The Promise of a Post-Copyright World

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There is one group of people not shocked by the record industry's policy of suing randomly chosen file sharers: historians of copyright. They already know what everyone else is slowly finding out: that copyright was never about paying artists for their work, and that far from being designed to support creators, copyright was designed by and for *distributors* — that is, publishers, which today includes record companies. But now that the Internet has given us a world without distribution costs, it no longer makes any sense to restrict sharing in order to pay for centralized distribution. Abandoning copyright is now not only possible, but desirable. Both artists and audiences would benefit, financially and aesthetically. In place of corporate gatekeepers determining what can and can't be distributed, a much finer-grained filtering process would allow works to spread based on their merit alone. We would see a return to an older and richer cosmology of creativity, one in which copying and borrowing openly from others' works is simply a normal part of the creative process, a way of acknowledging one's sources and of improving on what has come before. And the old canard that artists need copyright to earn a living would be revealed as the pretense it has always been.

None of this will happen, however, if the industry has its way. For three centuries, the publishing industry has been working very hard to obscure copyright's true origins, and to promote the myth that it was invented by writers and artists. Even today, they continue to campaign for ever stronger laws against sharing, for international treaties that compel all nations to conform to the copyright policies of the strictest, and most of all to make sure the public never asks exactly who this system is meant to help.

The reward for these efforts can be seen in the public's reaction to the file-sharing lawsuits. While most people agree that this time the industry went too far, the error is mainly treated as one of degree — as if the record companies had a valid point, but had merely resorted to excessive force in making it.

To read the true history of copyright is to understand just how completely this reaction plays into the industry's hands. The record companies don't really care whether they win or lose these lawsuits. In the long run, they don't even expect to eliminate file sharing. What they're fighting for is much bigger. They're fighting to maintain a state of mind, an attitude toward creative work that says someone ought to *own* products of the mind, and control who can copy them. And by positioning the issue as a contest between the Beleaguered Artist, who supposedly needs copyright to pay the rent, and The Unthinking Masses, who would rather copy a song or a story off the Internet than pay a fair price, the industry has been astonishingly successful. They have managed to substitute the loaded terms "piracy" and "theft" for the more accurate "copying" — as if there were no difference between stealing your bicycle (now you have no bicycle) and copying your song (now we both have it). Most importantly, industry propaganda has made it a commonplace belief that copyright is how most creators earn a living — that without copyright, the engines of intellectual production would grind to a halt, and artists would have neither means nor motivation to produce new works.

Yet a close look at history shows that copyright has never been a major factor in allowing creativity to flourish. Copyright is an outgrowth of the privatization of government censorship in sixteenth-century England. There was no uprising of authors suddenly demanding the right to prevent other people from copying their works; far from viewing copying as theft, authors generally regarded it as flattery. The bulk of creative work has always depended, then and now, on a diversity of funding sources: commissions, teaching jobs, grants or stipends, patronage, etc. The introduction of copyright did not change this situation. What it did was allow a particular business model — mass pressings with centralized distribution — to make a few lucky works available to a wider audience, at considerable profit to the distributors.

The arrival of the Internet, with its instantaneous, costless sharing, has made that business model obsolete — not just obsolete, but an obstacle to the very benefits copyright was alleged to bring society in the first place. Prohibiting people from freely sharing information serves no one's interests but the publishers'. Although the industry would like us to believe that prohibiting sharing is somehow related to enabling artists to make a living, their claim does not stand up to even mild scrutiny. For the vast majority of artists, copyright brings no economic benefits. True, there are a few stars — some quite talented — whose works are backed by the industry; these receive the lion's share of distribution investment, and generate a correspondingly greater profit, which is shared with the artist on better than usual terms because the artist's negotiating position is stronger. Not coincidentally, these stars are who the industry always holds up as examples of the benefits of copyright.

But to treat this small group as representative would be to confuse marketing with reality. Most artists' lives look nothing like theirs, and never will, under the current spoils system. That is why the stereotype of the impoverished artist remains alive and well after three hundred years.

The publishing industry's campaign to preserve copyright is waged out of pure self-interest, but it forces on us a clear choice. We can watch as most of our cultural heritage is stuffed into a vending machine and sold back to us dollar by dollar — or we can reexamine the copyright myth and find an alternative.

The first copyright law was a censorship law. It had nothing to do with protecting the rights of authors, or encouraging them to produce new works. Authors' rights were in no danger in sixteenth-century England, and the recent arrival of the printing press (the world's first copying machine) was if anything energizing to writers. So energizing, in fact, that the English government grew concerned about too *many* works being produced, not too few. The new technology was making seditious reading material widely available for the first time, and the government urgently needed to control the flood of printed matter, censorship being as legitimate an administrative function then as building roads.

The method the government chose was to establish a guild of private-sector censors, the London Company of Stationers, whose profits would depend on how well they performed their function. The Stationers were granted a royal monopoly over all printing in England, old works as well as new, in return for keeping a strict eye on what was printed. Their charter gave them not only exclusive right to print, but also the right to search out and confiscate unauthorized presses and books, and even to burn illegally printed books. No book could be printed until it was entered in the company's Register, and no work could be added to the Register until it had passed the crown's censor, or had been self-censored by the Stationers. The Company of Stationers became, in effect, the government's private, for-profit information police force [1].

The system was quite openly designed to serve booksellers and the government, not authors. New books were entered in the Company's Register under a Company member's name, not the author's name. By convention, the member who registered the entry held the "copyright", the exclusive right to publish that book, over other members of the Company, and the Company's Court of Assistants resolved infringement disputes [2].

This was not simply the latest manifestation of some pre-existing form of copyright. It's not as though authors had formerly had copyrights, which were now to be taken away and given to the Stationers. The Stationers' right was a *new* right, though one based on a long tradition of granting monopolies to guilds as a means of control. Before this moment, copyright — that is, a privately held, generic right to prevent others from copying — did not exist. People routinely printed works they admired when they had the chance, an activity which is responsible for the survival of many of those works to the present day. One could, of course, be enjoined from distributing a specific document because of its potentially libelous effect, or because it was a private communication, or because the government considered it dangerous and seditious. But these reasons are about public safety or damage to reputation, not about property ownership. There had also been, in some cases, special privileges (then called "patents") allowing exclusive printing of certain types of books. But until the Company of Stationers, there had not been a blanket injunction against printing in general, nor a conception of copyright as a legal property that could be owned by a private party.

For about a century and a third, this partnership worked well for the government and for the Stationers. The Stationers profited from their monopoly, and through the Stationers, the government exercised control over the spread of information. Around the end of the seventeenth century, however, owing to larger political changes, the government relaxed its censorship policies, and allowed the Stationers' monopoly to expire. This meant that printing would return to its former anarchical state, and was of course a direct economic threat to the members of the Company of Stationers, accustomed as they were to having exclusive license to manufacture books. Dissolution of the monopoly might have been

good news for long-suppressed authors and independent printers, but it spelled disaster for the Stationers, and they quickly crafted a strategy to retain their position in the newly liberal political climate.

The Stationers based their strategy on a crucial realization, one that has stayed with publishing conglomerates ever since: authors do not have the means to distribute their own works. Writing a book requires only pen, paper, and time. But distributing a book requires printing presses, transportation networks, and an up-front investment in materials and typesetting. Thus, the Stationers reasoned, people who write would always need a publisher's cooperation to make their work generally available. Their strategy used this fact to maximum advantage. They went before Parliament and offered the then-novel argument that authors had a natural and inherent right of ownership in what they wrote, and that furthermore, such ownership could be transferred to other parties by contract, like any other form of property.

Their argument succeeded in persuading Parliament. The Stationers had managed to avoid the odium of censorship, as the new copyrights would originate with the author, but they knew that authors would have little choice but to sign those rights back over to a publisher for distribution. There was some judicial and political wrangling over the details, but in the end both halves of the Stationers' argument survived essentially intact, and became part of English statutory law. The first recognizably modern copyright, the Statute of Anne, was passed in 1710.

The Statute of Anne is often held up by champions of copyright as the moment when authors were finally given the protection they had long deserved. Even today, it continues to be referenced both in legal arguments and in press releases from the publishing industry. But to interpret it as an authors' victory flies in the face of both common sense and historical fact [3]. Authors, having never had copyright, saw no reason now to suddenly demand the rather paradoxical power to prevent the spread of their own works, and did not do so. The only people threatened by the dissolution of the Stationers' monopoly were the Stationers themselves, and the Statute of Anne was the direct result of their lobbying and campaigning. In the memorable words of the contemporary Lord Camden, the Stationers "...came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a statutory security." [4] To make their argument more palatable, they had proposed that copyright would originate with the author, as a form of property that could be sold to anyone — anticipating, correctly, that it would most often be sold to a printer.

This proposal was a shrewd tactical move, because one of Parliament's concerns was to prevent the re-establishment of a centralized monopoly in the book trade, with its attendant potential for a renewal of censorship by the crown. Benjamin Kaplan, professor of law emeritus at Harvard University and a respected copyright scholar, describes the Stationers position succinctly:

> ....The stationers made the case that they could not produce the fragile commodities called books, and thus encourage learned men to write them, without protection against piracy... There is an apparent tracing of rights to an ultimate source in the fact of authorship, but before attaching large importance to this we have to note that if printing as a trade was not to be put back into the hands of a few as subject of monopoly — if the

> statute was indeed to be a kind of "universal patent" — a [legal] draftsman would naturally be led to express himself in terms of rights in books and hence to initial rights in authors. A draftsman would anyway be aware that rights would usually pass immediately to publishers by assignment, that is, by purchase of the manuscripts as in the past. ... I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the statute.[5]

The Statute of Anne, taken in historical context, is the smoking gun of copyright law. In it we can see the entire apparatus of modern copyright, but in still-undisguised form. There is the notion of copyright as property, yet the property is really intended for publishers, not authors. There is the notion of benefiting society, by encouraging people to write books, but no evidence was offered to show that they would not write books without copyright. Rather, the Stationers' argument was that publishers could not afford to *print* books without protection from competition, and that without the prospect of distribution, authors would produce fewer new works. Nor was this entirely disingenuous; indeed, had it been totally implausible, the courts and parliament would not have been so amenable. The publishers were now effectively forced to pay authors in return for exclusive printing rights (although in fact the Stationers had sometimes payed authors even before, simply to guarantee the completion and delivery of a work). The authors who succeeded in selling this new right to printers had no particular motivation to complain — and naturally, we don't hear very much about the authors not so favored. The consolidation of author's copyright probably did contribute to the decline of patronage as a source of income for writers [6], and even allowed some authors, though always a small minority, to support themselves solely from the royalties their publishers shared with them.

But the overall historical record is clear: copyright was designed by distributors, to subsidize distributors not creators.

This is the secret that today's copyright lobby never dares say aloud, for once it is admitted, the true purpose of subsequent copyright legislation becomes embarrassingly clear. The Statute of Anne was just the beginning. Having granted the premise that copyrights should exist at all, the English government found themselves under pressure to extend copyright terms further and further. In the long legal saga that ensued, what's important is not the particular sequence of laws and verdicts, but the identity of the plaintiffs: they were just the sort of stable, settled business interest capable of sustaining litigation and lobbying over a period of decades — that is, they were publishers, not authors. They had proposed the author's copyright out of economic interest, and only after the crutch of a censorship-based monopoly had been taken away from them. When it became clear that the tactic worked, they lobbied to strengthen copyright.

And this is still the pattern today. Whenever the U.S. Congress extends copyright terms or powers, it is the result of pressure from the publishing industry. The lobbyists will sometimes trot out a superstar author or musician as an exhibit, a human face for what is essentially an industry effort, but it's always quite clear what's really going on. All you have to do is look at who's paying the lawyer's and lobbyists' bills, and whose names appear in the court dockets — publishers'.

The industry's centuries-long campaign for strong copyright law is not merely a reflexive land grab, however. It's a natural economic response to technological circumstances. The effect of the printing press, and later of analog sound recording technology, was to make creative works inseparable from their means of distribution. Authors needed publishers the way electricity needs wires. The only economically viable method of reaching readers (or listeners) was the bulk print run: to manufacture thousands of identical copies at once, then physically ship them to various points of distribution. Before agreeing to such an investment, any publisher would naturally prefer to buy or lease the copyright from the author, and just as naturally would lobby the government for the strongest possible copyright powers, the better to protect their investment.

There is nothing inherently exploitative about this; it's just straightforward economics. From a business point of view, a print run is a daunting and risky project. It involves the high up-front costs of a physical medium (be it dead tree pulp, magnetic tape, vinyl platters, or pitted optical discs), plus complicated, expensive machinery to imprint the content onto the medium. There's also the unseen investment of vetting the master copy: because a flawed master can reduce the value of the entire run, publishers and authors go to considerable trouble to generate a polished, error-free version of the work before printing. There is little room for an incremental or evolutionary process here; the work must be brought to near-perfection before the public ever sees it. If any mistakes are overlooked, they will have to be tolerated in the finished product, at least until the process is started again for the next print run. The publisher must also negotiate prices and line up distribution paths, which is not only a matter of bookkeeping, but of physical expenses, of trucks and trains and shipping containers. Finally, as if all this weren't enough, the publisher is compelled to spend even more money on marketing and publicity, to have a better chance of at least recovering all these outlays.

When one realizes that all this must happen before the work has generated a penny of revenue, it is little wonder that publishers argue hard for copyright. The publisher's initial investment — that is, their risk — in any individual work is greater, in economic terms, than the author's. Authors by themselves might have no inherent desire to control copying, but publishers do. And in a world filled with publishers' royalty-supported marketing departments, authors, of course, need publishers all the more. The concentration of distribution revenues results, inevitably, in the familiar logic of an arms race.

The arrival of the Internet fundamentally changed this equation. It has become cliché to say that the Internet is as revolutionary a development as the printing press, and it is. But it is revolutionary in a different way. The printing press may have made it possible to turn one book into a thousand books, but those books still had to travel from the press into the hands of readers. Physical books were not only the medium in which the content was consumed, they were also the medium in which it was transported to the consumer. Thus, a publisher's total expense was proportional to the number of copies distributed. In such a situation, it is reasonable to ask that each user bear a portion of the costs of distribution. Each user is, after all, more or less responsible for her particular quantum of expense. If the book (or record) is in her hands, it must have gotten there somehow, which in turn means someone spent money to get it there. Divide those expenses by the number of copies, add in some amount for profit, and you arrive, roughly speaking, at the book's price.

But today, the medium over which content is distributed can be unrelated to the medium in which it is ultimately consumed. The data can be sent over a wire, at essentially no cost, and the user can print up a copy at their own expense, and at whatever quality they can afford, on the other end [7]. Thus the practice of charging the same fee for each copy, regardless of how many copies there are, makes little sense, since the cost of producing *and distributing* the work is now essentially fixed, no longer proportional to the number of copies. From society's point of view, every dollar spent beyond the amount needed (if any) to bring the work into existence in the first place is a waste, an impediment to the work's ability to spread on its own merits.

The Internet did something the Company of Stationers never anticipated: it made their argument a testable hypothesis. Would creators still create, without centralized publishers to distribute their works? Even minimal exposure to the Internet is enough to provide the answer: of course they will. They already are. Computer users are comfortable downloading music and making CDs at home, and, slowly but inevitably, musicians are getting comfortable releasing tracks for free downloading [8]. Many short works of both fiction and non-fiction are already available online. Printing and binding entire books on demand is rarer, but only because the equipment to do it is still somewhat expensive. That equipment is getting steadily cheaper, however, and it's only a matter of time before the copy shop down the street has it. There is no fundamental difference between music and text, from a distribution point of view. As printing and binding technology gets cheaper, authors will see more and more clearly that they have the same alternative musicians do, and the result will be the same: more and more material available without restriction, by the choice of the author.

Some might argue that authors are different, that they are more dependent on copyright than musicians. After all, a musician expects to perform, and can therefore gain indirectly by releasing recordings for free — greater exposure leads to more performances. But authors don't perform; they reach their audience only through their works, not in person. If they now had to come up with ways to fund themselves without imposing an artificial scarcity on their works, could they do it?
Imagine the simplest scenario: you walk into the neighborhood print shop and tell the clerk the Web address of the book you want. A couple of minutes later, the clerk comes back with a freshly printed, hardbound book, straight off the Internet. He rings up the sale.

"That'll be eight dollars. Would you like to add the one dollar author's suggested donation?"

Do you say yes? Perhaps you do, perhaps not — but note that when museums charge a voluntary admission fee, people often pay it. The same sort of dynamic is at work in the copy shop. Most people are happy to pay a tiny extra bit on top of some larger amount, if they have their wallet out already and think it's for a good reason. When people fail to make small, voluntary donations to a cause they like, it's more often due to the inconvenience (writing a check, putting it in the mail, etc) than the money. But even if only half, or fewer, of all readers were to make such donations, authors would still earn more than they do under traditional royalty schemes, and furthermore would have the pleasure of finally being the readers' ally in distribution, instead of their enemy.

This is not the only possible system, and it can easily coexist with others. Those not convinced by voluntary donations should consider another method: the threshold pledge

system. This system is designed to solve the classic problem of distributed funding, which is that each contributor wants reassurance that others are also contributing, before putting in her own money. Under the threshold pledge system, the hopeful creator of a new work states up front how much money will be required to produce it — this is the "threshold". An intermediary organization then collects pledges, in any amounts, from the general public. When the total amount pledged reaches the threshhold (or exceeds it by some standard percentage, to account for bookkeeping and assumption of risk), the intermediary signs a contract with the creator, and the pledges are called in. *Only* at this stage, when there is enough money to achieve the desired result, is anyone asked to actually pay up. The intermediary holds the money in escrow, paying the creator according to whatever schedule they negotiated. The last of the money is paid when the work is completed and made publically available, not just to the contributors, but to the entire world. If the creator doesn't produce, the intermediary returns the money to the donors.

The threshold pledge system has some interesting properties not found in the monopolistic, copyright-based marketplace. The resultant work is available to everyone in the world, free of charge. Yet the author was also paid enough to produce the work; if she needed more, she would have asked for more and seen if the market would bear it. Those who did choose to pay paid only as much as they were comfortable with, no more. And finally, there was no risk for the contributors — if the threshold is never reached, then no one pays anything.

Not all methods will be so pleasantly high-minded, of course. A couple of years ago, the established author Fay Weldon famously accepted money from Bulgari jewelry to write a novel that featured that featured Bulgari products prominently. She did so, titling the book "The Bulgari Connection". The book was originally intended as a limited edition to be given away at a corporate function, but having written it, Weldon took it to a publisher for general release. Does this mean that in the future we'll have to scrutinize all creative works for signs of hidden corporate sponsorship? Perhaps, but this is nothing new — product placement was invented in the context of traditional copyright, and has flourished there, as it probably would anywhere. Copyright is neither the cause of corporate sponsorship nor its antidote. To look to the publishing industry as a force for decommercialization would be weirdly out of touch indeed.

These are just a few examples of ways to support creative work without copyright. There are many other methods [9]; there were many even before the Interent made convenient, direct micropayments possible. Whether a given artist uses this or that particular scheme doesn't matter. The important thing is that with little or no friction to impede the payment of tiny amounts, authors will find ways to make such payments happen on the scale they need. Those economists who are enamoured of markets as a solution to everything should be in love with the possibilities here (but, predictably, many are not, because they hate to see anything become depropertized).

To see a glimpse of the future, it may be most helpful to look not at net-savvy musicians, but at software. The flourishing Free Software movement is probably the best example we have today of a post-copyright world. Free software (some also call it "Open Source") is the brainchild of Richard Stallman, a programmer who had the idea of releasing software under a deliberately reversed copyright. Instead of prohibiting sharing, the software's license explicitly permits and encourages it. A number of others soon caught

on to his idea, and because they were able to share and modify each other's programs without limit, they quickly produced a large body of working code.

Some predicted that this initial success would quickly level off as the software increased in size and complexity and required centralized, hierarchical organizations to maintain. But instead of foundering, the Free Software movement has grown so quickly that even its own participants are surprised, and it shows no signs of stopping. It now produces software whose functionality rivals that available in the proprietary market. Free software is widely used by banks, corporations, and governments, as well as individual computer users. More web sites run the free Apache web server than run all other web servers combined. Free operating systems are now the fastest-growing segment of the operating system market. Although some free software authors are paid for their work (after all, their services provide a benefit to those who use the software, and some of those users are willing to pay for it), others volunteer their time. Each software project has its own reasons for existing, and each programmer their own reasons for contributing. But the cumulative effect is a direct flaunting of copyright's entire justification: a thriving intellectual property community now exists without enforcing copyrights, yet achieves substantially the same results as its mainstream counterpart.

According to the traditional justification of copyright, this shouldn't be happening. The software is essentially in the public domain; its copyright serves mainly to identify the original authors, and in some cases to prevent anyone else from imposing a stricter license. The authors have given up every exclusive right except the right to be identified as the authors. They have voluntarily returned to a world before copyright law: they enforce no royalties, and have no control over the distribution and modification of their works. The software's license gives everyone automatic permission both to use and to redistribute it. You can simply start handing out copies, there's no need to notify anyone or ask permission. If you want to modify it, you're free to do that too. You can even sell it, though naturally it's difficult to charge much, since you'd be competing with others handing out the same goods at no cost. A more common model is to encourage people to download the software for free, and instead sell *services* such as technical support, training, and customization. These models are not fantasies, they are the basis for profitable businesses that exist right now, paying real programmers competitive salaries to work on free software. But the point is not that people are paid to do it — some are, but many more are not, and yet write it anyway. The real point is that a tremendous amount of free software is produced and maintained every year, at a rate that grows quickly even by the standards of the software industry.

If this phenomenon were isolated to software, it would be explainable as an aberration — software is different, programmers are overpaid, and so on. But it's not just software; if you look carefully, there are signs of it happening everywhere. Musicians are starting to release their tracks online for free downloading, and the quantity of freely available writing on the Internet — starting with reference and non-fiction works, but now including fiction and poetry — long ago passed the point of measurability. Software is not fundamentally different from these other forms of information. Like poems, songs, books, and movies, it can be transmitted digitally. It can be copied in whole or in part; it can be excerpted for use in other works; it can be modified and edited; it can even be satirized.

The abandonment of copyright is farthest along in software mainly because programmers were among the first groups to have Internet access, not because of

anything special about the nature of software. Gradually, creators in other areas are realizing that they too can disseminate their works without publishers or centralized distribution chains, by simply allowing the freedom to copy. And increasingly, they are choosing to do so, because they have little to lose, and because it's the easiest way for their work to find its way to an appreciative audience. Far from being especially dependent on copyright law, creators gain the most by abandoning the copyright monopoly.

Even in their early stages, these trends raise an obvious question. If copyright is not really needed to stimulate original creation, then what purpose does it serve today? For it is quite clear that if copyright did not exist already, we wouldn't invent it now. We just finished building ourselves a gigantic copying machine (the Internet) that doubles as a communications device, and incidentally makes it convenient to transfer small amounts of money between people. Sharing is now the most natural thing in the world. The idea that artists are somehow harmed by it is demonstrated false every day, by the thousands of new works that appear online, credited and fully acknowledged by their authors, yet free for the taking. If someone were to argue that creativity would soon dry up unless we immediately institute a system of strict controls over who can copy what, we could reasonably look on them as insane. Yet, in slightly more diplomatic language, this is essentially the argument used by the copyright lobby to press for ever stronger laws.

Creativity is not what's at stake here, and in its more honest moments the publishing industry even tacitly admits this. Although for public relations purposes industry leaders make token declarations about the need for poor artists to earn a living, their most detailed and compelling statements are usually about the business effects of copyright. Larry Kenswil of Universal Music Group, the world's largest record company, was quoted in the New York Times of Jan. 5th, 2003, in an article about digital copy protection schemes, saying "You're not buying music, you're buying a key. That's what digital rights management does: it enables business models."

It's hard to imagine a more succinct statement of the industry credo. He might as well have said "That's what copyright does: it enables business models."
Unfortunately, not all of the propaganda put out by the industry is as straightforward and honest as Kenswil's. The Recording Industry Association of America, for example, explains copyright this way on their web site at http://www.riaa.org/:

> You don't need to be a lawyer to be a musician, but you do need to know one legal term — copyright. To all creative artists — poets, painters, novelists, dancers, directors, actors, musicians, singers, and songwriters — the term matters dearly.
>
> To all artists, "copyright" is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To them, "copyright" means the chance to hone their craft, experiment, create, and thrive. It is a vital right, and over the centuries artists have fought to preserve that right; artists such as John Milton, William Hogarth, Mark Twain, and Charles Dickens. Twain traveled to England to protect his rights, and Dickens came to America to do the same.

Recognize that? It's a page straight out of the Stationers' playbook — an undisguised retelling of the copyright myth, complete with references to individual authors, designed to arouse our support for struggling artists valiantly fighting for their artistic integrity. Apparently, all those artists throughout history who did just fine without copyright aren't included in "all creative artists" as far as the RIAA is concerned. Professor Patterson's comments, about the Stationers' similar use of authors as a foil in front of the eighteenth century English parliament, are equally applicable today: "They [the Stationers] did so by arguments intended to elicit sympathy for the author (conveniently ignoring their role in creating the poor plight of the author that they bemoaned) and avoided sound logic and reason." [10].

The next paragraph in the RIAA's introduction to copyright is even worse. It's a brief — very brief — introduction to the origins of copyright law, heavy with the cadence of historical inevitability, but rather loose with the facts:

> Copyright law all started with the "The Statute of Anne," the world's first copyright law passed by the British Parliament in 1709. Yet the principle of protecting the rights of artists predates this. It may sound like dry history at first blush, but since there was precedent to establish and rights to protect, much time, effort, and money has been spent in legal battles over the centuries.

This breathless summary is the copyright equivalent of "Christopher Columbus sailed to America to prove the Earth was round and make friends with the Indians". Yes, much money has indeed been spent in legal battles, but the RIAA is careful not to say who spent it, nor are any further details given about the "principle of protecting the rights of artists" that is alleged to predate these developments.

The rest of their page continues in a similar vein, with so many omissions, mischaracterizations, and outright lies that it's hard to imagine how anyone doing even a modicum of research could have written it. It is, basically, low-grade supporting propaganda in their ongoing campaign to convince the public that copyright is as fundamental to civilization as the laws of thermodynamics.

The RIAA also indulges in one of the favorite tactics of the modern copyright lobby: equating illegal copying with the unrelated, and much more serious, offense of plagiarism. For example, Hilary Rosen, the (now former) head of the RIAA, used to speak at schools and colleges, urging the students to adopt the industry's views about information ownership. Here is her own description of how she presents the case:

> Analogies are what really work best. I ask them, "What have you done last week?" They may say they wrote a paper on this or that. So I tell them, "Oh, you wrote a paper, and you got an A? Would it bother you if somebody could just take that paper and get an A too? Would that bug you?" So this sense of personal investment does ring true with people.

Since people who duplicate CDs do not usually replace the artist's name with their own, let's ask the question Hilary Rosen should have asked: "Would it bother you if somebody could just show a copy of your paper around, so other people could benefit from what

you wrote, and see that you got an A?" Of course, the students would have answered "No, we aren't bothered by that at all," which isn't what Rosen wanted to hear.

The RIAA is extreme only in the clumsiness of their propaganda. Their message is, in essence, the same one offered by the rest of the copyright industry, which maintains a constant drumbeat of warnings that online content swapping will deprive creators of their reputations and their ability to work, despite overwhelming evidence that copyright never provided them with much of a livelihood anyway, and that they would happily continue to create without it as long as they have a way to distribute their works. The campaign might sound harmless or silly when described as I have described it here, but because they are fighting for survival, with large budgets and skilled publicity departments, the publishers have succeeded in shaping public opinion to a surprising degree. Consider this poor woman, from the International Herald Tribune of Sep. 11th, 2003, in an article about the RIAA file-sharing lawsuits:

> One woman who has received a subpoena from the recording industry association said she had struggled to explain to her 13-year-old son why file-sharing was wrong.
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> "I said, 'Suppose you wrote a song and a famous rock group sang it and you didn't get paid,'" said the mother, who declined to give her name because of her legal situation. "He said: 'I wouldn't care. That would be awesome.' They're still just in that young age where money doesn't matter."
>
> The mother said she had better results when she compared taking someone's song to plagiarizing a school paper.

(One can only hope the sensible 13-year-old manages to keep his head, when so many around him are apparently losing theirs.)

The combination of a still-sympathetic public and deep pockets has unfortunately allowed the copyright industry to exercise dangerous influence at the legislative level. The result is a disturbing trend: mutually reinforcing physical and legal barriers that, while ostensibly designed to combat illegal copying, have the inevitable effect of interfering with *all* copying. Digital copy-protection schemes are increasingly enforced by your computer's hardware itself, rather than by malleable and replaceable programs. And the same companies that own content often also manufacture the hardware that makes distribution possible. Have you bought a computer from Sony? What about a CD from Sony's music division? That's the same company, and its left hand knows what its right hand is doing. With government cooperation, this combination becomes even more powerful. In the United States we now have a law — the Digital Millennium Copyright Act — that makes it illegal to circumvent a digital protection scheme, or even to produce software that helps others circumvent a digital protection scheme. Unfortunately, since much hardware and software automatically imprints such schemes on any media it produces, the Act effectively stifles authorized copying and many other activities that would otherwise fall into the category of "fair use" under current copyright law.

It is vital to understand that these side effects are not accidents, not unexpected consequences of an otherwise well-intentioned effort to protect artists. Rather, they are

an integral part of a strategy that, at bottom, has nothing to do with encouraging creativity. The purpose of this three-pronged industry effort — the publicity campaign, the legal campaign, and the hardware "protections" — is simply this: to prevent the Internet experiment from being carried out to completion. Any organization that is deeply invested in the concepts of intellectual property and copy control cannot be pleased to see a system arise that makes copying as easy as clicking a mouse. To the extent possible, such organizations would like to see the same pay-per-copy model that we've been using for centuries continue, even though the fundamental physics of information have changed to make pay-per-copy obsolete.

Although the copyright lobby succeeds in getting new laws passed, and even in winning some court cases, these victories rest on a disintegrating foundation. How much longer will the public continue to believe in the copyright myth, the notion that copyright was invented to make creative work possible? The myth has been maintainable so far because it always had a tiny a grain of truth: although copyright was not inspired by authors, and was not enacted to protect them, it did enable the widespread *distribution* of many original works. Furthermore, there are still many publishers (generally the smaller or individually-owned ones) who behave with an admirable sense of cultural stewardship, subsidizing unprofitable but important works with money earned by stronger sellers, sometimes even losing money outright in order to print things they think worthwhile. But because they are all bound by the economics of large-scale printing, they are all ultimately dependent on copyright.

There won't be a dramatic battle between the publishing industry and the copying public, with a climax, a denoument, and a clear winner striding out of the dust. Instead, what we will see — are already seeing — is the emergence of two parallel streams of creative work: the proprietary stream, and the free stream. Every day, more people join the free stream, of their own volition, for all sorts of reasons. Some enjoy the fact that there are no gatekeepers, no artificial barriers. A work can succeed by its merits and word of mouth alone: although there's nothing to stop traditional marketing techniques from being used in the free stream, there's less to subsidize them, so word of mouth and peer-review networks are taking on a greater importance there. Others enter the free stream as crossovers from the proprietary, releasing a portion of their work into the free domain as an advertisement or an experiment. Some simply realize that they have no chance of success in the proprietary world anyway, and figure they might as well release what they have to the public.

As the stream of freely available material gets bigger, its stigma will slowly vanish. It used to be that the difference between a published author and an unpublished one was that you could obtain the former's books, but not the latter's. Being published *meant* something. It had an aura of respectability; it implied that someone had judged your work and given it an institutional stamp of approval. But now the difference between published and unpublished is narrowing. Soon, being published will mean nothing more than that an editor somewhere found your work worthy of a large-scale print run, and possibly a marketing campaign. This may affect the popularity of the work, but it won't fundamentally affect its availability; and there will be so many "unpublished" but worthwhile works, that the lack of a publishing pedigree will no longer be considered an automatic strike against an author. Although the free stream does not use traditional copyright, it does observe, and unofficially enforce, a "credit right". Works are frequently copied and excerpted with attribution — but attempts to steal credit are usually detected speedily, and decried publicly. The same mechanisms that make copying easy make plagiarism very difficult. It's hard to secretly use someone else's work when a Google search can quickly locate the original. For example, teachers now routinely do Google searches on representative phrases when they suspect plagiarism in student papers.

The proprietary stream cannot survive forever, in the face of such competition. The abolition of copyright law is optional; the real force here is creators freely choosing to release their works for unrestricted copying, because it's in their interests to do so. At some point, it will be obvious that all the interesting stuff is going on in the free stream, and people will simply cease dipping into the proprietary one. Copyright law may remain on the books formally, but it will fade away in practice, atrophied from disuse.

Or, we can sit back and allow this process to be halted, by permitting manufacturers to build in hardware "protections" that interfere with our ability to copy legitimately; by allowing the copyright lobby to capture our legislatures, to the point where we are constantly looking over our shoulders for the copyright police; and by hesitating to use the free stream to its full potential, because we've been taught a false story of what copyright is all about.

We can, if we choose, have a world where concepts like "out of print" or "rare book" are not only obsolete, but actually meaningless. We can live in a fertile and vibrant garden of constantly evolving works, created by people who wanted deeply to make them available, not mandated by a publisher's market research. Schools would never be forced to stay with out-of-date textbooks because of the per-copy prices set by publishers, and your computer would always let you share songs with your friends.

One way to get there is to question the copyright myth. Copying isn't theft, and it isn't piracy. It's what we did for millenia until the invention of copyright, and we can do it again, if we don't hobble ourselves with the antiquated remnants of a censorship system from the sixteenth century.

REFERENCES

[1] These events can be read in any history of copyright. A good online resource regarding their legal implications is "Copyright And `The Exclusive Right' Of Authors" http://www.lawsch.uga.edu/jipl/old/vol1/patterson.html Journal of Intellectual Property, Vol. 1, No.1, Fall 1993, by Professor Lyman Ray Patterson, Pope Brock Professor of Law at the University of Georgia and a noted intellectual property scholar. His description of this earliest copyright is concise and revealing:

The event in the history of Anglo-American copyright that led to the shaping events of the seventeenth and eighteenth centuries was the Charter of the Stationers' Company granted in 1556 by Philip and Mary .... The Charter gave the stationers the power to make "ordinances, provisions, and statutes" for the governance of "the art or mistery of [s]tationery," as well as the power to search out illegal presses and books and things with the power of "seizing, taking, or burning the foresaid books or things, or any of them printed or to be printed contrary to the form of any statute, act, or proclamation ...."

The power to burn offending books was a benefit to the sovereign (a weapon against unlawful publications), and a boon to the stationers (a weapon against competition). The book-burning power thus shows the real motivation for the Charter, to secure the

allegiance of the stationers as policemen of the press for the sovereign in an uncertain world.

[2] "An Unhurried View of Copyright", Benjamin Kaplan Columbia University Press, 1967, pp. 4-5.

[3] Patterson, in [1], goes so far as to say "The characterization of the statutory copyright as an author's copyright, however, is one of the great canards of history."

[4] Kaplan, p. 6.

[5] Kaplan, pp. 7-9.

[6] "Five Hundred Years of Printing" pp. 218-230, S. H. Steinberg, Penguin Books, 1955, revised 1961

[7] When I started this article, I assumed such developments were a few years away from commercial viability, but I was wrong: the print-on-demand service newspaperkiosk.com is already up and running.

[8] See www.mp3.com, for one example. (Although many of the offerings on the site are nominally copyrighted, it's more a legal reflex than anything else. The tracks are meant to be freely downloaded, listened to, and shared -- and that's exactly what people do with them.)

[9] For a description of one funding technique, and a survey of others, see "The Street Performer Protocol and Digital Copyrights" by John Kelsey and Bruce Schneier, at http://www.firstmonday.dk/issues/issue4_6/kelsey/.

[10] Patterson; see [1].

RECOMMENDED READING

- The writings of Eben Moglen, Professor of Law and
- Legal History, Columbia Law School:
- http://moglen.law.columbia.edu/

- The Free Software Foundation philosophy pages contain
- many excellent articles and links:
- http://www.fsf.org/philosophy/philosophy.html

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URL: http://www.copyrightmyths.org/promise
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