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Keynote Address: Resolving Tensions Between Copyright and the Internet

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BEYOND NAPSTER: DEBATING THE FUTURE OF COPYRIGHT ON THE INTERNET

KEYNOTE ADDRESS: RESOLVING TENSIONS BETWEEN COPYRIGHT AND THE INTERNET

Washington, D.C.
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HONORABLE LEWIS A. KAPLAN
United States District Judge for the Southern District of New York

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AFTERNOON PROCEEDINGS

MS. TABER: Good afternoon. We're ready to start our afternoon segment of today's symposium. On behalf of the *American University Law Review*, I would like to welcome you to the keynote address for the *Beyond Napster Symposium*. I'd like to introduce Professor Walter Effross. Professor Effross is a professor of commercial law and e-commerce law, and Director of the Program on Counseling Electronic Commerce Entrepreneurs here at the Washington College of Law. Professor Effross will be introducing our distinguished speaker this afternoon, Judge Lewis A. Kaplan of the Southern District New York. Please join me in welcoming Professor Effross.

PROFESSOR EFFROSS: Let me begin by recalling that when I was maybe twelve years old, I was a big fan of Isaac Asimov's popularization of science. He had a number of not just science-fiction works but, also, nonfiction essays, being a trained chemist himself, on all areas of science.

One of the things that strangely enchanted me, and that I never forgot was that, in one of his essays, he remarked that if you show to a chemist the word unionized, most chemists will automatically, and by reflex, read that same word as "un-ionized." That stayed with me all these years.

I thought I found a strange parallel to some of the topics under discussion today. It occurred to me that in Shakespeare's Richard III, there is a scene where Richard III, at that point only the Duke of Gloucester, says famously, "Now is the winter of our discontent."[1] I thought, if you change the emphasis on that just a little bit, in terms of the syllables, you get, now is the winter of our "dis-content," which I think is something that a number of industries are really starting to feel, not just because of the weather, but because of all of the actions of all of the people out there who are helping themselves to a number of items which are copyrighted, and a number of people who are devising systems to allow that type of transaction, or transition to occur.

Another interesting thing about that quote, once I started looking at it was, no less a person than Justice Stevens, speaking in 1991 to practitioners in Pennsylvania, said, "The listener, who at first assumes

1. William Shakespeare, THE TRAGEDY OF RICHARD THE THIRD, Act I, sc. 1.

that the word 'now' refers an unhappy winter, soon learns that war-torn England has been 'made glorious by this son of York.' It is now summer," not winter and, essentially, words, even a simple word like now, may have a meaning that is not immediately apparent.[2]

So, I thought that was also strangely relevant because in this situation there is a question of who, ultimately, is going to benefit from Napster-type materials, processes and programs? Perhaps, in some way, some of the content providers may, in fact, end up doing better, as with the VCR, than they did before. So, there's this tension—is it summer—or is it winter—for the content providers and for the people using their services?

All around, it seems to be summer for the lawyers, but it's my honor and privilege to introduce the symposium's keynote speaker, Judge Lewis Kaplan of the Southern District of New York. His full biography is in your materials and rather than summarize that for you, I'd like to mention that most relevant to us today is his decision in *Universal Studios, Inc. v. Reimerdes*.[3]

I should mention that the case and the decision appear to have made Judge Kaplan, himself, a cyber-celebrity of sorts. I went to Google this morning and found 1,220 pages listed for *Reimerdes* and, although they're probably not all directly related to this case, 6,144 for Judge Lewis Kaplan.

Whether or not you agree with all of the judge's conclusions, and I'm not here to be partisan in any way on that, I think the opinion is very instructive. Just as Isaac Asimov did with science, I think it essentially provides a tutorial on not only the technological aspects of the Internet, computers, hyperlinks, encryption and decryption but also provides a nice discussion on of the provisions and the policy and a parsing of the Copyright Act, particularly, the Digital Millennium Copyright Act, and the First Amendment.

Although I have no specific knowledge of this, I suspect that one of the reasons it is so plainly and clearly written is because the judge was aware that a lot of people who were not lawyers would have an intense interest in this case and would like to learn about these ideas and about what the Court was saying and why. Therefore, it is written in judicial plain English.

I'm going to use the decision in my e-commerce course next semester for a number of reasons. One of which, strikingly, is the arsenal of analogies that the judge has used. One of them, which is

2. John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992).

3. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

very close to the beginning of the case says, "In an era in which the transmission of computer viruses—which like [the decryption program in question], are simply computer code and thus to some degree expressive—can disable systems upon which the nation depends and in which other computer code also is capable of inflicting other harm, society must be able to regulate the use and dissemination of code in appropriate circumstances. The Constitution, after all, is a framework for building a just and democratic society. It is not a suicide pact."[4]

At another point, later in the opinion, the judge said that making this code which would allow the decryption of DVD discs as a number of Web sites and people were doing, "is analogous to the publication of a bank vault combination in a national newspaper. Even if no one uses the combination to open the vault, its mere publication has the effect of defeating the bank's security system, forcing the bank to reprogram the lock."[5] Then the judge stated, "Development and implementation of a new DVD copy protection system, however, is far more difficult and costly than reprogramming a combination lock and may carry with it the added problem of rendering the existing installed base of compliant DVD players obsolete."[6]

The judge noted in discussing the First Amendment issue that a particular provision of the DMCA, the Digital Millennium Copyright Act, "had nothing to do with suppressing particular ideas of computer programmers and everything to do with functionality—with preventing people from circumventing technological access-control measures—just as laws prohibiting the possession of burglar tools have nothing to do with preventing people from expressing themselves by accumulating what to them may be attractive assortments of implements and everything to do with preventing burglaries."[7]

The final instance, which I won't read to you in full, is an extended analogy and comparison between methods of epidemiological spreading. Judge Kaplan compared shutting down a printing press to shutting down a poisoned well. If you shut down a poisoned well and don't let anybody drink the water, then you pretty much stop a non-contagious infection from spreading. However, he compared Napster to a disease outbreak, in which some of the sites disseminating this code which would allow you to decrypt DVDs,

4. *Id.* at 304.
5. *Id.* at 315.
6. *Id.*
7. *Id.* at 329.

make it possible for that information to be passed on and on and on through the Internet and are, in effect, the equivalent of individuals infecting each other. There is not a single source. The judge concluded: the people who are "infected with the disease of capability of circumventing measures controlling access to copyrighted works in digital form" [in other words, the people who had downloaded this software] "do not suffer from having that ability. They cannot be relied upon to identify themselves to those seeking to control the "disease." Their self-interest will motivate some to misuse capability, a misuse that, in practical terms, often will be untraceable."[8]

To the new law you heard this morning that Declan McCullagh added to Moore's Law, I would provide a law which I would humbly call Effross's Law. I think that just as we see new technology building on old technology, we're going to see a lot of new analogies building on old analogies. Whether you agree or not with any of the particular analogies Judge Kaplan has used or the conclusions which he has reached, I think that a good analogy, and this is my rule, like one of Judge Kaplan's epidemics, would spread and infect and spawn new varieties of itself. If you want to put it a little more colloquially, Jimmy Buffet, that legal sage, famously said, "Changes in Latitudes, Changes in Attitudes." I would say, changes in attitudes, changes in platitudes and the reverse, changes in platitudes will cause (not to say the judge was engaging in platitudes, just for purposes of rhyming) changes in attitudes.

Finally, I would like to add, I believe I was one of the first academics, in an article I wrote on stored-value cards several years ago and how they can be hacked and other related legal issues, to cite the 2600 magazine that put up the Web site that is the core of a lot of the issues here.[9] I would recommend that magazine to people, not necessarily because I agree with or endorse any of its viewpoints, but because I think it provides an interesting perspective on the community of people who want to see themselves as hackers; wannabe hackers, as well as people who really are hackers. At a minimum, it is an interesting cultural artifact. For obvious reasons, I'm not on their mailing list, but I would mention, you can buy it—it's a small digest-sized publication issued quarterly at just about any Barnes and Noble or Borders and I think it provides $5-worth of at least entertainment, if not some form of perspective.

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8. *Id.* at 332.

9. Walter A. Effross, *Putting the Cards Before the Purse?: Distinctions Differences and Dilemmas in the Regulation of Stored Value Card Systems*, 65 UMKC L. REV. 319, 328 (discussing publication of article on "memory card" weaknesses).

So, I think it's still up in the air how harsh this winter will be and for whom. But to shed more light on the subject (to switch analogies in midstream) I'd like to introduce Judge Kaplan.

JUDGE KAPLAN: When I went to law school, copyright perhaps was one of the less glamorous and less popular areas of the law. But as this symposium demonstrates, copyright in this presidential election year is a matter of intense interest, as the *Napster, DVD* and *MP3.com* cases have focused a bright spotlight on the intersection between the Copyright Act and some exceptionally popular uses of the Internet. The bitterness and sloganeering that characterized the presidential campaign, hard as it would have been to imagine even a few years ago, have been matched by the bitterness and sloganeering that now characterize the debate over the proper accommodation among copyright, the Internet, and other technological developments of the electronic era. The dispute has focused on two issues. The first is the extent to which persons may distribute copyrighted material over the Internet without the consent of the copyright holder. The second is whether and to what extent people should be free to circumvent technological means of controlling access to copyrighted words available in digital form.

Napster, *DVD* and *MP3.com* all involve attempts to resolve these issues in the courts. I propose to share some thoughts with you today about the process by which these issues should be resolved. But, perhaps at the outset it is worth stepping back for a moment and to put the current controversies into a bit of historical context.

We live in the opening years of the fourth great age of human communication, each a product of technological progress. The first was the development of written language, which permitted the precise transmission of human thought over distance and time and made obsolete the far less accurate oral tradition. Centuries later, written language was followed by the printing press, which enabled the mass production and dissemination of writing and, incidentally, made the written word a means of economic gain. After several hundred more years came the development of broadcasting, which instantaneously transmits the spoken word and, more recently, visual images over vast geographic distances and reaches enormous numbers of people. Now we have the Internet, which for the first time has placed a means of mass communication in the hands of anyone with a computer and a telephone line.

Each of these developments exponentially broadened the reach of the human word. Each offered enormous potential for the betterment of the human condition. Yet each- particularly each step

in the development of mass communication-carried also the potential for abuse or, at any rate, the potential for perceived abuse. In consequence, each development brought with it a period of accommodation among competing interests.

The printing press was introduced into England in the fifteenth century, just in time to become a thorn in the side of Henry VIII when his efforts to dissolve his marriage to Catherine of Aragon led to the Act of Supremacy, which made the king head of the Church of England and displaced papal supremacy in ecclesiastical matters. I rather imagine that this event was at least as controversial in the England of 1534 as the presidential election is today, and Henry was especially sensitive to criticism. He imposed a system of general censorship to control the dissemination of negative views about his actions. But as Professor (later Justice) Benjamin Kaplan wrote, "such a system has always been found a slippery and inefficient business."[10] So the Tudor monarchs conferred the exclusive right of printing on the Stationers' Company and enlisted it in enforcing royal censorship policy, a role that it played until the emancipation of the English press more than a century later.

Parenthetically, it is interesting to note that the origins of copyright lie in the mechanism by which rights to print particular works were allocated among the members of the Stationers' Company.[11] The particular member of the Company who was granted the right to print any given work was said to hold the copyright.

Of course, the basis for copyright long since has changed and, in any case, this is a digression. The point of my reference to Tudor England is that the technological revolution wrought by the printing press was perceived by the crown as a threat. It adopted a repressive method of dealing with it. Its action was followed by a long period of gradual accommodation between the interests of the English state, on the one hand, and those advocating free expression on the other.

The next great leap brought its own problems. As radio came into vogue, there was a vast increase in the number of broadcasting stations. Stations adopted whatever frequencies they wished and competed to drown out each others' signals. Chaos reigned.[12] So Congress ultimately stepped in with the Radio Act of 1927 and, later, the Communications Act of 1934 and with the concept of public allocation of electromagnetic frequencies. The solution arguably was far from perfect. FCC regulation meant a certain amount of

10. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3 (1967).
11. *Id.* at 4.
12. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375-76 (1969).

censorship or content regulation, witness the *Pacifica* case[13] of 1978 and the fairness doctrine.[14] Indeed, the system has changed in important respects. Once again, however, there has been a lengthy process of experimentation and adjustment as society has come to grips with a new communications technology.

There have been two constants, I suggest, in this centuries-old tale. The first is the constant cry of repression, sometimes well founded and sometimes less so, born of attempts by government to deal with special problems created by new communications technology. The second is that free expression, broadly speaking, ultimately has triumphed, but never without some accommodation to genuine problems created by each new means of communication.

So that brings us to the Internet and the current controversies, which at root involve the issue of the extent to which copyright will restrict dissemination of materials on the Internet and other digital media. One does not need to look far to find the extremists on either side. In one corner, we have those who view any means of protecting the economic interests of copyright holders, no matter how blunt the method and no matter how restrictive of other interests, as trumping all other considerations. In the other corner are those who assert that the First Amendment prohibits any regulation of both computer code and the Internet, some few of whom in any case espouse the view that circumvention even of legal restrictions is justified in the interests of what might be called cyber-freedom or, perhaps, cyber-anarchy. While these widely disparate beliefs are sincerely held, one may doubt the consistency of their views with the essentially centrist nature of our political system and the Constitution.

Let us begin with the Constitution, which was very much the focus of the recent *DVD* case.[15] The defendants there were using the Internet to disseminate software, the sole purpose of which was to decipher the encryption that protects copyrighted DVD movies from unlawful copying. They maintained that software, or code, is expression and, in consequence, that the Digital Millennium Copyright Act,[16] which prohibits dissemination of such circumvention technology, violates the First Amendment. The argument was simple. Code is speech; speech may not be restricted.

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13. FCC v. Pacifica Found., 438 U.S. 726 (1978) (FCC sanction for using indecent but not obscene language in broadcast did not violate First Amendment).

14. *See Red Lion Broadcasting Co.*, 395 U.S. 367.

15. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

16. 17 U.S.C. § 1201 *et seq.*

I was persuaded that computer code is expressive and a matter of First Amendment concern. But I rejected the conclusion that the defendants would draw from that proposition. To me, it seemed much too simplistic and failed to take account of the special characteristics of computer code and this new medium.[17]

Although computer code is expressive, it does more than express the programmers' concepts. It does more, in other words, than convey a message. A computer program is a series of instructions that causes a computer to perform a particular sequence of tasks. Thus, it has a functional aspect in addition to reflecting the thoughts of the programmers. A decryption program enables one to circumvent an access control measure protecting a digital version of a copyrighted work and thus to infringe the copyright.

What, then, is the appropriate standard of review of measures preventing dissemination of decryption software that is usable to circumvent access control systems for copyrighted works? To me, the persuasive analogy is to the expressive conduct cases, notably the draft card burning case, *United States v. O'Brien*.[18] The Supreme Court there recognized that the burning of a draft card to protest the Vietnam War was expressive. But it refused to ignore the conduct element-the act of burning the draft card-which, it concluded, had an adverse effect on the operation of the Selective Service System. So it upheld the statute in question on the ground that government had a right to regulate the conduct, at least on the facts of that case.

O'Brien, in my view, was compelling authority in the *DVD* case. The dissemination of the decryption program, with its functional characteristics, threatened to result in severe adverse consequences for copyright holders. The expressive character of the code no more saved its functional aspect from regulation than the expressive character of burning a draft card saved the act of burning it from regulation.

There is of course one distinction between *O'Brien* and the *DVD* case. Unlike the situation in *O'Brien*, there is a difference between distributing a program that permits one to engage in an illegal act of infringement or circumvention and that forbidden act. I recognize also that the First Amendment traditionally requires a very close nexus between the questioned activity and the harm that is said to justify its regulation. But that is where the special characteristics of the Internet come in. The Internet makes a decryption program

17. *Universal City Studios*, 111 F. Supp. 2d at 327-36.
18. 391 U.S. 367 (1968).

instantaneously available to both potential fair users and potential pirates alike. Such instantaneous, widespread, and anonymous availability make it highly likely that such a program will be used for illicit purposes. It is likely to make enforcement of the rights of the owners of the protected copyrighted works virtually impossible and almost certainly far more difficult than in pre-Internet days. Thus, this new technology has created distinctive difficulties.

These considerations led me in the *DVD* case to rule that the constitutionality of measures restricting the dissemination of decryption computer code of this sort is governed by the *O'Brien* standard and to uphold the anti-trafficking provision of the DMCA as applied. Of course, this by no means is the last word on this issue. It will be up to the courts of appeals and, ultimately, the Supreme Court to pass the definitive judgment. But it is worth pausing to consider the fact that the Supreme Court repeatedly has rejected absolutist views of the First Amendment where their adoption would have prevented society from dealing with troublesome traits of new communications media. One need look no further than the examples I mentioned earlier, the *Red Lion* and *Pacifica* cases, in which the Court upheld the FCC's fairness doctrine and its regulation of indecent but not obscene speech, respectively, despite the fact that it is most unlikely that either of those regulations ever could have been applied to a newspaper. So it is not a foregone conclusion, to say the least, that the Internet is entirely beyond governmental regulation by virtue of its expressive and informational characteristics. That is not to say that the First Amendment is irrelevant to the Internet. It doubtless does circumscribe the nature and extent of any permissible regulation. But I strongly suspect that the Internet ultimately will be held to be subject to the rule of law, including the law of copyright. I venture to say that there is no absolutist answer to the tension between the law of copyright and untrammeled expression on the Internet. How, then, is this tension between copyright and expression to be resolved? Is it a matter for the courts or does the solution lie elsewhere?

The first step is to recognize the essential nature of the dispute. A copyright is a legally protected virtual monopoly of the right to publish particular expressions, and there is every reason to suppose that copyright holders are rational, profit maximizing actors. Their interest lies in exacting a toll for every use of a copyrighted work. The interest of users, including users who wish to disseminate information over the Internet, is to avoid paying the toll. But a copyright, unlike a patent, is not a perfect monopoly over the

protected work. It admits of exceptions, most notably the doctrine of fair use. So the push and pull we are witnessing in substantial measure is over the breadth or narrowness of the limitations on the copyright monopoly.

The Copyright Clause of the Constitution goes far in focusing the issue. It authorizes Congress to provide for copyright protection for a purpose, that is, "[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."[19] Thus, the extent to which Congress may go in granting copyright protection involves primarily a utilitarian judgment. The principal question in each case is whether the benefits of a particular measure in terms of encouraging creativity by rewarding authors are sufficient to outweigh any adverse consequences it may have. This is well illustrated by controversy concerning fair use and the DMCA.

In December 1996, the World Intellectual Property Organization ("WIPO"), held a diplomatic conference in Geneva that led to the adoption of two treaties. Article 11 of the WIPO Copyright Treaty provides in relevant part that contracting states "shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."[20]

The adoption of the WIPO Copyright Treaty spurred continued Congressional attention to the adaptation of the law of copyright to the digital age. Lengthy hearings involving a broad range of interested parties both preceded and succeeded the Copyright Treaty. A critical focus of Congressional consideration was the conflict between those who opposed anti-circumvention measures as inappropriate extensions of copyright and impediments to fair use and those who supported them as essential to proper protection of copyrighted materials in the digital era.[21] What might be termed the fair use community argued that technological means of protecting copyrighted works in digital form throw the baby out with the bath water. They prevent fair and non-infringing uses of copyrighted

19. U.S. CONST. art. I, § 8.

20. WIPO Copyright Treaty, Apr. 12, 1997, Art. 11, S. Treaty Doc. No. 105-17 (1997), *available at* 1997 WL 447232.

21. There is an excellent account of the legislative history of the statute. David Nimmer, *A Riff on Fair Use,* 148 U. PA. L. REV. 673, 702-38 (2000).

works as well as piracy and therefore go too far in restricting expression. They argued that circumvention of access control measures and dissemination of circumvention technology should not be restricted, as they facilitate fair use. The other side of the argument, of course, is that copyright holders will be unwilling to make their works available in digital form absent effective protection against circumvention of their access control measures for fear of infringement and piracy.

The DMCA was enacted in October 1998 as the culmination of this Congressional process,[22] and it clearly evidences Congressional attempts to accommodate the conflicting interests. It contains two principal provisions. The first, Section 1201(a)(1), governs "[t]he act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work." The second, Section 1201(a)(2), which is known as the anti-trafficking provision, "supplements the prohibition against the act of circumvention in paragraph (a)(1) with prohibitions on creating and making available certain technologies . . . developed or advertised to defeat technological protections against unauthorized access to a work."[23]

The anti-circumvention and anti-trafficking provisions, if they stood alone, probably would limit some fair and non-infringing uses even as they would reduce piracy. To that extent, they would interfere with proper expressive activities. The position of the fair use community thus cannot be rejected out of hand. Congress, however, recognized that fact. It limited both the anti-circumvention and the anti-trafficking provisions in ways designed to permit appropriate use of copyrighted materials while at the same time protecting the legitimate interests of copyright holders.

To begin with, Congress limited the prohibition of the act of circumvention to the act itself so as not to "apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a [copyrighted] work . . . ."[24] By doing so, it left "the traditional defenses to copyright infringement, including fair use, . . . fully applicable" provided "the access is authorized."[25]

Second, the statute contains a number of exceptions from the anti-circumvention provision, the anti-trafficking provision or both. These include exceptions for reverse engineering, encryption

22. *See generally* S. REP. NO. 105-190, 105th Cong., 2d Sess. 2-8 (1998).
23. *Id.* at 18.
24. H.R. REP. NO. 105-551(I), 105th Cong. 2d Sess., at 18 (1998).
25. *Id.*

research, security testing and, for libraries, archives and educational institutions, an exception from the anti-circumvention provision for the purpose of determining whether to purchase a copy of a copyrighted work.

Finally, the anti-circumvention provision did not become effective for a two-year period in order to permit the Library of Congress to exempt classes of works from its scope.[26] The Library of Congress was charged with conducting a rule making during the two-year period to determine whether users of copyrighted works of particular classes were, or were likely to be, affected adversely by the anti-circumvention provision in their ability to make non-infringing use of classes of works, in which case it was empowered to exempt those classes from the anti-circumvention prohibition. In doing so, it was instructed to consider, among other factors, the impact of the anti-circumvention prohibition on criticism, scholarship, comment, news reporting, teaching and research, as well as the effect of circumvention of access control measures on the market for or value of copyrighted works.[27]

The point here is not whether Congress struck the balance in exactly the right place. Rather, I offer this history to illustrate a point about process. The text of the statute and its legislative history confirm quite clearly the essential nature of the issue that is at the heart of the copyright- Internet controversies. It is the same sort of largely economic push and pull that is found throughout the broad scope of our economy and what others have termed the regulatory state. Will a given air quality standard provide sufficient health benefits to overcome any adverse economic consequences? Is added safety testing for a promising new drug worth the potential costs in delaying the availability of the drug to patients who might benefit from it? Will airline deregulation cause competitively pressed carriers to skimp on safety measures, thus outweighing the benefits of cheap fares? Will the benefits of prohibiting circumvention of access control measures protecting copyrighted works available on digital media-benefits in terms of promoting distribution of those works in digital form-outweigh the harm caused by preventing certain fair uses?

This sort of judgment in our society traditionally is made in the legislative arena. It is Congress that is in a position to hear from all relevant constituencies and to attempt to strike an appropriate

26. 17 U.S.C. § 1201(a)(1)(A) through (B).
27. *Id.* § 1201(a)(1)(C).

balance. It is Congress that is directly responsible to the people. It is Congress, the Supreme Court wrote in the *Betamax* case, that it is entitled to "consistent deference . . . when major technological developments alter the market for copyrighted material" because "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."[28] In other words, within broad limits, Congress is entitled to experiment and even to make mistakes because it is best suited to dealing with this problem.

Courts, on the other hand, are not well equipped to make judgments of this sort. Courts are limited to deciding particular controversies between usually private parties on the basis of the evidence that those parties choose to place before them. They have little ability to ensure development of a full and fair record for the resolution of broad issues of public policy such as these. They have no special expertise in making these judgments. They lack any objective standards by which to make them.

To be sure, there are limits beyond which Congress may not go. The First Amendment does and, I believe, will continue to stand as a restraint on repressive regulation under a standard or standards of review that balance our core value of free expression with the societal interests, including those served by copyright, that may be threatened by new technologies. But in the last analysis, the principal forum in which all or most of the appropriate accommodations must be reached is Congress.

This will be not be a tidy process. As Otto von Bismarck, once Chancellor of Prussia, said, "To retain respect for sausages and laws, one must not watch them in the making." But it is the very give and take, the opportunity and indeed necessity for making the messy compromises, that makes the legislature the appropriate arena. While the courts can and will serve as referees, they cannot play the game. At the same time, they can and will enforce the laws that Congress passes. Those who are under the impression that the Internet is the new wild, wild West and that there is no law west of the Pecos have gotten quite a few shocks this year and they are bound to get more absent acquiescence in the rule of law.

MS. TABER: I would like to express our sincere thanks to Judge Kaplan for joining us today and for sharing his judicial perspective on the future of copyright on the Internet. Please join me in thanking

28. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 434 (1984).

him again.

At this point, we'll be taking a half-hour break. We'll reconvene at 2:00 o'clock for panel three. Panel three will address the future of copyright on the Internet, new business models and technology options. We'll see you then.

(WHEREUPON A RECESS WAS TAKEN).

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