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The Tyranny of Copyright?

By Robert S. Boynton

Last fall, a group of civic-minded students at Swarthmore College received a sobering lesson in the future of political protest. They had come into possession of some 15,000 e-mail messages and memos—presumably leaked or stolen—from Diebold Election Systems, the largest maker of electronic voting machines in the country. The memos featured Diebold employees' candid discussion of flaws in the company's software and warnings that the computer network was poorly protected from hackers. In light of the chaotic 2000 presidential election, the Swarthmore students decided that this information shouldn't be kept from the public. Like aspiring Daniel Ellsbergs with their would-be Pentagon Papers, they posted the files on the Internet, declaring the act a form of electronic whistle-blowing.

Unfortunately for the students, their actions ran afoul of the 1998 Digital Millennium Copyright Act (D.M.C.A.), one of several recent laws that regulate intellectual property and are quietly reshaping the culture. Designed to protect copyrighted material on the Web, the act makes it possible for an Internet service provider to be liable for the material posted by its users—an extraordinary burden that providers of phone service, by contrast, do not share. Under the law, if an aggrieved party (Diebold, say) threatens to sue an Internet service provider over the content of a subscriber's Web site, the provider can avoid liability simply by removing the offending material. Since the mere threat of a lawsuit is usually enough to scare most providers into submission, the law effectively gives private parties veto power over much of the information published online—as the Swarthmore students would soon learn.

Not long after the students posted the memos, Diebold sent letters to Swarthmore charging the students with copyright infringement and demanding that the material be removed from the students' Web page, which was hosted on the college's server. Swarthmore complied. The question of whether the students were within their rights to post the memos was essentially moot: thanks to the Digital Millennium Copyright Act, their speech could be silenced without the benefit of actual lawsuits, public hearings, judges or other niceties of due process.

After persistent challenges by the students—and a considerable amount of negative publicity for Diebold—in November the company agreed not to sue. To the delight of the students' supporters, the memos are now back on their Web site. But to proponents of free speech on the Internet, the story remains a chilling one.

Siva Vaidhyanathan, a media scholar at New York University, calls anecdotes like this "copyright horror stories," and there have been a growing number of them over the past few years. Once a dry and seemingly mechanical area of the American legal system, intellectual property law can now be found at the center of major disputes in the arts, sciences and—as in the Diebold case—politics. Recent cases have involved everything from attempts to force the Girl Scouts to pay royalties for singing songs around campfires to the infringement suit brought by the estate of Margaret Mitchell against the publishers of Alice Randall's book "The Wind Done Gone" (which tells the story of Mitchell's "Gone With the Wind" from a slave's perspective) to corporations like Celera Genomics filing for patents for human genes. The most publicized development came in September, when the Recording Industry Association of America began suing music downloaders for copyright infringement, reaching out-of-court settlements for thousands of dollars with defendants as young as 12. And in November, a group of independent film producers went to court to fight a ban, imposed this year by the Motion Picture Association of America, on sending DVD's to those who vote for annual film awards.

Not long ago, the Internet's ability to provide instant, inexpensive and perfect copies of text, sound and images was heralded with the phrase "information wants to be free." Yet the implications of this freedom have frightened some creators—particularly those in the recording, publishing and movie industries—who argue that the greater ease of copying and distribution increases the need for more stringent intellectual property laws. The movie and music industries have succeeded in lobbying lawmakers to allow them to tighten their grips on their creations by lengthening copyright terms. The law has also extended the scope of copyright protection, creating what critics have called a "paracopyright," which prohibits not only duplicating protected material but in some cases even gaining access to it in the first place. In addition to the Digital Millennium Copyright Act, the most significant piece of new legislation is the 1998 Copyright Term Extension Act, which added 20 years of protection to past and present copyrighted works and was upheld by the Supreme Court a year ago. In less than a decade, the much-ballyhooed liberating potential of the Internet seems to have given way to something of an intellectual land grab, presided over by legislators and lawyers for the media industries.

In response to these developments, a protest movement is forming, made up of lawyers, scholars and activists who fear that bolstering copyright protection in the name of foiling "piracy" will have disastrous consequences for society—hindering the ability to experiment and create and eroding our democratic freedoms. This group of reformers, which Lawrence Lessig, a professor at Stanford Law School, calls the "free culture movement," might also be thought of as the "Copyleft" (to borrow a term originally used by software programmers to signal that their product bore fewer than the usual amount of copyright restrictions). Lawyers and professors at the nation's top universities and law schools, the members of the Copyleft aren't wild-eyed radicals opposed to the use of copyright, though they do object fiercely to the way copyright has been distorted by recent legislation and manipulated by companies like Diebold. Nor do they share a coherent political ideology. What they do share is a fear that the United States is becoming less free and ultimately less creative. While the American copyright system was designed to encourage innovation, it is now, they contend, being used to squelch it. They see themselves as fighting for a traditional understanding of intellectual property in the face of a radical effort to turn copyright law into a tool for hoarding ideas. "The notion that intellectual property rights should never expire, and works never enter the public domain—this is the truly fanatical and unconstitutional position," says Jonathan Zittrain, a co-founder of the Berkman Center for Internet and Society at Harvard Law School, the intellectual hub of the Copyleft.

Thinkers like Lessig and Zittrain promote a vision of a world in which copyright law gives individual creators the exclusive right to profit from their intellectual property for a brief, *limited* period—thus providing an incentive to create while still allowing successive generations of creators to draw freely on earlier ideas. They stress that borrowing and collaboration are essential components of all creation and caution against being seduced by the romantic myth of "the author": the lone garret-dwelling poet, creating masterpieces out of thin air. "No one writes from nothing," says Yochai Benkler, a professor at Yale Law School. "We all take the world as it is and use it, remix it."

Where does the Copyleft believe a creation ought to go once its copyright has lapsed? Into the public domain, or the "cultural commons"—a shared stockpile of ideas where the majority of America's music and literature would reside, from which anyone could partake without having to pay or ask permission. James Boyle, a professor at Duke Law School, notes that the public domain is a necessity for social and cultural progress, not some sort of socialist luxury. "Our art, our culture, our science depend on this public domain," he has written, "every bit as much as they depend on intellectual property."

In opposition to the cultural commons stands the "permission culture," an epithet the Copyleft uses to describe the world it fears our current copyright law is creating.

Whereas you used to own the CD or book you purchased, in the permission culture it is more likely that you'll lease (or "license") a song, video or e-book, and even then only under restrictive conditions: read your e-book, but don't copy and paste any selections; listen to music on your MP3 player, but don't burn it onto a CD or transfer it to your stereo. The Copyleft sees innovations like iTunes, Apple's popular online music store, as the first step toward a society in which much of the cultural activity that we currently take for granted—reading an encyclopedia in the public library, selling a geometry textbook to a friend, copying a song for a sibling—will be rerouted through a system of micropayments in return for which the rights to ever smaller pieces of our culture are doled out. "Sooner or later," predicts Miriam Nisbet, the legislative counsel for the American Library Association, "you'll get to the point where you say, 'Well, I guess that 25 cents isn't too much to pay for this sentence,' and then there's no hope and no going back."

There is a growing sense of urgency among the members of the Copyleft. They worry that if they do not raise awareness of what is happening to copyright law, Americans will be stuck forever with the consequences of decisions now being made—and laws being passed—in the name of preventing piracy. "We are at a moment in our history at which the terms of freedom and justice are up for grabs," Benkler says. He notes that each major innovation in the history of communications—the printing press, radio, telephone—was followed by a brief period of openness before the rules of its usage were determined and alternatives eliminated. "The Internet," he says, "is in that space right now."

America has always had an ambivalent attitude toward the notion of intellectual property. Thomas Jefferson, for one, considered copyright a necessary evil: he favored providing just enough incentive to create, nothing more, and thereafter allowing ideas to flow freely as nature intended. "If nature has made any one thing less susceptible than all others of exclusive property," he wrote, "it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone." His conception of copyright was enshrined in Article 1, Section 8 of the Constitution, which gives Congress the authority to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

But Jefferson's vision has not fared well. As the country's economy developed from agrarian to industrial to "information," ideas took on greater importance, and the demand increased for stronger copyright laws. In 1790, copyright protection lasted for 14 years and could be renewed just once before the work entered the public domain. Between 1831 and 1909, the maximum term was increased from 28 to 56 years. Today, copyright protection for individuals lasts for 70 years after the death of the author; for corporations, it's 95 years after publication. Over the past three decades, the flow of material entering the public domain has slowed to a trickle: in 1973, according to Lessig, more than 85 percent of copyright owners chose not to renew their copyrights, allowing their ideas to become common coin; since the 1998 Copyright Term Extension Act lengthened present and past copyrights for an additional 20 years, little material will enter the public domain any time soon.

Some of the changes that expanded copyright protection were made with an understanding of their effects; what also troubles the Copyleft, however, are the unintended consequences of seemingly innocuous tweaks in copyright legislation. In particular, two laws that were passed years before the creation of the Internet helped set the stage for today's copyright bonanza. Before the 1909 Copyright Act, copyright was construed as the exclusive right to "publish" a creation; but the 1909 law changed the wording to prohibit others from "copying" one's creation—a seemingly minor change that there-

after linked copyright protection to the copying technology of the day, whether that was the pen, the photocopy machine, the VCR or the Internet. In 1976, a revision to the law dispensed with the requirement of formally registering or renewing a copyright in order to comply with international copyright standards. Henceforth, everything—from e-mail messages to doodles on a napkin—was automatically copyrighted the moment it was "fixed in a tangible medium."

The true significance of these two laws didn't become apparent until the arrival of the Internet, when every work became automatically protected by copyright and every use of a work via the Internet constituted a new copy. "Nobody realized that eliminating those requirements would create a nightmare of uncertainty and confusion about what content is available to use," Lessig explains, "which is a crucial question now that the Internet is the way we gain access to so much content. It was a kind of oil spill in the free culture."

Lessig is one of the most prominent and eloquent defenders of the Copyleft's belief that copyright law should return to its Jeffersonian roots. "We are invoking ideas that should be central to the American tradition, such as that a free society is richer than a control society," he says. "But in the cultural sphere, big media wants to build a new Soviet empire where you need permission from the central party to do anything." He complains that Americans have been reduced to "an Oliver Twist-like position," in which they have to ask, "Please, sir, may I?" every time we want to use something under copyright—and then only if we are fortunate enough to have the assistance of a high-priced lawyer.

In October 2002, Lessig argued before the Supreme Court in Eldred v. Ashcroft, which concerned a challenge to the Copyright Term Extension Act. On behalf of the plaintiffs, Lessig argued that perpetually extending the term of copyright was a violation of the Constitution's requirement that copyright exist for "a limited time." The court responded that although perhaps unwise on policy grounds, granting such extensions was within Congress's power. It was a major setback for the Copyleft. Given the Eldred decision, there is nothing to stop a future Congress from extending copyright's term again and again.

Lessig's efforts haven't been limited to the courtroom. In 2001, he was part of a group that founded an organization called Creative Commons, which offers individual creators the ability to carefully calibrate the level of control they wish to maintain over their works. The organization services the needs of, say, musicians who want rappers and D.J.'s to be able to download and remix their music without legal trouble or of writers who want their works republished without charge, but only by nonprofit publications. The Commons has developed a software application for the Web that allows copyright holders who do not want to exercise all of the restrictions of copyright law to dedicate their work to the public domain or license it on terms that allow copying and creative reuses. The aim of Creative Commons is not only to increase the sum of raw source material online but also to make it cheaper and easier for other creators to locate and access that material. This will enable people to use the Internet to find, for example, photographs that are free to be altered or reused or texts that may be copied, distributed or sampled—all by their authors' permission. The Creative Commons now has a presence in 10 countries, including Brazil, whose minister of culture, the musician Gilberto Gil, plans to release some of his songs under the Creative Commons license so that others may freely borrow from them. Creative Commons is currently talking to Amazon and others about a plan to release out-of-print books under Creative Commons licenses.

One of the central ideas of the Copyleft is that the Internet has been a catalyst for re-engaging with the culture—for interacting with the things we read and watch and listen to, as opposed to just sitting back and absorbing them. This vision of how

culture works stands in contrast to what the Copyleft calls the "broadcast model"—the arrangement in which a small group of content producers disseminate their creations (television, movies, music) through controlled routes (cable, theaters, radio-TV stations) to passive consumers. Yochai Benkler, the law professor at Yale, argues that people want to be more engaged in their culture, despite the broadcast technology, like television, that he says has narcotized us. "People are users," he says. "They are producers, storytellers, consumers, interactors—complex, varied beings, not just people who go to the store, buy a packaged good off the shelf and consume."

A few weeks ago, I met Benkler in his loft in downtown New York. He stroked his beard while explicating his ideas with the care of a man parsing a particularly knotty question of Scripture. Benkler was born in Tel Aviv in 1964, and while in his 20's, he helped found a remote desert kibbutz in an attempt to recapture the Zionist movement's original socialist spirit. The challenges of creating a community in isolation from the rest of society ultimately proved overwhelming. "After a few years," he said, "we realized that at the rate we were going we wouldn't attend college until we were in our 50's." It was a hard lesson in the difficulty of producing anything—a community, a work of art—in isolation.

But Benkler's belief in the importance of creating things in common rests on more than anecdotal evidence. What makes his argument more than wishful thinking, he said, is that he has some economic evidence for his view. "Let's compare a few numbers," he said. "How much do people pay the recording industry to listen to music versus how much people pay the telephone industry to talk to their friends and family? The recording industry is a $12 billion a year business, compared with the telephone business, which is a more than $250 billion a year business. That is what economists call a 'revealed willingness to pay,' a clear preference for a technology that allows you to participate in work, socializing and interaction in general, over a technology that allows you to be a passive consumer of a packaged good. Is that a study of human nature? No. Is it an economic measure that would suggest there is a lot of demand out there for speaking and listening to others? Yes."

According to Benkler, the cultural commons not only offers a better model for creativity; it makes good economic sense. Like Lessig and other members of the Copyleft, he takes his bearings from the free software movement and views the success of products like Linux and services like Google as evidence of a viable collaborative (or "peer to peer") model for producing and sharing ideas—a model that will augment and, in some cases, replace the current model. (He concedes that some products, like novels and blockbuster movies, will never be produced peer to peer, though they will draw on the work of artists before them.)

Benkler predicts that the recording industry will be one of the first businesses to go. "All it does is package and sell goods," he said, "which is technically an unfeasible way of continuing. They are trying their best to legislate the environment to change, but that doesn't mean we have to let them."

The battle between the Copyleft and its opponents is as much a clash of worldviews as of legal doctrine. Aligned against the Copyleft are those who sympathize with the romantic notion of authorship and view the culture as a market in which everything of value should be owned by someone or other. Jane Ginsburg, a professor at Columbia Law School who specializes in copyright law, fears that in the Copyleft's rush to secure the public domain, it gives short shrift to the author. A self-described "copyright enthusiast," Ginsburg considers the author the moral center of copyright law and questions equating copyright control with corporate greed. "Copyright cannot be understood merely as a grudgingly tolerated way station on the road to the public domain," she writes in a recent article titled "The Concept of Authorship in Comparative Copyright Law." "Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert."

Ginsburg and others embrace many elements of the "permission society" demonized by the Copyleft and cite developments like the iTunes store as a sign of greater consumer choice and freedom. In his book "Copyright's Highway," Paul Goldstein, a professor at Stanford Law School, writes that "the logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works." He characterizes the permission society as a "celestial jukebox" in which access to every creation—music, literature, movies, art—is available to anyone for a price.

An entire "digital rights management" industry has arisen to bring this vision to fruition, each company calibrating a particular license through a system of micropayments—play a song on your computer for one price; transfer it to your MP3 player for a slightly higher fee. Goldstein argues that the scheme of a business like iTunes is actually more efficient and democratic than the commons model championed by the Copyleft. "The problem with the commons is that it doesn't take into consideration the direction of the payment; it doesn't reveal what kind of culture gets used and what kind doesn't," he says. "I think it is good to have a price tag attached to each use because it tells producers what consumers want; it lets them vote with their purchase for the kinds of culture they want."

But the Copyleft is convinced that there is a better way for the entertainment industry to adapt to the Internet age while still paying its artists their due. William Fisher, director of the Berkman Center, has spent the last three years devising an alternative compensation system that would enable the entertainment industry to restructure its business model without resorting to cumbersome micropayments. He has worked out a modified version of the system that artists' advocacy groups currently use to make sure that composers are paid when their music is performed or recorded. According to Fisher's plan, all works capable of being transmitted online would be registered with a central office (whether government or independent is unclear). The central office would then monitor how frequently a work is used and compensate the creators on that basis. The money would come from a tax on various content-related devices, like DVD burners, blank CD's or digital recorders. It is a brave proposal in a political culture that is allergic to taxes and uncomfortable with complex solutions. Still, if his numbers do indeed add up, Fisher's proposal might be the best thing that ever happened to the cultural commons: the creators would be paid, while every individual would have unlimited access to every cultural creation.

Fisher and Charles Nesson, his colleague at Harvard Law School, have showed this proposal to movie executives and lawyers for several media conglomerates. Fisher says that his ideas have been received with great interest by the very industries—music, home video—that see their business models disintegrating before their eyes.

When asked whether he thinks his ambitious scheme has a chance, Fisher says that the likeliest possibility would be for it to be adopted in countries that are neither so developed that they have signed on to international copyright protocols nor so unde-

veloped that they are desperate to do so. Only second-world countries, like Croatia or Brazil, he speculates, are unfettered enough to try something new. "The hope is in the rain forest," he says, in countries that "are more like the United States was before 1890, when we were a 'pirate' nation."

And in the United States, is there any future for this sort of payment system? Perhaps when the various current schemes fail, Fisher's plan will seem more attractive, he says. "What is involved here is nothing less than the shape of our culture and the way we think of ourselves as citizens," he adds. He describes a recent letter he received from a supporter of his work. "When they come for my guns and my music, they'd better bring an army," it read. "People are used to being creatively engaged with the culture," Fisher explains. "They won't let someone legislate that away."

The future of the Copyleft's efforts is still an open question. James Boyle has likened the movement's efforts to establish a cultural commons to those of the environmental movement in its infancy. Like Rachel Carson in the years before Earth Day, the Copyleft today is trying to raise awareness of the intellectual "land" to which they believe we ought to feel entitled and to propose policies and laws that will preserve it. Just as the idea of environmentalism became viable in the wake of the last century's advances in industrial production, the growth of this century's information technologies, Boyle argues, will force the country to address the erosion of the cultural commons. "The environmentalists helped us to see the world differently," he writes, "to see that there was such a thing as 'the environment' rather than just my pond, your forest, his canal. We need to do the same thing in the information environment. We have to 'invent' the public domain before we can save it."

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