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Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law

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by Kathy Bowrey and Matthew Rimmer

Special Issue Update

This paper is included in the First Monday *Special Issue: Music and the Internet, published in July 2005. Special Issue editor David Beer asked authors to submit additional comments regarding their articles.*

Since this paper was first published in 2002 there has been a constant stream of litigation surrounding P2P in the US and in other jurisdictions. In the United States, the District Court and the Court of Appeals controversially held that Grokster was not liable for contributory and vicarious copyright infringement. Justice Thomas of the Federal Circuit observed: "We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation." The United States Supreme Court is due to hear an appeal by copyright owners against the Grokster decision in 2005.

In Australia, litigation was initiated against Sharman License Holdings, LEF Interactive and Brilliant Digital Entertainment, as the controllers of the peer to peer network Kazaa. Again, media owners have emphasized that the network is a pirate bazaar. Global legal forum shopping is one of the intriguing aspects of P2P. We see the arguments of both sides, originally developed specifically for US deliberation manifest across the globe.

The Media naively ask whether there is any point in the Australian court considering these issues, given the litigation ongoing in the US. Here the US is seen as the world leader for legal ideas surrounding P2P, with the currency in ideas about technology, innovation and growing the global information economy clouding appreciation of national sovereignty and the distinctiveness of local jurisprudence. This context makes an appreciation of the cultural uniqueness of the US views all the more important.

Abstract

Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law by Kathy Bowrey and Matthew Rimmer
Whereas Lessig's recent work engages with questions of culture and creativity in society, this paper looks at the role of culture and creativity in the law. The paper evaluates the Napster, DeCSS, Felten and Sklyarov litigation in terms of the new social, legal, economic and cultural relations being produced. This involves a deep discussion of law's economic relations, and the implications of this for litigation strategy. The paper concludes with a critique of recent attempts to define copyright law in terms of first amendment rights and communicative freedom.

Contents

The Story So Far

One thing that the Napster phenomenon brought unambiguously to the fore was the question of the politics of copyright law. Media sources publicised the complaints of defiant Napster users, supported by prominent "alternative" musicians. Copyright law disempowered creative talent and led to the ripping off of artists and fans alike, it was argued. The law entrenched corporate greed.

"Napster = piracy", claimed other musicians, music and film studios and labels. Copyright is the main way of encouraging investment in new artists, and simply allocates what is justly deserved. Digital piracy sponsored by unauthorised file sharing technologies forestalls the development of new media services, preventing consumers from getting the best possible legitimate access to digital media as well as damaging the income potential of past and future artists and the corporations that support them.

The battle was cast in oppositional terms. There is much slippage between positions, but the issue has been interpreted by academics and other interested commentators in terms of Users v Owners [1]; Decentralized v Centralized Internet architecture [2]; Peer to Peer v Client/Server relations [3]; New Economy v Status Quo [4]. Copyright law, through regulation of content, had a role in managing the relationship between these parties or perspectives of the digital agenda. However copyright has not been a neutral or disinterested mediator.

In the first round, copyright, through the courts, seemed to defeat legions of Napster users [5]. In finding Napster responsible for the copyright infringements mediated via its databases, copyright took a stand not just against Napster and its free-riding users, but against the presumption of a technology standing outside of legal control. The law had a productive role to play in the development of the digital economy, and a disciplinary role with regard to unruly digital practices.

However this attempt at affirmation of legal authority was soon to be challenged by new bolder technologies - Aimster, FreeNet, Morpehus, Grokster, KazaA - that rose in popularity to take Napster's place. These new technology makers were "copyright aware" and, having learnt from the Napster experience, presented a very different kind of legal challenge. Technological innovation, it was hoped, would stay ahead of the law and avoid copyright's clutches through the development of more decentralised and anonymous, globally disseminated, file distribution technologies. Neither national law nor any one organization could manage to control these chaotic networks for sharing files.

The legislature had already anticipated the need for more development of copyright law to keep pace with digital reproduction techniques. Using new anti-circumvention provisions [6] owners soon embarked on actions they hoped would eventually prevent the circulation of "unauthorised" computer codes, that is any code potentially capable of supporting copyright infringing practices. In these current rounds of litigation the new provisions appear to have some bite [7]. Owners are taking the upper hand. The anti-circumvention provisions seem to give owners the ability to police access to information about, as well as access to, the tools capable of distributing digital content. They will control the terms and conditions under which any user accesses "their" files.

In defence, peer to peer advocates have more than technical savvy in their armoury. The new hope is that the constitutional right to free speech will trump this interpretation of the anti-circumvention provisions, and draw copyright into supporting a more technologically neutral line [8]. As Lawrence Lessig sees it "the future of ideas" is at stake.

His latest book *The Future of Ideas: The Fate of the Commons in a Connected World* [9] considers the state of innovation and creativity in these "reactionary" times. In a key statement Lessig considers the subtext of the advertisements from Apple Computer urging that consumers should "Rip, mix, burn", because "After all, it's your music". He seeks to explain the power of this commercial:

> "Apple, of course, wants to sell computers. Yet its ad touches an ideal that runs very deep in our history. For the technology that they (and of course others) sell could enable this generation to do with our culture what generations have done from the very beginning of human society: to take what is our culture; to "rip" it - meaning to copy it; to "mix" it - meaning to reform it however the user wants; and finally, and most important, "burn" it - to publish it in a way that others can see and hear. Digital technology could enable an extraordinary range of ordinary people to become part of a *creative* process" [10].

However, Lessig seizes on the irony that the very same machines that Apple sets to "rip, mix, [and] burn" music are programmed to make it impossible for ordinary users to "rip, mix, [and] burn" Hollywood's movies [11]. The problem is that software protects this content, and Apple's machine protects this code. Furthermore, Lessig considers the backlash against the notion that consumers should be able to "Rip, mix, burn". He observes:

> "But just as the cusp of this future, at the same time that we are being pushed to the world where anyone can "rip, mix, [and] burn," a counter-movement is raging all around. To ordinary people, this slogan from Apple seems benign enough; to lawyers in the content industry, it is high treason. To lawyers who prosecute the laws of copyright, the very idea that the music on "your" CD is "your music" is absurd ... [12].
>
> You have no "right" to rip it, or to mix it, or especially to burn it. You may have, the lawyers will insist permission to do these things. But don't confuse Hollywood's grace with your rights. These parts of our culture, these lawyers will tell you, are the property of the few [13]."

Lessig casts the conflict as one between "genuine" culture and passive consumerism, with the corruption of copyright law and its social objectives at stake. Perhaps a superior body of law, with more noble political aspirations, can save the day, and copyright law?

And so the battle goes on, with copyright law as the prize. However this is a prize never fully won. It is a protean creature, an uncertain character capable of fluctuating under pressure. For the winners, victories are small and incremental, and subject to the next technological assault. For the losers, there is always the possibility of another legal strategy, a different judge and court, and a new technical and legal issue. The politics of the law is always subject to dispute. The copyright battle may never end.

A Different Kind of Politics

This paper critiques the way copyright law and lawyers have engaged with peer to peer technologies, identifying three distinct phases of development - Part One: Peer to peer. The Napster experience; Part Two: The DMCA litigation. DeCSS and Beyond; and, Part Three: Dmitry, the con and the Constitution.

The writing is sympathetic to analyses that fear the social costs of recent developments in copyright law [14]. Predictions include a diminishing of the space for creative cultural exchanges and free scientific communications, greater surveillance of our cultural consumption, a stifling of technological innovation and the retardation of the digital economy. However the methodology takes a different view of the politics of the dispute, out of concern for the way in which the law's critics, in confronting the politics of the issue, are constructing the relationship between law and society.

Peer to peer supporters believe that they are engaged in a different kind of political practice to owner's organizations like the Recording Industry Association of America (RIAA). The latter's agenda is one of instrumentally using the legislature and the U.S. courts to advance their own, sectional interests. Their politics is a dirty, unwelcome intrusion onto the legal terrain. The academics, on the other hand, are not so engaged. They are speaking in defence, and are merely seeking a restoration of the historically established legal order. In justification of their stance supporters often acknowledge the philosophy expressed in the intellectual property provisions of the American Constitution:

> Article 1, Section 8, Clause 8. The Congress shall have the power ... to promote the progress of science and the useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.

This clause, as subsequently elaborated in case law, legitimates the interpretation of copyright as a limited and socially responsible property right [15], that is one that "balances" owner's and user's interests [16]. In this sense it is wrong to read their battle as one of "owners v users". Critics do not merely provide a voice for marginalised user interests. More importantly they speak as guardians of the spirit of copyright law, as it has been historically and judicially grounded [17].

There are strategic reasons for asserting the endorsement of constitutional framers and "key" decisions of the judiciary. However in broader terms, the stance involves a very problematic use of history and politics in the law.

The origins and purpose of intellectual property laws are cited in an attempt to put aside any questioning of their particular contemporary interpretation of the politics of the law.

History and principle are on my side. This suggests that any position contrary to mine is subjective and destabilising. This strategy singularizes legal history. It "rips" the foundational principle from its historical context, compressing it into a simple, generalized ideal, emptied of the original political content. The politics behind the eighteenth century constitutional provision - seeking intellectual property rights that further an Enlightenment understanding of truth and progress - becomes a much less specific demand, such as "to promote Learning" [18]. This movement is permitted because the American Enlightenment condition [19] itself authorised a forward looking, and utilitarian interpretation [20]. The point of the reference back is thus merely to authorise the new "mix", that is, whatever values related to "progress" that the user desires. Perversely, a clause once rooted in the politics of the American Enlightenment now authorizes a copyright balance that serves, amongst other things, a culture of postmodern appropriation.

This formulation endorses references to history and principle in the name of communicative freedom. But the purpose is actually to endorse one contemporary interpretation of copyright law and to disempower those with contrary views about its direction. The attempt is both to silence owners and attack the legitimacy of the unwelcome reforms by the legislature.

Twentieth century expansion of copyright law, justified in terms of keeping pace with technological change, is characterised as making too many *ad hoc* concessions to owners, with an improper level of attention to user rights [21]. The legislative agenda has been captured by Hollywood and other media interests, resulting in a lack of balance in deliberations. The solution to this "corruption" is really to try and assert the superiority of common law over the Legislature. The common law, as represented by their particular reading of the founders' philosophy and judgements that favour a "fair use" perspective, is less affected by money and politics. It is thus represented as a purer source of copyright law.

In jurisprudential terms this approach perpetuates myths about the order of the law, its politics and its relationship with society. The suggestion is that it is possible to accommodate copyright's proper balance, refine and redefine this over the centuries as is required, and at the end of the day achieve a coherent, internally consistent and rationally ordered body of law, that raises it above "dirty politics". This presents the values endorsed by the judiciary as somehow less "political" than those of the legislature.

Further in order to find "order" amongst the various paths available, it is necessary to disregard or discard provisions and decisions that fail to fit the chosen schema. Copyright only looks (potentially) ordered and principled, because it has been flattened into this particular shape. This suppresses the reality of discontinuities in approach from the eighteenth century onwards. It has the potential to reduce the true complexity of the problems that copyright must manage, obscure the range of approaches that are available, as well as overstate the dimensions of any particular perceived problem. It is not the case that the future of the law has been set by the past, and that this destiny is imperilled by any particular decision.

Part of the reason law is so disorderly and difficult is because citizens make challenging legal subjects. Some are ignorant about legal matters, some disinterested, some are "too interested" and wanting to test legal limits, and use legal venues to gain some strategic advantage. Others act in apparent defiance of perceived legal commands. What is represented in litigation is only a snapshot of the broader legal landscape, and this representativeness needs to be accounted for.

In copyright law the capacity for disorder is great, as the law has self consciously struggled to accommodate legal demands that have accompanied the development of different technologies. As Maureen Cain suggests, law works imaginatively, as "lawyers *invent relationships"* [22] to serve their client's needs:

> "They invent categories and these categories are constitutive of the practices and institutions within which their clients achieve their objectives" [23].

New cultural forms, such as the Internet, suggest the arrival of new sources of capital anxious for deployment in furtherance of our cultural "needs". If only copyright would protect digital goods "appropriately". Here capital is presented as pre-existing legal relations, as if it were already out there, an endangered species, slipping away because of legal inattention.

The legislature is expected to engage this capital. Copyright is supposed to provide "economic incentives" for cultural production. But in keeping with this broad justification the legislature is instructed to balance owner and user interests, in furtherance of the best interests of the development of the new cultural medium and access to the media. However the legislature is without the benefit of an established way of reading the cultural and economic dimensions associated with such new practices. In this context it is unsurprising that imaginative representations of the threat to capital in the form of visions of digital pirates or of an unenterprising colossus, flesh out the picture. Lawyers and legislators love to rescue the "victim".

The cultural specificity of the representation advanced is not necessarily obvious to those who advocate it, and to those wielding legal power, who engage with it:

> "Gramsci argued that organic intellectuals maintain institutionalized or regular relationships with a particular social class, such that they are integral members of it and have regular experiential knowledge of that class and its problems. These are also their own experiences and their own problems demanding a solution ... they are creative. They develop new forms of relationship, new practices and, of course, new names for them and ways of thinking about them. They literally think the advance of the class they are related to" [24].

Endorsing a particular view of the situation is not necessarily the result of "corruption", though it is problematic [25].

If those whose views were ignored were "downsiders" with few institutions supporting them, the new "status quo" can quickly find roots. The copyright reform is uncontroversial and law seems to passively "reflect" the social order it helps construct. However when the "disenfranchised" are backed by a strong competing claim to capital, the juridical attempt to resolve the attendant problem is soon plagued with problems of legitimation that lead to legal instability.

New provisions were drafted to "save" a source of capital. However as soon as they start to be utilised, the action begins to frustrate those with claims to a competing asset. These players are resourceful and lawyered-up. They are not willingly going to give away "their capital". So there is litigation, more litigation, other kinds of challenges and "public education". The refinement of the dispute leads to more specialist approaches - new categories, new exceptions, redrafting of principles. The end result is increased complexity in copyright law and disarray.

Over time a tumultuous episode in this history might be forgotten, particularly as the alternative claims to capital dissipate. In these circumstances the law can resume its appearance of good, rational order and harmonious social relations. But that order is always a facade that hides many alternate stories, conflicts and other paths.

In keeping with the above criticisms, the point of this paper is to bring to life the real complexity and messiness of the law, as it negotiates the peer to peer disputes and engages with conflicting views and cultures. The motivation is that of understanding how copyright law has managed its "representativeness" and the practical implications of the mismanagement of social diversity.

The methodology is one of looking at the law creatively, that is to try and identify the social, economic and legal relations that copyright law produces. It is not presumed that there is or will be any end to this creative engagement with the law. It is not the property of any one side nor exhausted at any stage. In this light though the saga below progresses in three parts. What is interesting is how the copyright story has already been transformed, and how much it has remained the same.

Part One - Peer To Peer: The Napster Experience

Peer To Peer Networks

Peer to peer is a class of computer applications that turn Internet-connected PCs into resources other Internet-connected PCs can access. Before peer to peer, if you wanted to serve files from your PC you needed a permanent IP address, domain name, registration with DNS servers and properly configured Web server software on the PC. With peer to peer technology your computer storage, cycles and content are made available because the PC via modem becomes a node that operates outside the DNS system, having significant autonomy from central servers with the ability to be accessed by other users [26]. It is file sharing on the Internet that occurs outside of the traditional forms of file transfer -- http and ftp. There is some centralisation that allows the network to function, however applications differ in this regard. At its simplest peer to peer creates an alternate file trading channel to the Web or a black market where what is traded is "free" but users of the network are subjected to shared codes of conduct.

Historical explanations for its development point to the Internet's militaristic origins - the desire to create a decentralised communications network for a post-apocalyptic world where any localised failure can be overcome by removing reliance on an intermediary server [27]. More current sociological explanations of peer to peer's popularity point to frustration at the way PC use has come to be controlled by plodding IT nerds at work, at universities and via ISPs. These IT experts decide the terms of your engagement with technology and other users, motivated by their own interest in an easy life and pleasing the CEO with the stability and security of their unadventurous IT systems [28]. Peer to peer can cut such intermediaries out of the technological loop.

The legal interest in peer to peer revolves around a question of law's service to economics - old commerce and e-commerce. As Larry Lessig explains:

> "The Hollywood lawyers have noticed something about the Internet: it conflicts with something they value. That is control over music, films and

other form of intellectual property" [29].

In the most notable, well publicised U.S. cases concerning copyright and the Internet, the law has protected the investments of the established media owners.

Napster

The Napster technology, as a peer to peer system, avoided the problems of a corporation centrally storing and serving files. With Napster's software MusicShare, users connect to a Napster central server and the server catalogues the user's MP3 files, making the names of the files available to other Napster users. Desired files can be downloaded from a host user's PC by using the MusicShare search capabilities and requesting the selected file to be transferred. There was originally no technological or other checking of the legitimacy of files moved through the network.

The Recording Industry Association of America (RIAA) filed suit against Napster Inc., operators of the Web site Napster.com, accusing them of violating federal and state laws through contributory and vicarious copyright infringement. The complaint describes the case as follows:

> "Napster is a commercial enterprise that enables and encourages Internet users to connect to Napster's computer servers in order to make copies of plaintiff's copyrighted sound recordings available to other Napster users for unlawful copying and distribution. Napster has thus misused and is misusing the remarkable potential of the Internet, essentially running an online bazaar devoted to the pirating of music" [30].

They also named a number of anonymous Jane Does - individual consumers who have been using Napster. Not only did the recording companies bring legal action against Napster, but they also brought legal action against Yale University, the University of Southern California, and Indiana University, alleging that they are complicit in music piracy. Press releases by artists such as Metallica and Dr Dre augmented the legal action against Napster.

In addition to complaint about direct lost sales and royalties attributable to potential consumers downloading MP3 files for free using Napster, it was alleged that Napster was undermining the future of the recording industry. Recording companies support music production and distribution through their investment of substantial sums of money, time, effort and creative talent:

> "Plaintiffs and their recording artists are compensated for their creative efforts and monetary investments largely from the sale of phonorecords to the public and from license fees for the reproduction, distribution, digital performance, or other exploitation of such phonorecords. Absent such compensation, profits and motivation are siphoned away from artists and record companies that record, manufacture, promote, and distribute those works. The pool of resources available for finding and promoting new artists shrinks, and sound quality and recording integrity are diluted and corrupted" [31].

"Legitimate" entrepreneurial development of commercial digital downloading markets is unsustainable in face of easy access to free download services:

> "Napster is not developing a business around legitimate MP3 music files,

> but has chosen to build its business on large-scale piracy. Napster seeks to profit by encouraging and facilitating the distribution and reproduction of millions of infringing MP3 files. Moreover, by deliberately refusing to maintain any information about its users in order to make copyright enforcement next to impossible, Napster has created a virtual sanctuary where music piracy can and does flourish on a monumental scale."

In the complaint references to "pirates" and the "bazaar" frame the role of law [32]. The bazaar as a foreign, unknowable and hence potentially dangerous creation, is contrasted with the potential of the "remarkable" Internet. But what exactly is remarkable about an entity whose future seems to have been already fully mapped? The Internet will have commercial music markets for MP3 downloads, developed in consultation with existing recording companies and their artists and available on their licensing terms. This future is apparently so close to being here that only a "virtual sanctuary" stands in the way. Here "virtual" refers to both Internet space and Napster's business practices such as the wilful "refusal to maintain" data the competitors desire. Law's role is cast as making the virtual concrete - making what we already know about the Internet fully arrive, forcing the competitor to conform in its business practices to those of the "real world" and transforming a mere market projection into something more secure. Were law to act otherwise, law would be conspiring in an "illegitimate" future, in the sense that it would constitute misuse of an established nexus between capital and copyright law.

In granting the plaintiff's motion for an injunction Justice Patel found that Napster was liable [33]. She accepted evidence that the defendant had actual or constructive knowledge that third parties were engaging in direct copyright infringement by downloading MP3 files using the Napster service.

In making her interpretations of fact and law Justice Patel adopted the characterisation of the issue very closely to the position as outlined in the original complaint. For example, the complaint:

> "Plaintiffs have invested and continue to invest substantial sums of money, as well as time, effort, and creative talent, to discover and develop recording artists ... [34]"

is reproduced in the judgement as:

> "The record company plaintiff's sound recordings also result from a substantial investment of money, time, manpower, and creativity ... In contrast, defendant invests nothing in the content of the music which means that, compared with plaintiffs, it incurs virtually no costs in providing a wide array of music to satisfy consumer demand" [35].

And

> "The record company plaintiffs have invested substantial time, effort, and funds in actual or planned entry into the digital downloading market" [36].

The defendant had sought to "take over, or at least threaten, plaintiff's role in the promotion and distribution of music" [37]. Napster has raised "barriers to plaintiff's entry into the market for the digital downloading of music" [38]. Napster's own investment in digital download technologies and distribution models is completely discounted as a relevant contribution to the music industry. It was not the "right kind" of contribution. The judicial view is that copyright law should serve a particular culture of

expectation: the established industry's plans for development of the market.

Justice Patel found that the defendants had not established or met their burden of proving that they were entitled to the affirmative defence of fair use [39]. Most of the files moved through MusicShare software were infringing copies and Napster was well aware of that fact. Napster was a means for distributing pirated copies, not a mechanism for exercising fair use rights. Sampling, (whereby users try before they buy, akin to accessing an in-store CD listening post), space-shifting, (where, for sake of convenience, users would retrieve copies of songs they already own for use on more portable media) and listening to authorised (as opposed to infringing) new works were judged not substantial non-infringing uses of Napster. Justice Patel also dismissed arguments about Napster users merely exercising home recording rights. The scale of usage suggest it went beyond that permitted under the U.S. Audio Home Recording Act of 1992 and suggested users were overwhelmingly avoiding paying for songs that otherwise they would not have been able to access for free [40]. She disagreed that Napster was a mere Internet service provider entitled to "safe harbour" protection. Napster provided more than a "mere conduit" for transfer of files [41]. Documents showed that the defendant's executives knew "we are not just making *pirated* music available but also pushing demand" [42]. She also rejected the notion that competition principles should limit the enforcement of intellectual property rights, noting that most relevant case law dealt with impermissibly restricted licenses being granted to defendants, and not the case of unlicensed dealings in works [43].

Napster's defence, crafted by David Boies, the legal counsel who was successful in the Microsoft anti-trust case, sought to broaden the terms of this debate. He answered RIAA press releases with his own media interventions, complementing court defences [44]. Drawing upon his experience and involvement with the case of Microsoft, David Boies alleged that the RIAA were engaging in collusion in breach of United States anti-trust:

> "Microsoft certainly has created more value. Microsoft built monopoly power, but it did so by creating and developing. There isn't any product innovation in having multiple companies get together and decide jointly what they're going to do. The monopoly power of the RIAA comes purely from collusion" [45].

David Boies alleged that the record companies were guilty of copyright misuse:

> "The 9th Circuit has made it clear that if copyright holders use their copyrights for anticompetitive purposes - to try to gain control over something they do not control directly through their copyrights - that's copyright misuse. It is clear that the RIAA has set out to control the Napster media. They have written documents saying that they want to shut Napster down and then take over the technology. The RIAA's members are acting in concert. They have pooled, according to their own statistics, 90 percent of the copyrights on music. All of those kinds of activities constitute copyright misuse. And if they are engaged in copyright misuse, they cannot enforce their copyrights" [46].

David Boies rejected the claim that the role of copyright law was to protect established commercial expectations:

> "The law is designed to strike a balance between the interests of copyright holders on the one hand and the interests of consumers on the other. With music, Congress has struck a balance to say that if there is commercial

> copying, the copyright holder controls it, and if there is non-commercial copyright, the copyright holder does not control it. Is that the right balance? I think it's a pretty good balance ... We never would have passed copyright laws in this country unless we believed they helped consumers by generating creative activity. We know there needs to be a fair return to do that but we don't want excessive return, because the ultimate beneficiary is designed to be the consumer" [47].

His analysis interprets copyright law in line with broad cultural objectives, as well as economic ones. This perspective was bolstered by academic support from copyright academics.

The *amicus* brief of copyright professors, lead by Professor Jessica Litman, sought to frame the dispute in light of the historical practice of copyright law and the objectives of the Constitution. Radio, television, photocopiers, analog radio and video tape recorders, cable television, fax, communications satellites, computers, digital audio, digital video and the Internet had all permitted new methods of copyright infringement and piracy. Nonetheless copyright law permitted these to develop:

> "Courts responded cautiously to the claims that new technologies should be shut down because they facilitate copyright infringement and rightly so. The Constitution empowers Congress to enact copyright laws in order 'to promote the Progress of Science and useful arts' ... Outlawing a useful technology merely because many people use it as a tool for infringement will rarely promote the progress of science and the useful arts. Only when the technology is not capable of legitimate uses does it make sense to outlaw it" [48].

In enforcing rights the pre-eminent historical concern has been a social one- maintaining openness with regard to new technological developments: "the balance rests on the side of permitting new technology, not stifling it" [49]. Fair use, as elaborated in *Sony Corporation Of America v University City Studios Inc.* [50] makes a space for new, potentially infringing, technologies. A technology should be permitted so long as it is capable of sustaining substantial non-infringing uses. Napster was capable of a number of non-infringing, non-commercial uses: listening to authorised works; sampling, which it was argued had the potential to increase CD sales; and space-shifting, such as downloading MP3 files at the office, of music you already own at home. Napster was ignorant of the content moved via its system, and should not be required to change the technology to aid the recording company's enforcement of rights.

Defence of Napster pursued a broader interpretation of copyright law, and whilst agreeing the law should encourage the development of new markets for creative and useful works, demanded that legal power be exercised in a technologically neutral way. Historically this goal was of greater importance than protection of any individual rights.

The Court of Appeal sees its role as determining whether the court employed the appropriate legal standards:

> "As long as the district court got the law right, "it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case"" [51].

This jurisprudential responsibility was interpreted narrowly. The court reviewed legal principle within the framework chosen by Justice Patel, and without any direct address

to this choice of politics. The exercise was one of checking for continuity in application of legal principle. That is, was her interpretation of fair use (§107) clearly erroneous, in the sense that it was not clearly supported by precedent? They found her interpretations of §107 were not clearly erroneous. It was agreed that Napster was liable for contributory copyright infringement. That precedent may have also supported alternate readings and approaches to the issue was not addressed.

The only concession made to defence politics related to application of the *Sony* test, that where equipment was capable of infringing and substantial non-infringing uses, defendants should not be liable for contributory infringement. Justice Patel had failed to consider that Napster's architecture was capable of being used in non-infringing way, even though current use was improper [52]. Here Napster's executives clearly knew of their user's infringement of plaintiff's copyrights and they were still liable for that conduct, however the terms of the injunction granted were varied. Napster would not be shut down. It would be obliged to keep infringing material out of the system, to prevent viral distribution of these works. As the current architecture did not read the content of files moved through MusicShare, liability to remove access to infringing files depended upon reasonable notice being given of the existence of these files [53]. Compliance with this ruling has been subject to ongoing litigation [54].

Only at the end did the Court of Appeals briefly address the defence's broader concerns. In response to the argument about abuse of market power it found: "There is no evidence here that plaintiffs seek to control areas outside of their grant of monopoly. Rather plaintiff's seek to control reproduction and distribution of copyrighted works, exclusive rights of copyright holders" [55]. These exclusive rights were read in microcosm - without reference to copyright's macro objectives, "balance" and commercial/non-commercial demarcations. Justice Patel's interpretation of §107 and related arguments were simply presumed to incorporate the broad principles of copyright law, without there being any contextual discussion of them. First Amendment concerns were also briefly addressed so that it "was not reasserted on remand". The Court stressed: "We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine" [56].

In practical terms the Court of Appeal decision could be read as a victory for Napster. Napster was given the opportunity to "evolve" into a legitimate peer to peer system. However it was not widely read as such, because of the narrowness of the legal reasoning. The Court of Appeal persistently disengaged from elaborating a view about the politics of copyright law. The reality was that both Justice Patel's and Boies et al's approaches had historical support. However as both positions were arguable, legal authority could only endorse one, by not honestly engaging with the other. A legalistic approach was sought to provide closure to the reality of multifaceted legal and social relations. Here legal authority is vested in singularity.

This approach energised many technological challenges to legal authority. Developers would seek to outsmart overbearing and unsympathetic regulation. Gnutella, Madster/Aimster, Grokster, Morpheus, KazaA, FreeNet and numerous other peer to peer systems provide different technological frameworks and legal issues. For some the desire was to render law irrelevant and redundant through technological innovation. In an interview for *Spin* magazine Freenet's creator, Ian Clarke, explained his motivations:

> "Milner: You've called Freenet "a near perfect form of anarchy". Given how enormous the Internet has become, is online anarchy such a good idea?
>
> Clarke: By "perfect" I mean a well-planned, decentralized system. There are

> a lot of people now who have a stake in trying to control the Internet, so it's important to build systems that have no central control. If you look at Napster, for example, there are people who have central control, which means legal action can be taken against them. The owners of Napster could be bribed into selling it to the music industry. In order to make Freenet immune to that, I designed it so that it doesn't depend on any one person or computer. I don't control it. If somebody put a gun to my head and said: "Shut down the system", I'd be unable to do it" [57].

Here regulation of any form is seen as bad. Regulation hinders innovation because it "knows best" by seeking to control the development, and furthering some interests at the expense of others. Developers think they know best, and if they're right, users will rush to take up the technology.

For others investing in peer to peer, the desire is more entrepreneurial:

> "John Borland: What made you decide to buy Kazaa? What are your plans for Sharman?
>
> Nikki Hemming: ... my investors had been looking at opportunities in the Internet field. ... The company was actually started for the purpose of investment in Internet opportunities ...
>
> Q: Were you able to shield yourself legally when you bought the original assets? You're not being sued at this point.
>
> A: ... obviously we were extremely pleased in March when the Dutch courts ruled that the KMD (software), which we owned, and the way that software functioned, was not infringing on copyrights in any way.
>
> Yes, there is a risky profile, and I think that is the reality check of a new paradigm. If you are operating on the frontier, and you're operating as a driver in changes in technology, consumer behavior, and in what the commercial model looks like, then there are always inherent risks ..." [58].

The RIAA has threatened or initiated legal actions against many peer to peer developers, anarchist and entrepreneurial alike [59].

What is disturbing is the way the courts have permitted the RIAA to use law in a strategic fashion to control developments. Though given the opportunity to take control by judging peer to peer technologies in terms of the broad foundations or objectives of copyright law, the courts have declined that challenge. Judicial passivity has played into the RIAA's hands, forestalling "unauthorised" peer to peer development, bankrupting companies backing them, and helping maintain the technologies as tools of the hacking underground. It is worth noting that the plaintiff's commercial peer to peer systems, much lauded by Justice Patel, are still not operating in any significant fashion.

Nonetheless, Jessica Litman anticipates that the public will continue to ignore and resist the legal regulation of their online practices:

> "People don't obey laws they don't believe in. Governments find it difficult to enforce laws that only a handful of people obey. Laws that people don't obey and that governments don't enforce are not much use to interests that persuaded Congress to enact them. If a law is bad enough, even its

> proponents might be willing to abandon it in favor of a different law that seems more legitimate to the people it is intended to command" [60].

The glut of copyright lawsuits coupled with a submissive judiciary will only encourage more civil disobedience. Burdensome prescriptions and draconian penalties will harm the legitimacy of copyright law, and will foster non-compliance amongst large numbers of the population.

Part Two - The DMCA Litigation: DeCSS and Beyond

In the United States, Australia and elsewhere copyright owners were successful in creating new copyright offences - related to circumventing technological protection (anti-circumvention provisions) [61] and disseminating decryption tools that could disable or avoid technical protection measures (anti-trafficking provisions) [62]. The provisions of the *Digital Millennium Copyright Act* (DMCA) have been soundly criticised for a lack of balance:

> "... by colorful use of high rhetoric and forceful lobbying, Hollywood and its allies were successful in persuading Congress to adopt the broad anti-circumvention legislation they favoured ...
>
> Had the Administration sought to broker a fairer compromise between the interests of Hollywood and its allies and the interests of Silicon Valley and its allies, this process would almost certainly have produced better legislation than the anti-circumvention provisions of the DMCA" [63].

It is argued that the provisions exceeded WIPO requirements, were at odds with the broader stated policy of devising laws that foster a "predictable, minimalist, consistent, and simple" e-commerce environment [64] and facilitated a "certain established but frightened copyright industries'" control over the design and manufacture of information technologies that can process digital information [65].

The anti-circumvention provisions can certainly be explained in terms of the wielding of political influence at the U.S. Congressional level. However beyond that kind of political explanation of the law, there is the politics played out in the way that copyright law has engaged with the new legal category and associated rights and restrictions. "Hollywood" couched the need for reform in terms of saving capital from seeping away through leaky digital pipelines:

> "The protection of America's creative works is as "old as the Constitution." Valenti noted that a simple way to protect creative works is to "deploy technology protection shields ... on the World Wide Web. Technology provides a coded lock on the door to which entry is allowed only when permission is granted by the copyright owner." ... He cautioned that if intellectual property is "vulnerable to poachers, through unauthorized entry or copying, if they are not protected by simple, firm, clearly stated rules of the game, then ... we will laugh loudly at our folly in the years to come" [66].

However the reforms did far more than simply provide for "locks" to protect content

from "poachers". It transformed the nature of copyright existing in relation to copy-protected content. It created entirely new legal relations with respect to this subject matter, at odds with established rights and limitations. This can been seen in some of the high profile litigation enforcing the new rights.

2600 Case

In the *2600* case [67] eight U.S motion picture studios sued the defendants to prevent them electronically linking their site to others where the DeCSS code could be obtained. DeCSS is designed to decrypt the CSS encryption system on DVD players and allows a copy of the DVD file to be stored.

Rather than sue the offshore creator of the DeCSS code, the litigation targeted a few of many hundreds who had published information about the cracked code. The main defendant was eventually settled as Eric Corley. He was relatively well known in hacker communities by his Orwellian pseudonym, Emmanuel Goldstein. His profile stemmed from his ongoing involvement with the magazine *2600: The Hacker Quarterly* founded in 1984, and the related Web site [68]. 2600 Enterprises Inc was also joined as a defendant. The choice of *2600* as a litigant was not accidental. As many commentators liked to explain, the name *2600* was derived from the fact that hackers in the 1960's found that the transmission of a 2600 hertz tone over a long distance trunk connection gained access to "operator" mode and allowed the user to explore aspects of the telephone system that were not otherwise accessible. *2600* had published articles on such topics as how to steal an Internet domain name, access other people's e-mail, intercept cellular phone calls, and break into the computer systems at Costco stores and Federal Express. The eight U.S. motion pictures wanted a high-profile target to test the rules regarding anti-circumvention devices. They also sought to tap into public discourse about hackers as copyright pirates, criminals, and spreaders of computer viruses [69].

At the District Court Justice Kaplan found that, by first publishing the code on the *2600* site and also by hyperlinking from the *2600* site to other sites where it could be downloaded, *2600* was responsible for "trafficking" in copyright circumvention devices. He rejected the arguments of the defendants that the posting was legitimate in order to facilitate exercise of fair use rights, for example to facilitate the making of Linux compatible DVD players. First Amendment objections were also rejected [70]. These findings were affirmed on appeal [71].

Prior to the DMCA the dominion granted owners can be represented as follows:

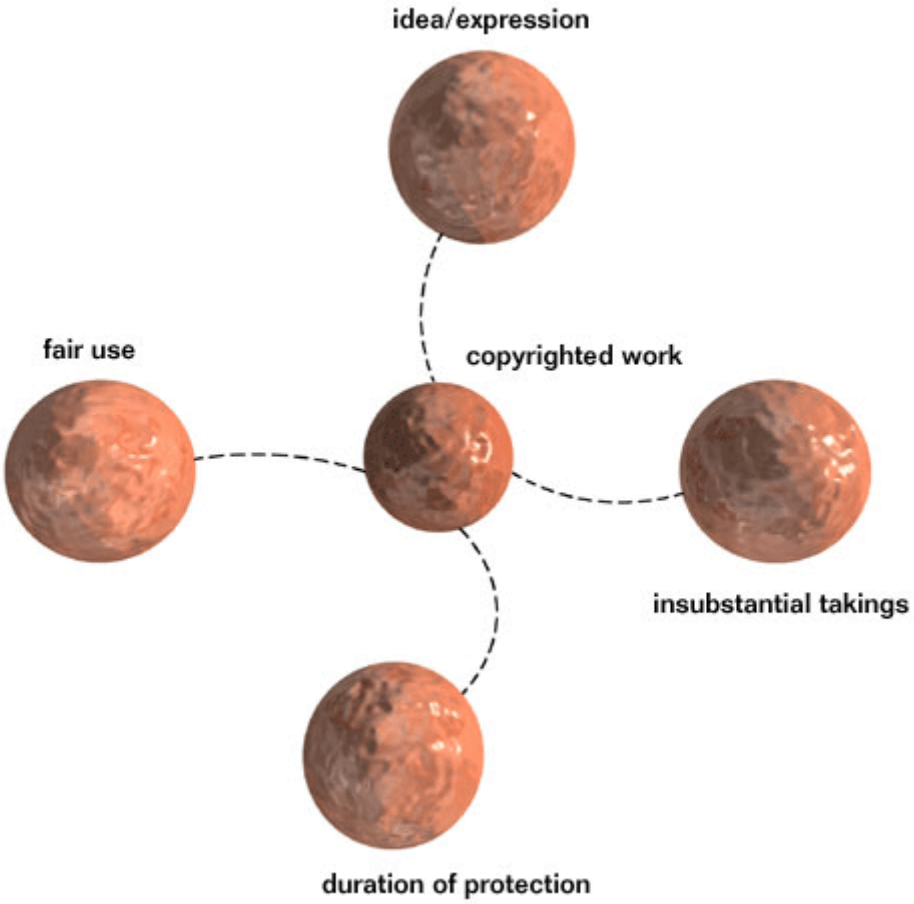

Figure 1: Copyright relationships pre-DMCA
Illustration by L. Sharp

Copyright locates legal rights to cultural production within a system of interdependencies. It is not really the case that copyright creates two competing domains - private and public. There is no private "domain" in a closed sense. The boundaries that exist are permeable. This is because ownership is determined by overlapping cultural limitations that express the realities of that copyrightable work's genesis, and enable similar relations with other cultural producers to the benefit of cultural production generally. For example, fair use, taking of insubstantial parts, taking ideas but not the expression, and limits to the duration of protection all interrupt the owner's "domain". There are no "walls" around the copyrightable work in that property sense.

Nonetheless, in explaining the new rights under the DMCA, the courts make reference to the need to "target the circumvention of digital walls" [72]. This implies that the effect of the DMCA is to harden the membrane surrounding the copyrightable work, that is, to make an impenetrable wall. However this metaphor really oversimplifies the relations the DMCA creates.

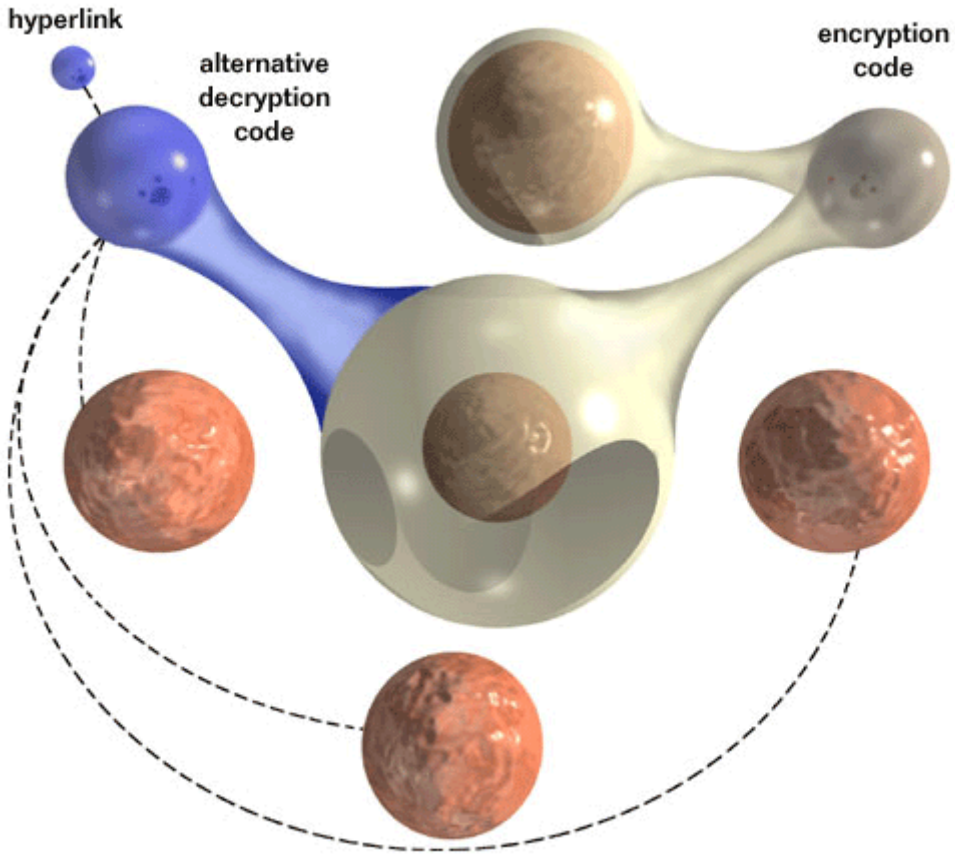

Figure 2: Copyright relationships post-DMCA
Illustration by L. Sharp

The work itself remains defined in copyright terms in the same manner as previously, and it is not that work's boundary that is changed by the DMCA. Rather under the DMCA the copyrightable work, once encrypted, is housed within a protective cocoon. It is the cocoon that does not allow for fair use in the ordinary sense [73], or other forms of dealings with the work, where decryption is required to enable access. "Defence" of the copyrightable work has led to the creation of an ancillary set of legal relations to do with the encryption process as a separate entity, unrelated to dealings with the encrypted content in the conventional infringing sense.

The owner's encryption code is actually protected functionally distinct from its relation with the copyrightable work. Through the new provisions, part of the owner's dominion now relates to controlling the ability *of anyone* to develop and disseminate code that is functionally equivalent to the owner's own decryption code, whether or not that decryption code infringes the owner's code in its expression, and regardless of the reason for the development or use of this "original" code. Thus the effect of the provisions is to create a monopoly that relates to the function of the owner's code [74]. This is radically at odds with copyright principles as historically established where, especially in relation to computer code, courts have strived to limit owner's rights to the expression and avoid monopolisation of the idea or function of the program. Under the DMCA encryption codes stand apart from any other code, because of their usefulness to owners.

Further in interpreting a hyperlink to decryption code as encapsulating a form of "trafficking", the owner's dominion now extends far beyond any form of dealing with the protected content or the copyright work that is the encryption code. The provision restrains broader communications about this form of useful code. It thus entails a prohibition with respect to an area of discourse where that involves technical specificity about encryption codes. In this context, it is unsurprising that on appeal the discussion focussed on First Amendment arguments.

The appeal was supported by eight *amicae* briefs. In support of this strategy there was also a rise in the circulation of academic arguments about software as a form of expressive speech or dialogue, in an attempt to disrupt the current legal approach that sees technology as a functional tool or instrument in the service of a particular interest to found more a more permissive attitude to technological development and communications [75].

However, the courts were reluctant to accept such academic arguments. Justice Kaplan denied that the DMCA should be read in the context of constitutional arguments about freedom of speech. He offered this stinging rebuke:

> "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" [76].

On appeal, Justice Newman showed a greater delicacy in disposing of the constitutional arguments about the First Amendment. His Honour stressed that the Court faced an unpalatable, inescapable choice:

> "This reality obliges courts considering First Amendment claims in the context of the pending case to choose between two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication" [77].

In the end, Justice Newman stressed that the issues of public policy were best left to be solved by legislative response. His Honour was reluctant to consider whether the injunction was inconsistent with the limitations of the First Amendment.

Neither Justices Kaplan and Newman took up the issue of the relation between §1201 and copyright law generally. The cultural considerations associated with copyright and assumed in its principles and logic, were only addressed in terms of a brief discussion of the relation between §107 and §1201, and then suspended. Justice Kaplan found:

> "The policy concerns raised by defendants were considered by Congress. Having considered them, Congress crafted a statute that, so far as the applicability of the fair use defense to Section 1201(a) claims is concerned, is crystal clear. In such circumstances, courts may not undo what Congress so plainly has done by "construing" the words of a statute to accomplish a result that Congress rejected ... " [78].

Justice Newman argued Congress had taken a "balanced approach" to fair use [79]. He also concluded "We need not explore the extent to which fair use might have constitutional protection ... such matters are far beyond the scope of this lawsuit" [80]. He found deficiencies in the defendant's claims and evidence justified his lack of

consideration of further issues.

Thus Congress has determined the national priority as generally favouring protection over access rights, despite conceding some limited exceptions. This is taken as dispensing with the "management" of the cultural agenda of copyright. There is no perceived need to relate the new section to the body of law within which it is situated. Reasoning techniques such as references to inadequate evidence being brought by the defendant, or references to the alleged problem not arising in this factual situation, or technical issues of matters being in footnotes of the *amicus* brief, are used to "manage" the inconsistency.

There is thus continuity in judicial approach to that outlined regarding the Napster case. The "national" concern for "piracy" provides the narrative and justification for the decision to the extent to which these are elaborated. There is really only an external justification for the new provisions enacted by Congress. However this politics materializes in a new internal rationalisation for copyright law. In the treatment of "owner's rights" coherent legal definition is substituted by reference to metaphor. The historical reality of copyright as a limited and interdependent right is cast out by reference to a newly reified version - the "walled" work. This metaphor suffices as the new inner logic of the law. Law can "get by" with this sketchy analysis, by drawing upon both the expectation and experience of legal reasoning acting in the service of capital, the "terror" of piracy erasing the possibility of a real competing claim.

The creative reinvention of the owner's domain creates a kind of monopoly in certain prized codes previously unknown to copyright and extends the owner's reach to activities far beyond direct or indirect dealings with protected content or distribution of infringing works. But scrutiny of the awkward fit of these new relations within the body of copyright law is averted by narrowing the judicial focus to particular technical matters, not requiring reference to the broader purposes, aims of principles of copyright law.

It can be argued that it is necessary to avoid this kind of legal inquiry in deference to the superior will of Congress. However even if that is so, that political reasoning will lose its relevance to the law with time. At that stage what will be referred to as the new jurisprudential grounding of these provisions? Will it mean copyright comes to have two conflicting paths - one set of legal relations defining non-encrypted content, and entirely different ones where encryption is involved? Judicial unwillingness to engage with the broader issues underlying the *2600* case could be explained in terms of judicial uncertainty about the future paths of the law. Who would want to claim authorship over a fractured body of law?

The Sony Hacker Challenge

That owners see their protected domain as including communications of a particular subject matter, and no longer in terms of works *per se,* can be seen from Ed Felten's case. Ed Felten took part in a Sony-sponsored hacker challenge, where a $US10,000 prize was on offer to anyone who could successfully document how to break the Secure Digital Music Initiative code (SDMI) [81]. Felten, Professor of Computing Science at Princeton University, succeeded, but he was not happy with the conditions of accepting the prize money, especially the confidentiality clause. As an academic he wished to discuss the code and his experience in breaking it. He proposed to give a paper on the subject at a conference. Under threat of legal action by the RIAA he elected not to give the paper, but sued the RIAA seeking a declaration that he was entitled to submit his paper to an academic conference without violating the anti-circumvention provisions of

the DMCA.

Unlike the *2600* case, here the affected party was a middle aged respectable academic seeking to participate in regular academic life in accordance with the established scientific practices of peer review and debate. It was argued that encryption experts and teachers needed to be free to discuss their skills and codes in order for better tools to be invented. Corporations are likely to sell "secure" packages but will never publicly disclose weaknesses. There is no reason to believe that the products will always perform as claimed in advertisements, or offer the best solution that is currently available. The public will end up being deceived and ignorantly trust insecure technologies in the absence of appropriate scientific review of such technologies.

The RIAA sought to have the action dismissed, arguing that it had no problem with Felten's paper. It had a strategic interest in stopping this action, because of the strong free speech concerns. Justice Garrett Brown of the District Court of New Jersey dismissed the action: "The plaintiffs liken themselves to modern Galileos persecuted by authorities. I fear that a more apt analogy would be to modern day Don Quixotes feeling threatened by windmills that they perceive as giants" [82]. His Honour stressed that the defendants should pursue their "political, rather than a legal concern" in the legislature [83].

Citing assurances from the government, the recording industry, and a federal court that the threats against his research team were ill-conceived and will not be repeated, Edward Felten and his research team decided not to appeal the November dismissal of their case by a New Jersey Federal Court [84]. The government stated in documents filed with the court in November 2001 that "scientists attempting to study access control technologies" are not subject to the DMCA [85]. The RIAA echoed this, stating "we felt Felten should publish his findings, because everyone benefits from research into the vulnerabilities of security mechanisms" [86]. Princeton Professor Ed Felten said, "Although we would have preferred an enforceable court ruling, our research team decided to take the government and industry at their word that they will never again threaten publishers of scientific research that exposes vulnerabilities in security systems for copyrighted works" [87].

§1201(g) permits encryption research aimed at identifying flaws in encryption technology if the research is conducted to advance the state of knowledge in the field. It is not yet clear whether those seeking to rely on the provision only have to fulfil a "genuine purpose" test, or whether the provision is also "status driven". Does research that "advance(s) the state of knowledge of the field" have to come from an acknowledged research institute? Felten, as a reputable researcher with established links with an elite educational institution had no problem passing either genuine purpose or status tests. It seems more doubtful that contributors to *2600,* where postings expose flaws in encryption, would be entitled to the same protection under §1201(g), because of the different social relations their communications enable [88]. If this is correct, then it seems the fair use exception establishes the majority as non-persons with regard to fair use, but privileges the few that limit their communications and activities to a "recognized" forum. You have to be a card-carrying member of the establishment, and confine your talk to those circles, if you want to break the code.

Taking heed of the advice of the courts, copyright users have pressed the Congress with their political concerns. Democrat Congressman Rick Boucher has proven to be sympathetic to the plight of Professor Felten [89]. He has called for a revision and rewriting of the DMCA. Boucher maintains that the defence of fair use should apply notwithstanding the technological measures provisions [90]. The Congressman also

believes that Congress should reaffirm the principles of fair use in other specific areas - such as parallel importation, musical sampling, space-shifting, and making back-up copies of copyrighted data. However such reforms have thus far been disregarded and disdained.

Part Three - Dmitry, the Con and the Constitution

In the wake of the DMCA, copyright owners have not been content to rest upon their laurels. Senior Democrat Congressman Fritz Hollings has introduced the *Consumer Broadband and Digital Television Promotion Act of 2002* into Congress [91]. Essentially, the bill would prohibit the sale or distribution of any technology unless it featured copy-protection standards set by the U.S. government [92]. Jack Valenti of the Motion Picture Association of America supports the Hollings Bill, calling it "a measure that will serve the long-term interests of consumers by calling upon the Information Technology, Consumer Electronics and Copyright industries to negotiate in good faith to find solutions to digital piracy" [93]. The bill seeks to force manufacturers to embed technological measures in software and consumer electronics. In other words, it is a renewal of the battle between Hollywood and Silicon Valley, as noted by Pamela Samuelson [94].

The Hollings Bill has been greeted with some scepticism. The Bush administration has been quiet about the plan [95]. Copyright users are slowly becoming roused. As Declan McCullagh observes: "America's programmers, engineers and sundry bit-heads have not yet figured out how much a new copyright bill will affect their livelihood. When they do, watch for an angry Million Geek March to storm Capital Hill" [96].

In the meantime, copyright owners have continued to rely upon the DMCA in concerted legal action. The pattern of litigation is not accidental. Copyright owners have been targeting hackers on purpose because they are pushing a wider public agenda about stopping piracy. Furthermore, they are confident that their opponents have limited scope to make arguments about freedom of speech. The long-term strategy is for copyright owners to win favourable interpretations of the DMCA, which they can later assert against more formidable opponents - such as the computer software and consumer electronics industries.

A recent decision denying a motion to dismiss the indictment of Elcom Ltd. [97], the Russian-based employer of computer programmer Dmitry Sklyarov, for offences against §1201, demonstrates continuity with the *2600* jurisprudence, and a refinement of that approach. Rather than acknowledge the creativity inherent in the provisions of the DMCA and the radical impact on existing jurisprudence, the court projects a facade of continuity with pre-DMCA law.

This legal action was initiated when Dmitry Sklyarov came to the U.S. to give a paper at "Defcon 9", an annual hacking convention. Sklyarov was author of the Advanced eBook Processor code (AEBPR), which was software that decrypted Adobe eBook files, turning them into standard PDF format files, free of eBook licence restrictions. Whilst the AEBPR software was legal in Russia, it could be purchased online and thereby was available to consumers in the United States. Sklyarov speech was about the poor security utilised in protecting electronic books and documents. He was arrested in the United States and has the dubious honour of being the first person indicted under the

trafficking provisions of §1201. Later Sklyarov was released from custody and allowed to return to Russia in exchange for testimony in proceedings against Elcom Ltd. The lawsuit is continuing with Elcom Ltd as the main defendant.

The constitutional challenge to the indictment highlighted concerns about the effect of the trafficking provision §1201(b) on fair use. The ban with respect to circumvention tools went too far, it was argued, because the section prevented any access to circumvention devices making it impossible to exercise traditional fair use rights. Fair uses are being treated by the legislation as if they were all infringing uses. It was argued that the provision was bad because it was unconstitutionally vague, constituted a content-based restriction on speech not sufficiently tailored to serve a compelling government interest, and that Congress exceeded constitutional power in enacting the DMCA [98].

In rejected these complaints Justice Whyte argued that §1201(b) deliberately targeted trafficking, and not the use of circumvention tools *per se,* and this was a concession to protect fair use rights:

> "Congress did not prohibit the act of circumvention because it sought to preserve the fair use rights of person who had lawfully acquired a work" [99].

He acknowledged that "engaging in certain fair uses of digital works may be made more difficult if tools to circumvent use restrictions cannot be readily obtained" [100]. However he argued the provision was not vague in relation to what tools were banned.

Justice Whyte recognised computer code as speech under the First Amendment, but found that §1201(b) did not target speech. It targeted devices: "Congress sought to ban the code not because of what the code says, but rather because of what the code does" [101]. He rejected the notion that it was impossible to regulate the functional aspects of the code without regulating the expressive (constitutionally protected) content of the code because:

> "Divorcing the function from the message, however, is precisely what the courts have done in other contexts, for example, in determining what portions of code are protectable by copyright and what uses of that same code are permitted as fair uses" [102].

The test of constitutionality was not "strict", because the code had both functional and expressive components, and the restrictions promoted a substantial government interest. It was a legitimate governmental interest to protect the "thriving electronic marketplace" from "the plague of digital piracy" [103].

That the provisions did not burden speech more than is necessary was evident from the existence of the statutory exceptions. Further broader fair uses than those contained in the exceptions remained, because fair use itself was not banned, only devices that might enable it:

> "Nothing prevents anyone from quoting from a work or comparing texts for purpose of study or criticism. It may be that from a technological perspective, the fair user m(a)y find it more difficult to do so - quoting may have to occur the old fashioned way, by hand or by re-typing, rather than by "cutting and pasting" from existing digital media. Nevertheless, the fair use is still available. Defendant has cited no authority which guarantees a fair

> user the right to the most technologically convenient way to engage in fair use" [104].

Further public domain works are not affected by the DMCA even though, via encryption, rights to control a digital copy of such an unprotected work might arise. Public domain works, copyrighted works and fair use all exist with the same legal status as previously.

This characterisation is a con. Whilst legal relations continue as previously when rights and categories are viewed abstractly and independently, the DMCA disrupts the interrelationships copyright has traditionally maintained. That on paper the old categories of exclusive rights (§106) and fair use (§107) still exist with the same legal definition does not mean that they are the "same" rights, when viewed in the context of the interrelation between legal categories. Via the protection §1201 confers, §106 rights are enhanced, because §107 rights cannot be meaningfully exercised without access to the locks that stand between works and prospective users.

It is possible to recreate a digital quotation of a literary work, but it is not so obvious how one is to reproduce more digitally sophisticated forms of expression such as artistic works, sound recordings or films. Fair use did not traditionally require "re-creation" of an original effort, although this process was certainly permitted. Fair use permitted duplication of certain portions for appropriate purposes. Duplication is now denied, regardless of the amount taken or reason for the taking, unless the user falls within one of the "special status" exceptions. Thus the problem for ordinary fair users, especially in relation to works other than literary works, is much greater than one of the DMCA creating mere technological inconvenience making the exercise of their fair use rights "more difficult".

It is a further ruse to deflect criticism of the concern for burdening the expressive content of code by reference to the copyright practice of "divorcing the function from the message". It is true that copyright law has established a distinction between the (unprotected) function of the code and the (copyrightable) expression. However as discussed above, the code in issue here - encryption code - was explicitly excluded from these kinds of relations. The point of §1201 was to catch functional code, but not for the usual copyright case of keeping access to function free of copyright. Thus whether jurisprudence about not protecting functional code provides any guidance in identifying and protecting "expressive code" is highly questionable. The existing jurisprudence simply does not illustrate how expressive code remains free under §1201(b).

So far, even when responding to constitutional arguments, the courts have elided discussion of the politics of digital copyright law, except through referral to Congress. The creative invention of new relations of "protection", out of step with the existing jurisprudence, has been largely denied. The courts have consistently rejected the notion that there are any significant "internal" housekeeping matters to consider, and close the possibility of reconciling the old law with the new provisions.

In the cases discussed it is widely anticipated that the "thriving electronic marketplace" will blossom due to the thoughtfulness of Congress and the usefulness of the DMCA provisions. Perhaps the fancy (or fantasy) is of suspending any practical discussion of status of the old rights and hiding the incoherency the DMCA has produced, in expectation that hard copies and unencrypted versions will soon be replaced by certified, secure, protected copies [105]. Then a new copyright logic can emerge and supplant the older, "lesser" rights and confounding limitations on the owner's dominion.

In face of the current judicial intransigence, a move towards constitutional arguments to defeat the politics of the court, such as the assertion of fair use as a constitutional right, is understandable. However to date, so far as the DMCA provisions are concerned, the courts have also ignored the essence of that challenge.

It is worth noting that the courts have been happier to engage the emerging constitutional jurisprudence in relation to "cultural" arguments [106]. It could be argued that, in spite of the much vaunted ideal of technological neutrality, the courts are discriminating between different forms of media. Judges are relatively comfortable in considering matters of freedom of speech in the context of the act of publishing recognised literary works. However, they display a much greater degree of hesitancy in applying constitutional notions of freedom of speech to exclusively digital media and modes of distribution - reflecting deep seated doubts as to whether computer code is equivalent to "literary" expression.

There may be something to "owner" calculation of the weaknesses of the free speech defences. In touting free speech as a superior body of law to the DMCA, and in developing the notion of free speech as an interior cultural motivation underpinning copyright, an analysis of the status of more conventional copyright principles seem to have fallen by the wayside. Incontestable copyright concerns such as for the idea/expression dichotomy, substantial part, limited terms and fair use, can, of course, be related to a free speech story. However they need not be. The apparent removal of these from current jurisprudence requires judicial account. Academic lawyers should be mindful of this conventional jurisprudential detail, and not allow it to be lost in the intellectual excitement of leading "emerging" jurisprudence, in a highly charged litigation context. Resistance to the new copyright *status quo* is particularly difficult, given law's deference to the service of capital. An overemphasis on "free speech", where there are doubts about the character of the "speech", pitches a weak notion of "culture" against a strong, established but "vulnerable" notion of economy. Law can step in, in the service of the economy, to prevent "oppressive" and "unproductive" economic activity, but here "culture" runs interference in identifying the source of real economic oppression.

Part Four - Some Questions about Law, Politics, and the Politics Of Law

To date the authoritative story of peer to peer and the DMCA has shown:

- reliance on legal authority vested in a singular perspective of the issues (the Napster experience);
- refusal to engage with the implications of digital protection, outside of a one-sided preoccupation with the "culture" of "piracy" (The *2600* case); and,
- a misleading assertion of jurisprudential continuity under the DMCA (Elcom Ltd).

Challenging this politics requires exposure of the law's mismanagement of cultural diversity and technological change. But in working towards this goal and the dislodging of the "new" legal *status quo,* it would be helpful not to repeat the same mistake of "ripping, mixing and burning" the jurisprudence.

The "continuity" and "coherence" needs of copyright law can be approached in the spirit of keeping the same questions alive, rather than pretending to invoke the authority of past answers. Answers for these times can be tested in light of their implications for diverse cultures. This differs from U.S. Congressional politics, in that there is a guardianship role for lawyers, committed to understanding past legal wisdom and not abandoning this wisdom too lightly, hearing all sides of the debate. That views on what is wise, and what is surplus, to law will differ is to be expected, and not feared, as currently, as a source of failure for law. The best that can ever be expected of law is an honest and reasoned engagement with what was, and what is, at stake.

At present, some of the better academic literature seems to pursue this kind of legal politics. Further the "end game" behind the current constitutional challenges to copyright law could be read in terms of a desire for a more open jurisprudence than is currently experienced. However when the arguments are readied for court, at face value they are more commonly expressed in terms of a closed and flattened jurisprudence. Perhaps this is because it is the language that the court system craves. However if this is the case, academic focus needs to move far beyond a questioning the politics of the U.S. Congress, peer to peer and the DMCA, and more firmly direct critical attention to the chosen jurisprudence of the courts. 

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4. John Perry Barlow, 2000. "The Next Economy Of Ideas: Will Copyright Survive The Napster Bomb?" *Wired,* volume 8, number 10 (October), p. 240.

5. See Part 1.

6. *Digital Millennium Copyright Act* 1998, s1201 (U.S.). See also *Copyright Treaty* 1996, Art. 11 (WIPO); Copyright Act 1968, s 116a, (Aust.); *Copyright Act* 1994, s 226 (2)(a) (N.Z.); *Copyright, Design And Patents Act* 1988, s 297A, (U.K.).

7. See Part 2 below.

8. See Part 3 below.

9. Above note 2.

10. *Ibid.* at 9.

11. *Ibid.* at 11.

12. *Ibid.* at 10.

13. *Ibid.* at 11.

14. See Litman, above note 1; Lessig, above note 2; Oram, above note 3, Pamela Saumelson, 2001. "Anti-Circumvention Rules Threaten Science," *Science,* volume 293 (14 September), p. 2028; Pamela Samuelson and Randall Davis, 2000. "The Digital Dilemma: A Perspective on Intellectual Property in the Information Age" at http://www.sims.berkeley.edu/~pam/papers.html.

15. As discussed by Pamela Samuelson, 2000. "Economic And Constitutional Influences On Copyright Law In The United States," In: Chris Marsden (editor). *Regulating The Global Information Society.* New York: Routledge; also at http://www.sims.berkeley.edu/~pam/papers/Sweet&Maxwell_1.htm.

16. See, for example, Litman, above note 1 at 15.

17. See Lessig, note 2 at pp. 105-110; 197ff. and especially at 199: "The freedom to build upon and create new works is increasingly, and almost perpetually, restricted under existing law. To a degree unimaginable by the Framers of our Constitution that law has been concentrated in the hands of the holders of copyrights - increasingly, large media companies."

18. Litman above note 1 at 17.

19. For a discussion of this and the connections with the culture of writing see Robert A. Ferguson, 1997. "Finding the Revolution," In: *The American Enlightenment, 1750-1820.* Cambridge, Mass.: Harvard University Press.

20. Samuelson above note 14.

21. See Litman, "The Art of Making Copyright Laws" above note 1 at pp. 22-34.

22. Maureen Cain, 1994. "The Symbol Traders," In: M. Cain and C. Harrington (editors). *Lawyers in a Postmodern World: Translation and Transgression.* Buckingham: Open University Press, p. 33; emphasis in original.

23. *Ibid.*

24. *Ibid.* at 39.

25. It should be noted that copyright experts habitually represent large media owners, and the old economy allegiances with the U.S. Congress and other legislative bodies are historical, whilst user representatives are usually members of powerful user institutions like universities, and new economy allegiances are embyronic.

26. C. Shirky, "What is P2P and What Isn't," O'Reilly Network at http://www.openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html.

27. Damien Riehl, 2001. "Peer to Peer Distribution Systems: Will Napster, Gnutella and Freenet create a Nirvana or Gehenna?" *William Mitchell Law Review,* volume 27, p. 1761.

28. C. Shirky, "Smuggled in Under Cover of Darkness," O'Reilly Network at http://www.openp2p.com/pub/a/p2p/2001/02/14/clay_darkness.html.

29. D. Sims, "Lessig: Fight for Your Right to Innovate," O'Reilly Network at http://www.openp2p.com/pub/a/p2p/2001/02/16/lessig.html.

30. *A&M Records Inc and others v Napster Inc and Does 1-100,* Case No 99-5183-MHP, Complaint for Contributory and Vicarious Copyright Infringement, Violations of California Civil Code Section 980(a)(2), and Unfair Competition. (N.D. Cal. 2000) at #1, p. 2; our italics.

31. *Ibid.,* at #30 p. 8.

32. The emotive use of terms such as "piracy" to describe activities that may well be legitimate under copyright law has been discussed elsewhere. See Litman, above note 1 at 85.

33. *A&M Records Inc v Napster Inc,* 114 F. Supp. 2d 896 2000 U.S. Dist. LEXIS 11862 (N.D. Cal. 2000).

34. *A&M Records Inc and others v Napster Inc and Does 1-100,* above note 30 at # 30 p. 7.

35. *A&M Records Inc v Napster Inc,* above note 33 at 908.

36. *Ibid.*

37. *Ibid.* at 903.

38. *Ibid.* at 913.

39. 17 U.S.C. §107.

40. *A&M Records Inc v Napster Inc,* above note 33 at 914.

41. *Ibid.* at 919.

42. *Ibid.* at 903.

43. *Ibid.* at 923.

44. John Heilemann, 2000. "David Boies: The Wired Interview," *Wired,* volume 8, number 10 (October), p. 253, and at http://www.wired.com/wired/archive/8.10/boies.html.

45. *Ibid.* at 259.

46. *Ibid.* at 256.

47. *Ibid.* at 257.

48. Amended Brief Amicus Curiae of Copyright Law Professors in Support of Reversal. Appeal Nos.00-16401 and 00-16403 United States Court of Appeals, Ninth Circuit. *Napster Inc v A&M Records,* at 2.

49. *Ibid.* at 8.

50. *Sony Corporation Of America v University City Studios Inc.* (1984) 78 L Ed 2d 574.

51. *A&M Records Inc v Napster Inc,* 239 F.3d 1004; 2001 U.S. App. LEXIS 5446 (9th Cir. 2001) at 1013.

52. *Ibid.* at 1021.

53. *Ibid.* at 1027.

54. See for example, *In Re Napster, Inc. Copyright Litigation* 2002 U.S. Dist. LEXIS 2963. (N.D. Cal. 2002).

55. *Ibid.* at 1027.

56. *Ibid.* at 1028.

57. Greg Milner, 2000. "Anarchy from the U.K.," *Spin* (September), p. 165.

58. J. Borland, 2002. "CNET sits down with Sharman Networks' CEO: The Brains behind Kazaa," *Gnutella News* (23 April), at http://www.gnutellanews.com/article/4751.

59. See "RIAA: What We're Doing" at http://www.riaa.org/Protect-Campaign-5.cfm.

60. Litman, above note 1 at 195.

61. §1201(a)(1).

62. §1201(a)(2), (b)(1).

63. Pamela Samuelson, 1999. "Intellectual Property and the Digital Economy: Why the Anti Circumvention Regulations Need to be Revised," *Berkeley Technology Law Journal,* volume 14, p. 519 at 523.

64. *Ibid.*

65. *Ibid.* at 533.

66. Jack Valenti (President and CEO Motion Picture Association of America), 1998. "Valenti Calls for End to "INVASION OF COPYRIGHT SNATCHERS"," (16 July), at http://www.mpaa.org/jack/.

67. *Universal City Studios v Reimerdes,* 111 F. Supp. 2d 294, 2000 U.S. Dist. LEXIS 11949 (S.D.N.Y. 2000). *Universal City Studios v Corley,* 273 F.3d 429;2001 U.S.App.LEXIS 25330.

68. http://www.2600.com/.

69. Amanda Chandler, 1996. "The Changing Definition and Image of Hackers in Popular Discourse," *International Journal Of The Sociology Of Law,* volume 24, pp. 229-251.

70. *Universal City Studios v Reimerdes,* above note 67.

71. *Universal City Studios v Corley,* above note 67.

72. *Ibid.* at 443.

73. There are statutory exceptions, including reverse engineering, security testing, good faith encryption research, and certain uses by nonprofit libraries, archives and educational institutions. §1201(d), (f), (g), (j).

74. This is discussed by Justice Kaplan in *Universal City Studios v Reimerdes,* 111 F. Supp. 2d 294 at 318.

75. For example see Brian Fitzgerald, 2001. "Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity," *European Intellectual Property Review,* volume 23, number 3, p. 121 and, Brian Fitzgerald, 2000. "Software as Discourse: The Power of Intellectual Property in Digital Architecture," *Cardozo Arts & Entertainment Law Journal,* volume 18, p. 201.

76. *Universal City Studios v Reimerdes,* above note 67 at 305.

77. *Universal City Studios v Corley,* above note 67 at 457-8.

78. *Universal City Studios v Reimerdes,* above note 67 at 324.

79. *Universal City Studios v Corley,* above note 67 at 443n13.

80. *Ibid.* at 458-9.

81. See the archives on the Electronic Frontier Foundation Web site at http://www.eff.org/IP/DMCA/US_v_Elcomsoft/.

82. *Felten and others v RIAA* (unreported, United States District Court of New Jersey, 28 November 2001), at http://www.eff.org/IP/DMCA/Felten_v_RIAA/20011128_hearing_transcript.html.

83. *Ibid.*

84. EFF, 2002. "Security Researchers Drop Scientific Censorship Case Government, Industry Claim DMCA Not a Threat to Science" (6 February), at http://www.eff.org/Cases/Felten_v_RIAA/20020206_eff_felten_pr.html.

85. *Ibid.*

86. *Ibid.*

87. *Ibid.*

88. The other exceptions also seem to be "status" driven, eg. fair use by officials employed by libraries, educational establishments etc. In line with this, the reverse engineering exception presumably involves employ by a known and reputable proprietary software producer.

89. Congressman Rick Boucher, 2002. "Congressman Boucher's New American Foundation Speech On Fair Use Rights," (10 May), at http://www.house.gov/boucher/internet.htm.

90. Congressman Rick Boucher, 2001. "Congressman Rick Boucher Urges Reaffirmation Of Fair Use Rights," (25 July), at http://www.house.gov/boucher/docs/fairuse.htm.

91. Senator Ernest Hollings, 2002. "Statement on the Introduction of The Consumer Broadband And Digital Television Act of 2002," (21 March), at http://www.senate.gov/~hollings/press/2002613820.html.

92. D. McCullagh, 2002. "What Hollings' Bill Would Do," *Wired News* (22 March); and, Catherine Olanich Raymond, 2002. "The Consumer Broadband And Digital Television Promotion Act - A Closer Look," *Linux and Main,* at http://linuxandmain.com/essay/craymond.html.

93. Jack Valenti, 2002. "Statement By Jack Valenti On S. 2048," (21 March).

94. See Samuelson, above note 14.

95. D. McCullagh, 2002. "White House Cool To Hollings' Act," *Wired News* (27 April).

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97. *United States of America v Elcom Ltd and Dmitry Sklyarov* 2002 U.S. Dist. LEXIS 9161; 62 U.S.P.Q.2D (BNA) 1736.

98. *Ibid.* at 14-15.

99. *Ibid.* at 10.

100. *Ibid.* at 25.

101. *Ibid.* at 35.

102. *Ibid.* at 36.

103. *Ibid.* at 37.

104. *Ibid.* at 44.

105. *Security Systems Standards And Certification Act of 2001;* see also *Consumer Broadband and Digital Television Promotion Act of 2002.*

106. See *Eldred v Reno* (2001) 239 Fd. 3d 372; 2001 US App Lexis 2335; *Eldred v Ashcroft* (2001) 255 F.3d 849; and, *Suntrust Bank, as Trustee of the Stephens Mitchell trusts v Houghton Mifflin Company* (2001) 268 F 3d 1257; US Appeal Lexis 21690.

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Contents Index

Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law by Kathy Bowrey and Matthew Rimmer
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