interests of technological developers remains of principal importance, the SOPA/PIPA protest introduced an increasingly powerful element—the interest of content consumers and technology users. In terms of legal implications, the rise of the consumers as a force to be reckoned with represents a failure in the online intellectual property market at best and a reassertion of the fundamentally anarchical culture of cyberspace at worst. To remain relevant in the online context, copyright law must return to its most basic roots, where its primary purpose of serving the public interest aligns closest with the needs of the cyberspace community.

The struggle between copyright and technology seems like a tale as old as time, made more pronounced by the unique attributes of the Internet. Ever since the Internet emerged as a medium for the fast and seemingly unlimited distribution of copyrighted works, a war has been brewing between copyright and technology. Copyright owners have tried to maintain the same rights and control over their creative works that they had outside of the digital world. Meanwhile, the developers and users of technology create new capabilities and habits that perhaps unintentionally, but quite effectively frustrate all efforts at traditional copyright enforcement. Skirmishes flare up occasionally—usually when a new technology threatens to further reduce the control of copyright owners.² Thus, in a way, the SOPA/PIPA debacle was

merely the latest incident to break the fragile détente.

On the other hand, an interesting new development occurred when a counteroffensive led by online entities successfully repelled the most recent copyright incursion into the online world.³ The key to the victory lay in the empowering of consumers as an effective lobbying force, as many websites directed visitors to call or write their Congressmen.⁴ Faced with unexpected pressure from their constituents, many lawmakers reconsidered or abandoned their support for the legislation.⁵ Consequently, the SOPA/PIPA bills ended up on the congressional backburner.⁶

The grassroots effort of the SOPA/PIPA

Inc., 464 U.S. 417, 417 (1984) (regarding videocassette recorder technology); *Am. Broad. Co., Inc., v. Aereo, Inc.*, 874 F. Supp. 2d 373, 373 (S.D.N.Y. 2012) (detailing a technology that enables television watching online); Brian Stelter, *A DVR Ad Eraser Causes Tremors at TV Upfronts*, N.Y. TIMES, May 16, 2012, <http://www.nytimes.com/2012/05/17/business/media/dish-networks-hopper-cuts-ads-and-causes-tremors-at-tv-upfronts.html?pagewanted=all> (“Some reviewers have already called the feature, named Auto Hop, a dream come true for consumers. But for broadcasters and advertisers, it is an attack on an entrenched television business model, and it must be strangled, lest it spread.”).

3. See Amy Chozick, *Tech and Media Elite Are Likely to Debate Piracy*, N.Y. TIMES

July 9, 2012, available at http://www.nytimes.com/2012/07/10/business/media/tech-and-media-elite-are-likely-to-debate-piracy.html?_r=0 (“Congress, overwhelmed by the popular opposition, quickly backpedaled, leaving the legislation to die.”).

4. Deborah Netburn, *Wikipedia: SOPA protest led 8 million to look up reps in Congress*, L.A. TIMES BLOG (Jan. 19, 2012, 10:42 AM), <http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html> (reporting that “8 million U.S. readers took Wikipedia’s suggestion and looked up their congressional reps from the site” while “4.5 million people had signed [Google’s] petition asking lawmakers to reject [SOPA and PIPA]”).

5. See Paul Tassi, *Internet Blackout Causes 18 Senators to Flee from PIPA*, FORBES.COM

(Jan. 19, 2012, 9:29 AM), <http://www.forbes.com/sites/insertcoin/2012/01/19/internet-blackout-causes-18-senators-to-flee-from-pipa/> (including a list of Senators who withdrew support for the bill).

6. Stephanie Condon, *PIPA, SOPA put on hold in wake of protests*, CBSNEWS.COM

(Jan. 20, 2012, 9:41 AM), http://www.cbsnews.com/8301-503544_162-57362675-503544/pipa-sopa-put-on-hold-in-wake-of-protests/ (“Senate and House leaders announced Friday they are postponing work on two controversial anti-piracy bills in the wake of large online protests that spurred several congressmen to rethink the legislation.”).

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2. See generally *Sony Corp. of Am. v. Universal City Studios*,

protestors also highlights the importance of the law in the ongoing conflict. While copyright holders have consistently looked to copyright law for support as they advance towards gaining more ground, copyright law may just as well serve the purposes of the online community in resisting efforts to control the Internet and its users. In other words, the Internet community's apparent belief—that copyright holders' need to be compensated fully⁷ for the use of their creative works online should defer to the interest of a free and open Internet—could very well have support in legal doctrines.⁸ These doctrines then could provide a way to harmonize intellectual property law with online behavior and perhaps provide some measure of satisfaction to all parties.

This Article discusses the role of copyright law as applied to the Internet environment in light of past and current developments involving copyright holders, technology developers, and now consumers. Part I provides a brief background on the jurisprudence of copyright law as applied to technological developments in the entertainment and related industries. Part II examines both statutory and case law that supports the separation of copyright's exclusive rights from traditional, direct financial compensation to copyright holders. Part III explores the policy implications of altering the compensation scheme of copyright holders on the Internet. Finally, Part IV concludes that the law need only serve the public interest, and it is the industry that must compromise when faced with a conflict between copyright and technology.

I. BACKGROUND

The purpose of copyright is explicitly stated in the highest law of the land. Given its progress-oriented purpose, it is paradoxical how often copyright struggles when faced with new, groundbreaking technology. An examination of the jurisprudence of copyright law encountering new technologies may help to shed some light into this paradoxical relationship.

A. The Original Purpose and Subsequent Codifications of Copyright Law

Article I, Section 8, Clause 8 of the United States Constitution provides: "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

7. Compensated "fully" means that copyright holders would be compensated under purely market-based conditions, as opposed to statutorily determined compensation or no compensation at all.

8. See *infra* Part II.

Writings and Discoveries."⁹ Other fields of law should be so lucky as to have their purpose so explicitly stated in the ultimate source of their authority.¹⁰

The goal of copyright does not focus so much on the interests of the authors and inventors as it does on the public interest goal of promoting progress of the sciences, which has been interpreted to mean knowledge and creativity in general.¹¹ Providing financial compensation to authors and inventors is merely the means by which creative advancements are incentivized, but financial compensation is not the end goal itself.¹² By that logic, then, in instances where the public interest would best be achieved by limiting or denying an author or inventor the exclusive right to his or her works, the law should and can readily support such curtailment.¹³ The Copyright Act already specifically limits the copyright holder's exclusive rights to an enumerated bundle.¹⁴ The rights granted by copyright law are also limited to a specific set.¹⁵ These include, among others, the exclusive right of reproduction and the exclusive right of public performance.¹⁶

In addition to the limitation of enumerating the rights available to copyright holders, two legal doctrines limit these rights even further. First, the constitutional clause itself provides for "limited times" during which the author's right to his or her work is exclusive.¹⁷ This notion is reflected in the doctrine of public domain, by which the author's exclusive

9. U.S. CONST. art. I, § 8, cl. 8.

10. *But see* William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 171–74 (Stephen R. Munzer ed., 2001) (surveying three additional theories of intellectual property).

11. *See* *Infodek, Inc. v. Meredith-Webb Printing Co., Inc.*, 830 F. Supp. 614, 621 n.8 (N.D. Ga. 1993) ("[T]he use of the term 'science' relates to copyrights and is generally given its eighteenth century meaning of knowledge or learning.").

12. When considering who is being incentivized, it is important to note that the incentives are not solely for those who create copyrighted works, but also extends to those who would invest and produce the works. Producers and investors require assurance that the money they put into a creative endeavor will yield fruit. 144 CONG. REC. H9950 (daily ed. Oct. 7, 1998) (statement of Rep. Coble) ("When works are protected by copyright, they attract investors who can exploit the work for profit."). This means that copyright also protects the investment interests of persons or entities other than the artists themselves.

13. See *infra* text accompanying notes 14–20.

14. 17 U.S.C. § 106 (2006).

15. *Id.*

16. *Id.* § 106(1), (4).

17. U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.") (emphasis added).

property rights in a work are terminated by the simple passage of time.¹⁸ Once a work enters into the public domain, parties other than the author may use or enjoy the work however they wish.

Second, copyright law recognizes the doctrine of fair use.¹⁹ Fair use directly invokes the public interest purpose of copyright by denying authors an exclusive right to their work when usage by another party is perceived to be fair in the eyes of the law.²⁰ For both public domain and fair use, the copyright holder has no control over his or her original work. This has resulted in numerous interpretations of narratives in the public domain²¹ as well as diverse commentary and criticism on certain works through fair use.²²

On principle, the Copyright Clause of the Constitution and the Copyright Act form the most basic understanding of copyright. The verbiage and the legal doctrines created by the texts are clearly directed at serving the public interest. Yet in practice, copyright, or at least the perception of copyright, has been viewed as serving the interests of certain industries at the expense of the larger public.²³ The true intent of copyright law is often lost in conversations

involving the vast amounts of revenue generated by the sale of copyrighted works. Just precisely how this contradictory perception came into being involves looking into a most curious legal history.

To their credit, United States courts have long recognized the public interest aim of copyright law. This purpose is perhaps best articulated by the Second Circuit in *Berlin v. E.C. Publications, Inc.*,²⁴ a case about song parody lyrics published in a magazine. In *Berlin*, the copyright owners brought suit against Mad Magazine for infringing on the copyrighted lyrics of twenty-five popular songs.²⁵ While finding that there was no infringement, the court also laid out the purpose of copyright law quite clearly. The court elaborated that “the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself.”²⁶ The court then stated, “[a]s a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science and industry.”²⁷ This fluid standard—balancing the interests of copyright holders with those of the public as particular infringement claims arose—would be put to the test time and again, as the next section demonstrates.

B. Traditional Copyright Versus New Technology

The clear purpose of copyright law notwithstanding, numerous fights have emerged and presented many opportunities for lawmakers to address how copyright applies to emerging technologies. A prominent illustration of such a conflict occurred when cable television emerged and threatened the exclusive right of transmission of the copyright holders through broadcast television.²⁸ The conflict seemingly wrote the script for future battles: 1) in the exposition, a technology emerges that makes copyrighted content more accessible to the public; 2) however, the technology renders the current efforts of the copyright holder to receive compensation for his or her work more difficult, if not impossible; 3) as the action rises, the copyright holder looks to the law to exercise some measure of control over the new technology so that the current copyright enforcement efforts remain effective; which in turn leads to 4) the climactic battle in the

18. 17 U.S.C. §§ 301–04 (2006).

19. *Id.* § 107.

20. While fair use is recognized as a defense to copyright infringement, there is a school of thought that would deem fair use to be a right in and of itself. Compare *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (“The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.”), with Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 3 UTAH L. REV. 715, 719 (2007) (“More recently, the United States Supreme Court has made it clear that fair use is one of the mechanisms by which copyright recognizes the principle of freedom of expression that is enshrined in the First Amendment to the U.S. Constitution: without fair use, copyright law could be found unconstitutional as applied to expressive activities . . .”). In other words, if copyright protection is an exception to the right to free speech, and fair use is the exception to copyright protection, does not fair use simply restore the right to free speech? See *id.* at 719.

21. See *THE LEAGUE OF EXTRAORDINARY GENTLEMEN* (20th Century Fox 2003) (noting that the movie was based on a film adaptation of a comic series that utilizes characters almost entirely from the public domain such as Allan Quatermain, Captain Nemo, Ishmael, and Tom Sawyer); *Trivia for The League of Extraordinary Gentlemen (2003)*, IMDB.COM, <http://www.imdb.com/title/tt0311429/trivia> (last visited Oct. 20, 2012) (“All of the characters except [one] have fallen into the public domain, which means that anybody can write about them.”).

22. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, app. A, B (1994).

23. See Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1069 (2001) (“The ordinary person doesn’t notice, because the ordinary person has become so accustomed to the idea that culture is managed—that corporations decide what gets released when, and that the law can be used to protect criticism when the law is being used to protect property—that the ordinary person can’t imagine the world of balance our Framers created.”).

24. 329 F.2d 541 (2nd Cir. 1964).

25. *Id.* at 542.

26. *Id.* at 543–44.

27. *Id.* at 544.

28. H.R. REP. NO. 94-1476, at 88–89 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5703.

courts for a resolution.

When cable television first emerged, it allowed certain areas to receive broadcast television that had previously been unavailable due to poor over-the-air reception.²⁹ However, the mechanism by which cable infrastructure received the broadcast television signals and then transmitted the signals to consumers implicated one of the enumerated exclusive rights of those who held the copyrights to the broadcasted content.³⁰ This created a dilemma. Though the broadcasters' content reached a larger audience through cable technology, the broadcasters needed some measure of control over the retransmission of their content pursuant to copyright law.³¹ Copyright law allows for broadcasters to consent to the retransmission of their content in exchange for compensation.³² However, cable providers argued that having to negotiate retransmission consent fees with each and every broadcaster would be burdensome and inefficient, especially when broadcast signals were free over the air.³³

The conflict between television broadcasters and cable technology resulted in a compromise—namely, the statutory licensing scheme that has since been applied to several other technologies.³⁴ At a basic level, statutory licensing allows for anyone to make and distribute reproductions of copyrighted works without the consent of the copyright owner as long as that person pays a statutorily established royalty to the copyright owner. In addition to cable retransmission, statutory licensing has been applied to satellite retransmission of broadcast television signals as well as

retransmission of audio works over Internet radio.³⁵

A few years later, the emergence of the videocassette recorder (VCR) also posed a problem to copyright holders in the motion picture industry. Videocassette recorders were challenged as copyright infringing technology in a case that reached the Supreme Court. In *Sony Corp. of America v. Universal City Studios, Inc.*,³⁶ various entertainment studios sued the manufacturers of home VCR's and alleged that use of the recorders amounted to copyright infringement of commercially sponsored television.³⁷ Universal Studios argued that by selling the allegedly infringing technology, the manufacturers were liable for contributory copyright infringement.³⁸ The Court held that the sale of VCR's did not constitute contributory copyright infringement.³⁹ The *Sony* Court made a point to note that copyrights were not designed to provide a special private benefit.⁴⁰ Instead, the Court noted that the granting of copyrights is only a means to achieve an important public purpose, namely to motivate creative activity and to allow public access to the products of creative activity.⁴¹

After the *Sony* decision, Congress passed the Audio Home Recording Act (AHRA) in 1992.⁴² Like statutory licensing before it, the AHRA codified a compromise between copyright holders—the movie industry—and technology developers—in this case, the producers of VCRs.⁴³ The AHRA created a blank media levy that required developers of recording devices and blank media to pay royalties to copyright holders based on a statutorily defined formula.⁴⁴ In exchange, the developers were granted immunity from claims for copyright infringement.⁴⁵ While the blank media levy has very notable limitations,⁴⁶ the royalty system allows for the coexistence of copyrighted works alongside technology that perfects making copies of such works.⁴⁷

29. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391–92 (1968) (providing some background information on an early cable system); H.R. REP. NO. 94-1476, at 88, reprinted in 1976 U.S.C.C.A.N. at 5702–03 (“A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers.”).

30. See 17 U.S.C. § 106(4) (2006) (granting copyright holders the exclusive right of public performance). Public performance has been interpreted to include the transmission and broadcasting of television signals. See *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 758–59 (S.D.N.Y. 1988). However, this interpretation was not always the case. See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408–09 (explaining that the regulation was subsequently superseded by statute, which led to the statutory licensing scheme in place today); *Fortnightly*, 392 U.S. at 400–01.

31. See *Fortnightly*, 392 U.S. at 391–92.

32. See 47 U.S.C. § 325(b) (2006).

33. See H.R. REP. NO. 94-1476, at 89, reprinted in 1976 U.S.C.C.A.N. at 5704 (“The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.”).

34. 17 U.S.C. § 111(c) (2006); see also *Id.* §§ 114(d)(1), (2).

35. Currently, while statutory licensing covers transmissions via Internet radio, it does not cover the permanent downloading and copying of works over the Internet. See 17 U.S.C. § 114(d)(1).

36. 464 U.S. 417 (1984).

37. *Id.* at 417.

38. *Id.* at 419.

39. *Id.* at 417.

40. *Id.* at 429.

41. *Id.*

42. 17 U.S.C. ch. 10 (2006).

43. Statement by President George Bush Upon Signing S. 1623, 1992 U.S.C.C.A.N. 3609.

44. 17 U.S.C. §§ 1003–04 (2006).

45. See *id.* § 1008.

46. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999) (excluding computer hard drives from the scope of the AHRA).

47. Although *Sony Corp. of Am. v. Universal City Studios*,

In both instances with cable and recording technologies, the law recognized that a compromise, a give and take, was preferable to strictly enforcing the provisions of the Copyright Act. Curiously, when the Internet and its associated technologies implicate copyright law, the law has followed another path, and copyright holders have opted to enforce copyright protections instead of compromising for mutual benefit. The information sharing capabilities of the Internet presented problems the likes of which the entertainment industries have never seen. Not only could perfect copies of copyrighted music be created, but the copies also could be distributed instantaneously to potential consumers worldwide. The unauthorized copying and distributing of copyright works became known as piracy.⁴⁸ Concern over the Internet's effect on copyright led Congress to pass the Digital Millennium Copyright Act (DMCA) in 1998.⁴⁹ The DMCA was meant to strengthen copyright protections in the online context.⁵⁰ However, there were still questions that needed answering in the courtroom.

The online activity of file-sharing earned the wrath of the music industry in 2001.⁵¹ A circuit

Inc., had already solidified the legality of videocassette recorders, the AHRA allowed for fuller coverage of all audio recording technology—and blank media used to facilitating recording—that fell within its scope.

48. The word choice, “piracy,” is both inaccurate and unfortunate. The term is inaccurate because copyright infringement is not quite the same as theft—and copyright holders had a difficult time convincing the public to perceive it as such. Theft implies that the copyright holder is deprived enjoyment of the property after the unauthorized copying. See BLACK'S LAW DICTIONARY (9th ed. 2009); see also *Theft*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/theft> (last visited Oct. 19, 2012). However, this is not the case because only a copy is made and the original remains untouched with its owner. Nor can the unauthorized distributor be said to be taking the prospective profits of the copyright holder since there is no guarantee that a consumer would reliably buy something that is not available for free. The piracy label also proves unfortunate due to the romantic notions associated with classical pirates in popular culture, and many so-called online pirates embraced the nomenclature. See *The Pirate Bay: About*, THEPIRATEBAY.SE, <https://thepiratebay.se/about> (last visited Oct. 20, 2012).

49. Statement by President William J. Clinton Upon Signing H.R. 2281, 1998 U.S.C.C.A.N. 671.

50. *Id.* The DMCA represents the United States' implementation of the World Intellectual Property Organization's twin treaties meant to address the concerns about copyright in the digital age. *Id.* An important provision in the DMCA is its safe harbor provision, which provides immunity to online service providers from copyright infringement under certain conditions. See 17 U.S.C. § 512 (2006).

51. File-sharing presented an interesting case because it was not immediately apparent that such behavior implicated one of the exclusive rights of copyright holders. Unlike downloading from a website, which is analogous to direct reproduction, file-sharing could be viewed as merely the sharing by users of copyright-protected songs they already purchased. *But see* A&M

court held in a subsequent case that the uploading and downloading of copyrighted works was not fair use. In *A&M Records, Inc. v. Napster, Inc.*,⁵² the Ninth Circuit examined the activities of the then popular online file-sharing service Napster with respect to interpersonal transmission of copyrighted works. The *Napster* court ruled that facilitating the downloading of copyrighted music infringed upon the exclusive right of reproduction and distribution.⁵³ Furthermore, using copyright works in this way does not qualify as fair use.⁵⁴

The Supreme Court later strengthened the copyright holders' victory over file-sharing. In *MGM Studios, Inc. v. Grokster, Ltd.*,⁵⁵ the Court unanimously held that file-sharing companies could be liable for inducing copyright infringement.⁵⁶ In *Grokster*, the file-sharing companies sought to rely on the *Sony* decision,⁵⁷ which had held that the mere production of technology capable of facilitating copyright infringement could not constitute contributory infringement if the technology had substantial non-infringing uses.⁵⁸ However, the *Grokster* Court distinguished the *Sony* decision by holding that when a company induces infringing behavior through the promotion of its technology, it no longer has the protection of *Sony*.⁵⁹

Despite these victories, copyright holders still claim to suffer considerable harm from the unauthorized consumption of media on the Internet.⁶⁰

Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) (discussing how direct economic benefit is not required for a finding that an allegedly infringing use is commercial in nature).

52. 239 F.3d 1004 (9th Cir. 2001).

53. *Id.* at 1014.

54. *Id.* at 1019. After *Napster*, it is firmly established in legal jurisprudence that downloading and file-sharing of copyrighted music infringes upon a copyright holder's rights. However, could such behavior still be permitted? The question is this: could Napster have survived (legally) if it, or Internet service providers, had paid statutory royalties to the copyright holders? The *Napster* court declined to allow Napster to use a compulsory license scheme because it could not reconcile Napster's service with any of the enumerated circumstances in copyright law that allowed for compulsory licenses. *Id.* at 1028. However, the implication is an amendment would be necessary to bring online activities such as file-sharing within the purview of statutory licensing.

55. 545 U.S. 913 (2005).

56. *Id.* at 913–14.

57. *Id.* at 933.

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

59. *Grokster*, 545 U.S. at 935–36.

60. See *Motion Pictures Association of America Industry Reports*, MPAA.ORG, <http://www.mpa.org/policy/industry> (last visited Oct. 22, 2012) (containing a list of industry reports on the harms of online piracy and copyright infringement); *Recording Industry Association of America Piracy Impact Studies*, RIAA.COM,

Most recently, these industries supported SOPA and PIPA as the latest push towards tightening enforcement of copyright laws.⁶¹ Yet the pushback from the online community, bolstered by public support, stymied the efforts of the copyright holders.⁶² Perhaps then, in light of the apparent failures of these enforcement efforts, a statutory compromise may yet provide the proper solution.

II. STATUTORY SOLUTIONS IN THE ANALOGOUS SITUATIONS OF CABLE TELEVISION AND DIGITAL AUDIO RECORDING DEVICES PROVIDE AMPLE SUPPORT FOR A COMPROMISE BETWEEN COPYRIGHT HOLDERS AND INTERNET INTERESTS

Copyright holders certainly have good cause for clinging to the traditional business model of making money directly from selling their copyrighted content in the marketplace. This traditional business model has worked splendidly for the entertainment industries.⁶³ Given the highly lucrative nature of the entertainment industry, marketplace financial compensation serves as a very strong incentive for business as usual.⁶⁴ However, from a legal standpoint, no reason exists as to why copyright law should concern itself with ensuring the traditional business model survives in the Internet age.⁶⁵

http://www.riaa.com/keystatistics.php?content_selector=research-report-journal-academic (last visited Oct. 22, 2012). For the purposes of this Article, the harm and losses claimed by the entertainment industry are presumed to be accurate and unexaggerated.

61. Cecilia Kang, *House introduces Internet piracy bill*, POST TECH (Oct. 26, 2011, 6:12 PM), http://www.washingtonpost.com/blogs/post-tech/post/house-introduces-internet-piracy-bill/2011/10/26/gIQA0f5xJM_blog.html (“Hollywood, media firms and the U.S. Chamber of Commerce immediately hailed the bill, saying the government needs to take a stronger stance to prevent the rampant illegal use of online content.”).

62. See Art Brodsky, *The Web Can't Declare Victory Just Yet—If Ever*, PUB. KNOWLEDGE POL'Y BLOG (Jan. 24, 2012), <http://www.publicknowledge.org/blog/web-cant-declare-victory-just-yet-if-ever> (detailing the efforts and effects of the SOPA/PIPA protests).

63. See generally *Domestic Movie Theatrical Market Summary 1995 to 2012*, THE-NUMBERS.COM, <http://www.the-numbers.com/market/> (last visited Oct. 25, 2012) (providing figures for the movie industry).

64. It is debatable whether business as usual has yielded any real creativity or has merely resulted in studios churning out simplistic product to cater to the widest audience possible. Courts do not make judgments on the artistic merits of creative works, nor should they. Instead, whether financial compensation actually stimulates creativity, or in other words, does money actually produce true art, is a discussion best left to liberal arts scholars. However, there is an argument to be made that genuine artistic expression is not and cannot be motivated by financial gain.

65. See *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 543–44 (2nd Cir. 1964).

A. The Law Does Not Require Market-Based Compensation to Copyright Holders

The text of the Constitution and copyright law unquestionably demonstrate that copyright is a limited right, conditioned on the principle that it must serve the public interest.⁶⁶ In that sense, copyright more closely resembles a privilege than a right. Accordingly, there are important statutory limitations—namely public domain and fair use—on the exclusive right of copyright holders.⁶⁷

Under both public domain and fair use, the copyright holder receives no compensation for the consumption or use of their copyrighted work.⁶⁸ Therefore, these doctrines support the notion that financial compensation, although by far the most popular means of incentivizing creativity, is not the end goal of copyright, but rather a means to an end.⁶⁹

The many instances during which an emerging technology threatened to upset the established business model of entrenched entities demonstrate that, very often, the two sides struck a deal and compromised to allow the introduction of the technology, while ensuring that copyright owners received some measure of compensation for the curtailment of their exclusive rights. The emergence of cable technology threatened the broadcast industry and led to the compromise of statutory licensing.⁷⁰ Like cable technology, which infringed upon the broadcast industry's exclusive right of public performance, the Internet and its content distribution technologies infringe upon the music and motion picture industries' right of reproduction. Also, like the numerous broadcasters with which cable companies would have had to negotiate retransmission consent, the number of musical and motion picture copyright holders with which Internet providers⁷¹

66. See *supra* Part I. a.; see also U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 106 (2006) (enumerating rights); 17 U.S.C. § 107 (2006) (codifying fair use); 17 U.S.C. §§ 301–04 (2006) (setting the limited duration of copyrights).

67. The statutorily created limitations make a great deal of sense when viewing copyright law in its proper context. Copyright law and intellectual property law in general, by their very nature, infringe upon one of humanity's most important freedoms—the freedom of speech or expression. See Jasz, *supra* note 20, at 719.

68. Copyright holders receive no compensation from public domain or fair use because they do not have the exclusive rights to their works under these two doctrines.

69. See *Berlin*, 329 F.2d at 543–44.

70. See H.R. REP. NO. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704.

71. Internet service providers, as the gatekeepers of the Internet, are probably the party on whom it makes the most sense to place the responsibility of collecting fees for statutory licensing. See WILLIAM W. FISHER III, PROMISES TO KEEP 219 (Stanford

would have to negotiate separate licensing fees would also be astronomical. Lawmakers recognized that such inefficiency justifies the implementation of statutory licenses for cable providers.⁷² Similarly, lawmakers could also recognize that requiring Internet service providers to negotiate licensing fees for music online would be burdensome to the point of inefficiency.⁷³ Therefore, the framework of a statutory license could easily be applied to the online context.⁷⁴

Similarly, the advent of digital recording technologies led to the compromise now found in the statutory language of the Audio Home Recording Act. Like digital audio recording devices, which allowed consumers to record copyrighted music,⁷⁵ the Internet also greatly facilitates the duplication of copyrighted music and movies. Also, like the developers of digital recording technologies who wanted protection from copyright infringement suits while being able to continue manufacturing their products,⁷⁶ Internet technology developers also would likely desire legal assurances that both the development of their technology could continue and that they would not be made liable for any infringement claims. Lawmakers codified a compromise that exchanged statutorily defined royalties for protection from infringement suit liability.⁷⁷ Likewise, lawmakers could also use similar statutory terms to allow copyright holders and Internet technology developers to come to a similar compromise.

No such compromise has been brokered for the Internet, but the established framework from either statutory licensing or AHRA blank media royalties⁷⁸ are readily applicable.⁷⁹ The question becomes whether such a solution would resolve the concerns of all the

parties involved. This includes the copyright holders, the developers of Internet and related technologies, and now the consumers.

B. Statutorily Defined Compensation Would Resolve the Conflict Between Copyright Holders and Internet Interests

If the provisions of the new compensation scheme mirror those of previous ones, they will address many of the problems caused by consumption of copyrighted works on the Internet. Copyright holders would be guaranteed a way to receive compensation for their works. Internet service providers would be shielded from liability. In theory,⁸⁰ all parties should take away some measure of satisfaction.

Theoretically, copyright holders will be able to receive steady compensation for producing content that goes onto the Internet, though the compensation scheme will not necessarily be perfect. Indeed, they would have to gamble all of the revenue currently generated through direct sales in the market in hopes of recovering the revenue through the new statutorily defined compensation system. Depending on how the statutory compensation is set, revenue from the new compensation may not satisfactorily cover their losses. However, if piracy truly deprives them of the amount of revenue that they claim, perhaps imperfect compensation would nevertheless be preferable to the current system. This dynamic is perhaps already the generally accepted premise of blank media royalties.⁸¹ Although the compensation received by copyright holders through such royalties may not perfectly offset the compensation lost through private copying, copyright holders certainly prefer getting some money to none at all.

Internet service providers would receive protection from infringement liability. While they have not been targeted for contributory infringement claims yet,⁸² they may one day find themselves in those crosshairs. While it is true that the Internet is capable of substantial non-infringing uses, under *Grokster*, such a capability would not necessarily protect Internet service providers from liability.⁸³ A compromise would solidify that protection, and Internet service providers would not even pay for it themselves since they

University Press 2004).

72. See H.R. REP. NO. 94-1476, at 89, *reprinted in* 1976 U.S.C.C.A.N. at 5704.

73. *Id.* (demonstrating congressional recognition of the burden of excessive negotiations).

74. The exact fee amount would still be a point of negotiation between the interested parties, as it was with statutory licensing.

75. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073–74 (9th Cir. 1999) (explaining the “brave new world of Internet music distribution” by describing how digital recording technology works).

76. See H.R. REP. NO. 102-873(I), at 24 (1992) (describing the exemptions as “critical components” of the legislation).

77. See 17 U.S.C. §§ 1003, 1008 (2006).

78. The compensation system under the AHRA is far from perfect, but imperfect compensation still is legal because copyright law does not require financial compensation to be equal to market levels. See discussion *supra* Section II.A.

79. See FISHER, *supra* note 71, at 202–03; *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, EFF.ORG, <https://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> (last visited Oct. 19, 2012).

80. See *infra* Part III for the practical implications.

81. See FISHER, *supra* note 71, at 86–87.

82. Online service providers already have been targeted for contributory infringement claims. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25–26 (2d Cir. 2012).

83. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935–36 (2005).

could pass on any costs to the customers.⁸⁴ Similarly, Internet service providers would become immune from lawsuits regardless of the degree of knowledge they had regarding infringing content, which currently has become an increasingly contentious part of the DMCA's safe harbor protections.⁸⁵

Finally, what would such a compensation scheme mean for the piracy problem? Establishing a compensation scheme would not directly solve the piracy problem, but it likely would do so indirectly. Websites that offer unauthorized downloads and transfers of copyrighted content would have no reason to shut themselves down initially. However, once copyright owners fully embrace the model of providing content for free, which is not really free, the piracy websites would no longer be providing a unique service. The competition from legitimate sources of content would likely push them out of existence.⁸⁶

That is how the solution would work in theory. How such a compensation scheme would work in practice, if it would work at all, requires an entirely different analysis.

III. UNDERSTANDING THE NATURE OF ALL INTERESTED PARTIES, PARTICULARLY THE CONSUMERS, IN THE INTERNET CONTEXT IS CRUCIAL TO MAINTAINING THE RELEVANCY OF COPYRIGHT LAW ONLINE

Aside from the legal concerns, numerous policy concerns need to be addressed to adopt a new compensation scheme that would radically alter how the entertainment industry operates online. When considering the difficulties, however, it remains important to remember what necessitates them—a demonstration of consumer desire and the adjustment that copyright law must make to continue to serve the public interest. The SOPA/PIPA protests showed that the consumers of the Internet and its content cared more about ensuring the free and open exchange of ideas than they did about eliminating online piracy.

The previous section framed the conflict

largely, if not exclusively, in terms of copyright holders versus technology developers. However, through all the conflicts, the consumers have always been an interested party.⁸⁷ What the SOPA/PIPA protest also showed was that, properly mobilized, the consumers have tremendous power in fighting legislation.⁸⁸ Dealing with the newly empowered class of consumers requires examining just what to make of the strong resistance that consumers have towards copyright enforcement online. On the one hand, this resistance may be characterized as market failure. In that sense, the problem is a familiar one, and one that familiar solutions could easily address. On the other hand, this resistance may reveal the revolutionary impact the Internet has had in shaping culture. The Internet's anarchical structure and participatory culture may have fundamentally altered the way in which the public interacts with media and entertainment in the digital space. If that is the case, then the challenge becomes finding a solution that will be regarded as legitimate both to the Internet constituency and to the original aim of copyright law.

A. Characterizing the Piracy Problem as Market Failure

Even if the entertainment and media industries resist abandoning traditional business models with the argument that the new compensation scheme is not fair and that it undermines the market,⁸⁹ the law has an answer to those arguments. There are many instances in which the government must institute a regulatory scheme to ensure that certain socially desirable ends are met.⁹⁰ More relevantly, the legislative history of

84. Cable systems and blank media producers operate in this fashion by transferring the costs of such statutory fees to their customers through their prices.

85. See 17 U.S.C. § 512 (2006); *YouTube*, 676 F.3d at 30.

86. Consider the example of the prohibition of alcohol. See U.S. CONST. amend. XVIII (repealed 1933). During Prohibition, criminal figures amassed great wealth because they were willing to provide a service that legitimate business could not. See *Organized Crime—American Mafia*, LAW LIBRARY—AMERICAN LAW AND LEGAL INFORMATION, <http://law.jrank.org/pages/11944/Organized-Crime-American-Mafia.html> (last visited Nov. 28, 2012). After the repeal of Prohibition, such criminal elements no longer had a market because what was once illegal was now legal. See *id.*

87. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to . . . allow the public access to the products of [creative] genius after the limited period of exclusive control has expired.”).

88. See Brodsky, *supra* note 62.

89. A statutory licensing or royalty scheme need not be completely unresponsive to market forces. For example, royalty payments could be made to various artists based on the amount of play their audio or video receives. See Fisher, *supra* note 71, at 223–24. See generally *Online Measurement*, NIELSEN.COM, <http://nielsen.com/us/en/measurement/online-measurement.html> (last visited Nov. 29, 2012).

90. The most notable example of a government-imposed compensation scheme would be taxes, used to pay for public goods. See 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, 1610–11 (1982) (discussing the compulsory payment for public goods dynamic). Understandably, government regulation of the creative industries would be highly undesirable, but it is worth noting that creative industries such as television and radio have long been subject to federal regulation.

the Copyright Act's statutory licensing sections has provided that the government may step in and impose a compensation scheme when there is market failure.⁹¹ The question then becomes: has there been a failure in the online market for copyrighted content such as music and movies?

Copyright holders would argue that the market has not failed, but merely needs stricter enforcement to ensure its function. However, stricter enforcement has rarely been the answer when copyright confronts technology, as the examples of statutory licensing and blank media royalties have demonstrated. Nor does enforcement appear particularly effective given the online piracy problem. Certainly, if piracy is the problem to the extent that the motion picture and music industries make it out to be,⁹² piracy itself may be considered to be a market failure in the sense that there appears to be a widespread unwillingness to pay for copyrighted content in the traditional sense.⁹³ A statutorily imposed compensation scheme then very well could solve the problem in the same way that taxes solve the public goods problem,⁹⁴ and just as statutory licensing cable licensing solved the retransmission consent problem for cable and satellite television.

If piracy itself constitutes market failure, then the resistance shown by consumers to SOPA/PIPA may be characterized as market failure as well. Perhaps consumers resist the imposition of laws to enforce the traditional business models because they do not find the traditional business models to be worth protection.⁹⁵

91. See H.R. REP. NO. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5704.

92. See discussion *supra* note 60.

93. The entertainment industry seems to believe that the unwillingness results from the public's ignorance that such practices are illegal and harmful, as evidenced by their efforts to reeducate the public through public service announcements. Eric Perrott, *Relatively New Anti-Piracy PSA: Another Analogy Comparison of Piracy to Stealing Cars or an Effective Message?*, AM. U. INTEL. PROP. BRIEF (May 12, 2011, 8:37 AM), <http://www.ipbrief.net/2011/05/14/relatively-new-anti-piracy-psa-another-analogy-comparison-of-piracy-to-stealing-cars-or-an-effective-message/>. However, if the public innately or instinctively believes that a practice is legal, no amount of reeducation is likely to dissuade individuals from continuing that practice. Again, consider the example of Prohibition. See generally SYLVIA ENGDALH, AMENDMENTS XVIII AND XXI: PROHIBITION AND REPEAL (Greenhaven 2009) (noting that respect for the law greatly diminished during the unpopular prohibition of alcohol). In such instances, the law must bend to the will of the people or else risk criminalizing a substantial portion of the public who had no real intention to violate the law.

94. See Gordon, *supra* note 90, at 1610–11.

95. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 462 (Yale Press 2006) (“Ubiquitous low-cost processors, storage media, and networked connectivity have made it practically feasible for individuals, alone and in cooperation with others, to create and exchange information, knowledge, and culture in patterns of social reciprocity, redistribution, and sharing, rather than proprietary,

Perhaps the old business models are no longer supportable.⁹⁶ The introduction of a new compensation scheme may be precisely what is needed then to serve the interests of all parties.

B. Legitimizing the Law in the Culture of Cyberspace

A far larger problem would be the highly likely scenario that consumers, and the technology developers,⁹⁷ reject any kind of statutorily mandated payment to copyright holders.⁹⁸ In other words, what do the consumers really get out of such a new statutory compensation arrangement? Theoretically, consumers would receive the ability to do what they have wanted to do all along—that is, to consume and use copyrighted works freely. That is not to say that copying and distributing songs over the Internet would suddenly become legalized.⁹⁹ However, being that it no longer presents a problem to copyright holders, the threat of legal action disappears to the point where it becomes *de facto* legal. The problem with this theoretical benefit is that consumers may do whatever they desire, no matter what the law is.

To look at it another way, the piracy problem and the consumer resistance to laws aimed at greater suppression of piracy may indicate that there is a fundamental disconnect between the consumers and producers of copyrighted works on the Internet. Furthermore, the protests demonstrate that even the lawmakers themselves severely misread the reactions of the people. The consumers—the users of the Internet—may have no desire to accommodate either copyright holders or the law in an effort to maintain any semblance of the current framework of intellectual property.¹⁰⁰

market-based production.”).

96. See *id.* at 468.

97. The consumers play a major role in whether Internet service providers would accept the new compensation scheme. The incentive for Internet service providers to pay these royalties lies in the potential immunity from litigation. However, providers would only be willing to pay if consumers were willing to bear the added costs.

98. See Mike Masnick, *Why A Music Tax Is A Bad Idea*, TECHDIRT (Dec. 9, 2008, 11:40 AM), <http://www.techdirt.com/articles/20081209/0144083060.shtml>.

99. This sentiment is an important distinction because even the Audio Home Recording Act's provision shields developers of recording technology, not users, just as the DMCA shields online service providers and not end users. Compare 17 U.S.C. § 1008 (2006), *with id.* § 512.

100. See generally John Perry Barlow, *A Declaration of the Independence of Cyberspace*, EFF.ORG (last visited Oct. 19, 2012), <https://projects.eff.org/~barlow/Declaration-Final.html>; Josh Levy, *After SOPA: A Declaration of Internet Freedom*, HUFFINGTONPOST.COM (July 1, 2012, 10:32 PM), [16](http://www.huffingtonpost.com/josh-</p></div><div data-bbox=)

In light of this, the equally possible notion is perhaps the Internet creates a jurisdiction where traditional copyright simply cannot be enforced to the extent that it is enforced outside of cyberspace.¹⁰¹ Might the Internet be governed by a different set of laws or rules than the physical world?¹⁰² Is the Internet every bit the haven for lawless rogues that the high seas were for pirates during the golden age of piracy?¹⁰³ Perhaps, then, the lawless pirates understand more about cyberspace than the law and lawmakers.

Alternatively, framed another way, the culture of the Internet, and its empowering effect on the individual, could offer another explanation for the power shift whereby consumers want to take control of the content they support and consume. The Internet and social media have conditioned users to be more vocal and participatory.¹⁰⁴ No longer will consumers sit idly by and allow the industries they support to remain callous to their desires about how they want to consume media.¹⁰⁵ This shift is not necessarily a

levy/after-sopa-a-declaration_b_1641959.html.

101. See MADHAVI SUNDER, FROM GOODS TO THE GOOD LIFE 29 (Yale University Press 2012) (stating that “[m]eanwhile, rapid-fire technological advances and new forms of creative output, from YouTube and MySpace to the advent of open-source collaborative networks, garage bands, remix culture, and the World Wide Web itself, undermine utilitarian intellectual property law’s very premise: that intellectual property rights are necessary to incentivize creation.” This suggests that technological advances may even undermine the incentive based purpose of intellectual property law.).

102. See generally Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

103. The fictional Captain Jack Sparrow, from Disney’s PIRATES OF THE CARIBBEAN franchise, espouses that the only rules that matter are defined solely by the capabilities of any individual. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Studios 2003) (“The only rules that really matter are these: what a man can do and what a man can’t do.”).

104. See SUNDER, *supra* note 101, at 35 (“Changing technologies and social mores have made culture more interactive and participatory.”). Might the exclusionary nature of intellectual property protection then be fundamentally at odds with the evolution of an increasingly inclusionary culture? Some theorists would argue that the Internet almost demands a shift from proprietary models of production towards nonproprietary ones. See BENKLER, *supra* note 95, at 462.

105. See BENKLER, *supra* note 95, at 467 (“Some of the time that used to be devoted to passive reception of standardized finished goods through a television is now reoriented towards communicating and making together with others, in both tightly and loosely knit social relations.”). Furthermore, despite their role as the audience for content, consumers are often an afterthought when players in the entertainment industry fight over money, as evidenced by the dropping of certain television networks and programs during carriage disputes between television programmers and distributors. See Brian Stelter, *DirecTV-Viacom Dispute Turns Into Blackout Reality*, MEDIA DECODER—NYTIMES.COM (July 11, 2012, 10:19 AM), <http://mediadecoder.blogs.nytimes.com/2012/07/11/viacom-directv-standoff-causes-channel-blackout-in-20-million-households/>. Consumers may now be able to make their displeasure known in

bad thing and may simply represent the next step in cultural evolution. Evolution requires adaptation. The entertainment industry simply needs to adapt and to bend more to the will of their consumers, or customers. This should be nothing new to the industry, which like any business, ought to obey the age-old maxim that the customer is always right.¹⁰⁶

Throughout all of this, the law need only do one thing to remain legitimate: continue to promote the public interest. And the public has spoken that they have more interest in keeping the Internet free of controls and regulations if such control means even the potential of stifling ideas and innovation online. Inasmuch as the free expression of ideas is every bit as crucial to the progress of the sciences and the useful arts, if not more so than financial incentives, copyright law would continue to fulfill its original, constitutional mandate even if it no longer facilitated traditional market-based compensation to copyright holders.

IV. CONCLUSION

Copyright does not function merely to grant copyright holders exclusive rights to their works, but rather the law also must promote progress in the creative fields. Copyright is not a tool for maintaining control of copyrighted works as a means to preserve business models for maximizing profits from creative works. It merely provides incentives that will promote creative expression. The incentives—financial compensation—are the means, not the ends towards which copyright law strives to achieve. Understanding this fundamental principle of copyright law will be crucial to working out a compromise, a peace accord, of sorts between copyright holders and the online community—including both technology developers and consumers.

The music and movie industries are only a couple of the many industries that must contemplate how to adapt to online distribution of their products. Books may soon have to deal with the same problem as electronic books become the norm. Finally, as video drives the increase in broadband technology, television will soon migrate online as well. While the natural tendency may be to hold onto the business models that have worked offline, the nature of the Internet may ultimately frustrate those efforts. Instead, all parties involved would be better served to look forward and implement a system that better serves the interests of

much louder ways than in the past.

106. The industry already cares deeply about what consumers want. It needs only now to pay more attention to how the consumers want to view and use that content.

the consumers, consisting of the greater public who use the Internet more and more with each passing day. Considering that the purpose of copyright law also functions to promote the interests of the public, there is no reason why copyright should not also change to accommodate the demands of the Internet community.