



Copyright Renewal for Libraries: Seven Steps Toward a User-Friendly Law

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abstract: Copyright law is a source of a great deal of bewilderment and frustration to academic librarians. Beyond the basics of copyright protection and fair use, most librarians struggle to grasp the complexity of the law and the roadblocks it presents to access and use. This article attempts to elucidate some of those complexities by suggesting seven steps toward copyright reform that would make the law more useful for libraries. These suggestions address such issues as the predictability of the application of copyright law, specific exceptions for libraries, and ways to ensure that more copyrights remain in the hands of authors.

Copyright renewal as a requirement for continuing protection of individual “works of authorship” was dropped from U.S. law in 1976.¹ But the same facts that made formal renewal unnecessary—automatic protection and an extremely long term—have also made the renewal of copyright as a body of law more necessary than ever. Copyright law in the United States no longer serves its ostensible purpose of providing an incentive for creators to create so that society gets the benefit of a wide and various array of works, and no group knows this better than librarians. In recent years, a different kind of renewal question has suggested itself—can copyright itself, as a body of law, be renewed in ways that will help the law better serve its Constitutional purpose “to promote the progress of science and the useful arts”?²

The limited monopoly that is carved out by copyright law has always been intended to provide a balanced incentive for creation. The goal is to balance rewards sufficient to make creation worthwhile with access and use rights robust enough to facilitate subsequent creations. For a variety of reasons, that balance has been largely lost in the last 30 years.³ Librarians, who most often see the problems that copyright restrictions create for users, are especially sensitive to this imbalance. Yet, because they are consumers of new creative expression of all kinds, librarians are also in a unique position to appreci-

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ate the importance of incentive. The problem, after all, is not with the idea of incentive but with the current failure, especially in an environment in which technology makes it possible for almost everyone to create and distribute creative expression, to also provide the access and use rights that are just as important to incentivize creation.

In the digital world, many people will create, especially if use rights are well crafted, while only a few will benefit from the monetary incentive, so the current lack of balance

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tips in precisely the wrong direction. As librarians try to come to grips with the burgeoning phenomenon of born-digital creativity, their awareness of the problems created by the over-enforcement of the copyright monopoly grows. Ironically, the fact that everyone can now be a producer and publisher of content is precisely the technological development that has led the content industries into their current battles to increase enforcement and penalties

for copyright infringement. As these major entertainment companies push, with pretty good success, for more and more draconian protections, librarians tend to see the other side of the issues. It is often in libraries that patrons find inspiration and begin the process of new creation. Librarians see the benefits of reuse and remixing as new works emerge from old. Thus, librarians are well placed to speak for new creators and to resist the content industries attempts to make the law serve only their profit motives instead of the balanced approach it was designed to take that would foster innovation.

A recent survey of the copyright systems in 16 countries demonstrated that this imbalance of protection versus access and use is not just a U.S. problem, concluding that

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“a rigid enforcement of strict copyright laws can seriously harm the interests of consumers in any country.”⁴ In reporting on this survey, a Pakistani news report cited a succinct expression of the problem by an intellectual property (IP) lawyer in that country: “Good IP law should not be about strict copyright protection as one small group of special interests demands, but about fair and open access that con-

tributes to innovation broadly.”⁵ So it is clear that the difficulty of copyright imbalance is not an isolated problem but has an impact on users and consumers around the world.

Librarians do their work in the midst of this dilemma. In many cases, they are asked to provide resources and advice about what is allowed under copyright law and what is not. Often they are frustrated by the current state of the law and yet uncertain about what might be done to alleviate the difficulties. In this essay, I want to provide seven steps that could be taken to help restore the balance that is at the heart of a workable copyright law, especially in an age of rapidly changing technology. I hope that, by examining these seven suggestions, librarians will gain a better understanding of what the

roadblocks in copyright currently are and what they, as professionals with an important voice in the copyright debates, might wish and advocate for.

As a prerequisite to presenting these suggestions, I want to indicate the areas I will not be discussing. By and large, these are areas in which there is already a lot of information available, and robust debates are taking place. I will not, for example, have anything to say about compulsory or voluntary licensing schemes that circumvent copyright restrictions by creating blanket permissions at a set cost.⁶ Such schemes could help resolve some of copyright's imbalance, but they rarely actually benefit higher education, as the various debates about "solutions" to the problem of file sharing over campus networks have made clear.⁷

Another topic that will not receive substantial treatment in this article is orphan works and the legislative proposals to solve the orphan works "problem." Although there is little doubt that a problem does exist, the legislative fixes that have been suggested have grown increasingly cumbersome and unworkable because they are introduced, largely ignored by Congress, and then reintroduced.⁸ The fact is that librarians are better off relying on fair use and a low risk of litigation for digitization projects involving such material than they are waiting for an orphan works bill to pass. In any case, the settlement in the copyright infringement lawsuits brought against Google for its Book Search project may make the notion of orphan works legislation obsolete; there will be some comments on this topic at the end of this article.

Fair use is the final area that will not be treated in this discussion because fair use, itself, is not a problem, although the judicial understanding and interpretation of fair use is often problematic. Out of sheer necessity, most librarians have become very familiar with the analysis of fair use and the opportunities and limitations that analysis imposes. Fair use needs vigorous exercise on the part of the creative and educational communities, and it requires well-reasoned application from the bench, but the law itself is not in need of reform.⁹

Instead of dealing with these familiar issues that plague librarians as they try to apply copyright law and educate others about its nuances, this essay will focus on seven suggestions that may be new to many in the academic library world. Each of these suggestions focuses on a legal reform of copyright that would improve the way the law functions for academic libraries. In fact, the first two suggestions actually address mechanisms that impede the very application of copyright law and leave librarians and other users in a situation of uncertainty about the relationship between copyright rules, contract provisions, and technological restrictions; their adoption would contribute greatly to predictability in copyright decision making. The remaining five suggestions all attempt to outline possibilities for copyright reform that may be less familiar, and so more enlightening, to librarians than the wearying debates about which so much ink has already been spilt. These suggestions attempt to expand libraries' copyright vision from the focus on a few issues to a comprehensive view of how copyright law as a whole could be reformed and renewed in ways that would serve the interests of those who use copyrighted content to learn, to better their situations in life, and as the grist from which they create new works.¹⁰



Step One: Anti-circumvention Exceptions

The first, and likely least surprising, of these recommendations is that robust exemptions to the anti-circumvention rules that were added to the copyright law in 2000 and provide legal protection to technological protection measures be enacted for higher education. The Digital Millennium Copyright Act of 1998 (DMCA) had both positive and negative effects on the availability of copyrighted content for reuse and new creativity.¹¹ On the one hand, by creating a safe harbor from liability for online service providers who do not control the content that users upload,¹² the DMCA has made possible many user-generated content sites like Flickr and YouTube that encourage experimentation with the boundaries of fair use. On the other hand, the creation of copyright-like legal penalties for circumvention of digital rights management systems—basically making it illegal to “pick” a digital “lock” even when the purpose for which the user wants the content would be perfectly legal¹³—has allowed a vast expansion of the rights holders’ sphere of control without the accompanying recognition of user needs that is normal in copyright legislation. Technological protection systems can now be used to restrict access to and reuse of public domain works, prevent fair use of legally obtained content,¹⁴ and enforce anti-competitive practices such as restricting viewing of content to a particular manufacturer’s equipment (thus creating profitable licensing opportunities but severely constraining consumer choice).

Congress appeared to recognize that the anti-circumvention provisions of the DMCA could be devastating to certain users whose uses of content were socially valuable, and they built in a mechanism, in the form of delegated rule-making authority to the Library of Congress, to mitigate these potential harms.¹⁵ The Librarian of Congress is instructed to designate certain “classes of works”¹⁶ every three years for which circumvention will be allowed. Unfortunately, the exceptions declared in 2000 and 2003 were extremely narrow and contained no recognition at all of the needs of higher education. In 2006, a single exception for higher education was included in the rulemaking to allow professors of film and media studies to circumvent digital rights management (DRM) systems to compile clips from films for face-to-face classroom instruction if the films were owned by the university’s film and media library.¹⁷ There was no allowance for other professors included, and it was not clear if a university that did not have a separate film and media library could benefit from the exception.

These very narrow terms of this single exception help point out how absurd the restriction on circumvention for obvious fair uses really is. Of course, professors other than film instructors need to make compilations of film clips, and their need is neither any different nor would permitting them to make such compilations pose any threat greater than that posed by the exception for media studies. The 2009 round of rulemaking is underway as of this writing,¹⁸ and numerous calls for a broader exception for teaching have been sounded during the process. But the fact that each exception must be renewed every three years and is subject each time to intense lobbying by interests on all sides means that the rule-making process really cannot supply the degree of consistency and predictability that law must have if it is to help rather than hinder the smooth functioning of society. Higher education, for example, may get a broader exception in 2009, or it may lose the tiny concession it won in 2006; because of this uncertainty, the rule-based exceptions simply are not usable.

A legislative attempt to address the problem of restrictive digital rights management systems, coupled with draconian legal protections for those systems, was proposed in 2007. The Freedom and Innovation Revitalizing U.S. Entrepreneurship Act (FAIR USE Act) was intended to codify and broaden the scope of the exemption for educators to make classroom compilations of film clips. More significantly, it would have permitted circumvention in order for users to gain access to public domain works as well as for all of the purposes listed in section 107 as exemplars of fair use.¹⁹ The proposed legislation never reached the floor of the House of Representatives, but it remains a model for the kind of reform of the DMCA anti-circumvention rules that needs to be enacted.

As an alternative to a legislative solution, recognizing that copyright legislation is relatively rare and seldom favors users over the interests of lobbyists from the major content industries, Professor Timothy Armstrong has proposed that courts apply the long history of fair use interpretation to construct a common law boundary for the anti-circumvention rules, as the language of the DMCA itself seems to suggest.²⁰ After rehearsing the fair use factors from 17 U.S. Code 107, Armstrong writes, "It is not difficult to imagine ways in which these same factors might be profitably analogized to explain limits on the reach of DMCA liability under the rubric of 'fair circumvention.'"²¹ It is true, after all, that fair use was, itself, a judicially constructed limit on copyright for the first 125 years of its application, and Armstrong notes with regard to the DMCA that "Congress spoke in copyright language and was thinking copyright thoughts in the DMCA, and it would hardly represent judicial usurpation of lawmaking authority for the courts to construe the statute consistently with its background."²²

Whether it is to be solved legislatively or through judicial interpretation, the problem of DMCA anti-circumvention rules is a significant obstacle to rebalancing the copyright law so that rights holders and users are both fairly protected. One kind of solution or the other is the first of our seven steps toward a user-friendly law.

Step Two: Preemption of Non-negotiable Contracts

In *Copyright's Paradox*, Neil Netanel joins digital rights management and licensing of intellectual property into a single category that he calls "paracopyright."²³ Netanel, whose emphasis throughout the book is the potential conflict between free speech and copyright protection, notes that digital locks and "enforceable mass market licenses" allow copyright holders to "readily elide the speech-enhancing limitations" on copyright.²⁴ Indeed, private licensing is an increasingly popular technique for avoiding the limitations of copyright, like the doctrines of "first sale"²⁵ or fair use, that compromise the complete control over all use of content that some copyright holders seek even after they release that content to the public. Just as the ability to lock up content with digital encryption should be limited by exceptions to anti-circumvention rules, so should these mass-market licenses be limited in a way that prevents such total avoidance of copyright's provisions that encourage use and new creativity. Thus, the second suggestion for a library- and user-friendly copyright law is a provision that preempts non-negotiable license agreements where they contradict the provisions of copyright.

Contracts are a common means by which private parties re-adjust the legal relationships between themselves. Because they bind only those parties who negotiate and



agree to them, contracts can preempt many provisions of our law. One way to think of this is to recognize that many of our business laws actually only stipulate the “default rules” for commercial relationships, which parties are free to vary using private law, including contractual relationships that are legally enforceable.²⁶ Licenses are the way these default rules are varied in the sphere of intellectual property.

When contracts, in general, and IP licenses, in particular, are negotiated between parties with roughly equal power in the relationship and “at arms length” (meaning there is no coercion), this respect for private agreements is not at all problematic and facilitates efficient business dealings. In the copyright realm, however, the rights between parties are increasingly being determined by licenses for which no negotiations at all are possible. Most common in this regard are “click-through” licenses for software downloads, access to online information, and use of user-generated content sites. To give just one example from among a huge number of possibilities, every user who wants to upload their vacation pictures to Flickr in order to share them with family and friends has to agree to a contract, called “terms of service,” which is equivalent to seven closely typed pages of contract verbiage and includes several licenses granted to Yahoo!, Flickr’s parent company, to use the photos that are uploaded.²⁷ No part of this agreement is negotiable, and users cannot access the site without clicking on “I accept.”

There is nothing sinister or particularly unfair about the Yahoo! terms of service, but they are emblematic of the complex agreements to which Internet users now routinely agree with little thought and with no opportunity to discuss or object.²⁸ These agreements increasingly govern the relationship between users and IP owners, and they can often eliminate basic rights that copyright law would allow to users. In an article aptly titled “Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property,” Elizabeth Winston details this problem quite thoroughly, listing numerous examples in which books have been sold with shrink-wrap licenses to prevent resale or lending, and even seeds and digital cameras that have been sold with licenses purporting to restrict use.²⁹

The difficulty with such licensing for intellectual property is that the consumer seldom knows what provisions are agreed to and has no opportunity to vary those provisions. The predictability of acceptable uses for intellectual property is thus compromised, and many of the balancing provisions that Congress included in copyright law to facilitate downstream use for innovation and new creativity are eliminated. In an age when contracts were routinely the subject of negotiation, provisions like section 108(f)(4) of the Copyright Law, which specifically allows for contracts to vary the terms of library reproduction rights, made sense. Times, however, have changed; and a great deal of material is now obtained by libraries and by consumers under the terms of non-negotiable licenses.³⁰ In those cases, in order to preserve the policy decisions contained within the copyright balance, an opposite provision is needed; the copyright law should be amended to stipulate that its provisions preempt non-negotiated private contracts to the extent that they contradict those provisions.

The suggestion that copyright provisions should preempt contract terms in non-negotiable agreements has been made several times before. In its 2001 report on the effects of the Digital Millennium Copyright Act, the Library of Congress included, as the last paragraph of its “Executive Summary,” a brief acknowledgement that “a number

of commenters [*sic*]...argued that the Copyright Act should be amended to insure that contract provisions that override consumer privileges in the copyright law... are not enforceable."³¹ The discussion of this suggestion is inconclusive, but the report correctly notes the increasing likelihood that "rights holders...will determine the landscape of consumer privileges in the future."³² So far, Congress seems to have been generally unwilling or uninterested in stemming this usurpation of their policy-making prerogative. One legislative attempt has been made, however, as part of a 2003 bill called the BALANCE Act.³³ This bill had a number of important provisions, and we will return to it. In this context, the significant language in the BALANCE Act was the following:

When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title.³⁴

The BALANCE Act did not pass, but the suggestion for copyright preemption for non-negotiable contracts continues to arise. Most recently, it is discussed as part of the report prepared by the Section 108 Study Group, in which members of the group agreed that negotiated licenses should still trump section 108 provisions for library copying, but could not agree about whether nonnegotiable licenses ought to continue to be allowed to do so.³⁵

In spite of these inconclusive discussions and un-adopted proposals, this is an issue that will not go away. An eventual resolution in favor of preserving copyright provisions whenever a license's terms are presented on a "take-it-or-leave-it" basis is necessary to protect users and to preserve the predictability of the application of our law. Such a legislative enactment is, therefore, our second step toward a more library- and user-friendly copyright law.³⁶

Step Three: Preservation Options for Sound Recordings

Another area about which the Section 108 Study Group reports discussion without sufficient agreement to make a recommendation is the issue of preservation activities for pre-1972 sound recordings.³⁷ It is one of the oddest quirks of U.S. copyright law that

sound recordings that were fixed before 1972 are not subject to the provisions of the federal law at all. Before 1972, copyright protection was not extended to sound recordings, only to the underlying musical compositions that were being performed. Such recordings, like all unpublished works under the older copyright provisions, were protected, if at all, by state law. Four years after protection was

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extended to sound recordings, of course, the entire federal law was radically rewritten by the Copyright Act of 1976. That act preempted



state copyright laws and extended federal protection over published and unpublished works alike, with one exception.³⁸ For reasons having to do with the historical development of copyright and with short-sighted lobbying efforts in Congress, section 301(c) of the Copyright Act explicitly excludes pre-1972 sound recordings from federal protection and leaves their protection to those state laws that are otherwise preempted.

The problem with this state of affairs is that preservation of these early recordings, which is increasingly urgent as storage media begin to decay, relies on the ability of

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libraries and archives to make copies of the recordings. That ability, however, is at the mercy of a patchwork of state laws. There is no predictability, and hence no security, in a situation in which one must try to figure out both which state's common law copyright will

apply and what, if anything, that law says about preservation copying. This situation is made more complex by the desire of libraries and archives to make preserved digital copies of early recordings available for research and study on the Internet. Since the online environment does not recognize state boundaries, such distribution would have to take account of every state's law and, in practice, would be governed by the most restrictive state provisions.

The Association for Recorded Sound Collections (ARSC) has undertaken a campaign to make both Congress and the library community aware of this problem. Their recommendations for changes to the United States Copyright Law suggest five specific steps, but they begin with this simple plea, "Place pre-1972 U.S. recordings under a single, understandable national law by repealing section 301(c) of Title 17, U.S. Code, the provision that currently keeps pre-1972 recordings under state law until 2067."³⁹ It is difficult to see what evil consequences would result from the repeal of this provision, and it seems to be more apathy than opposition that has prevented Congress from taking this action up till now. It is worth noting that the reason the Section 108 Study Group did not recommend the repeal of section 301(c) was not that there was opposition to such action but merely because it fell outside the scope of the recommendations about reform of section 108. As the report puts this point,

The Study Group observes that, in principle, pre-1972 U.S. sound recordings should be subject to the same kind of preservation-related activities as permitted under section 108 for federally copyrighted sound recordings. The Study Group questioned whether it is feasible to amend the Copyright Act without addressing the larger issue of the exclusion of pre-1972 sound recordings from federal copyright law.⁴⁰

The Study Group is quite correct that the preservation problem for pre-1972 sound recordings cannot be resolved merely by amending section 108 because it is not clear how such an amendment could function given its conflict with the continuing application of state law over these works. It is for that reason that legislative action to repeal section 301(c), as well as whatever further actions are needed to permit the preservation of historic sound recordings,⁴¹ is the third of our steps toward a library-friendly copyright law.



It is worth noting, before we turn to our fourth recommended step, that in both of the past two discussions we have seen that the Section 108 Study Group addressed the problem but proved unable, in the end, to arrive at a recommendation for legislative action. There are two lessons that can be learned from this situation. First, our copyright law has become so complex that it is nearly impossible to address the difficulties and problems created by one particular provision without examining and potentially amending several other sections of the law

as well. Copyright law has become an intricate specialty requiring considerable expertise both from its practitioners and from legislators who would undertake its improvement. The other lesson, however, shows us that we can seldom avoid such legislative enactments. The Section 108 Study Group, which made recommendations only on

matters that were so uncontroversial as to be superfluous (although it did describe the divergent opinions that prevented agreement on many matters and, therefore, makes fascinating reading), shows the extremely limited scope for negotiated solutions to the imbalances created by copyright. There is always an interest that is served by each imbalance, so any attempt to reach consensus is doomed in advance to inconsequentiality. The only alternative, which has worked well in the past for the United States, is the legislative forum, in which each interest—including the public good—can make its case and take its best chance in a process in which winners and losers are inevitable. If the interests of users and libraries cannot win at least some victories in the legislative contest, there really is no other hope.

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Step Four: A Digital First Sale Doctrine

First sale, the principle that the exclusive right to control distribution is “exhausted” after the first sale of a particular copy of a work,⁴² is the foundation of virtually all library practice. Because of section 109, libraries are able to purchase a single copy of a work and subsequently lend it to multiple patrons; they can even destroy the copy when it becomes damaged or resell it when it is no longer in demand.⁴³ First sale is also the legal foundation of the second-hand market for books, CDs, DVDs and other physical media embodying copyrighted material, as well as for rental markets. Unfortunately, when a work is in digital format, it is fairly clear that first sale, as it is currently articulated, does not

apply. All of the activities described above depend on the transfer of a physical object and not the making of a copy of that object. Transfer of digital files, however, always involves making copies, and that takes such transfers outside the scope of the current

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first sale rules. As Henry Sprott Long puts it, "People who wish to sell or donate to future parties art and other works which were legally obtained in digital format face a unique problem from a first sale standpoint."⁴⁴

The solution frequently proposed to this situation is a "forward and delete" scheme that would replicate the situation with physical objects and facilitate secondary markets by allowing someone who has a lawfully obtained digital file to forward that file to another (thus making a copy) as long as the original file is deleted by the sender.⁴⁵ In its 2001 report on the impact of the DMCA, the Library of Congress dismissed this idea by saying:

The tangible nature of a copy is a defining element of the first sale doctrine and is critical to its rationale. The digital transmission of a work does not implicate the alienability of a physical artifact. When a work is transmitted, the sender is exercising control over the intangible work through its reproduction rather than common law dominion over an item of personal property.⁴⁶

In spite of the unusually categorical and assertive language used by the library here, there is really no dispositive argument against "forward and delete" that can be based on the requirement for a physical "container" for IP; the report simply uses that argument as a surrogate for two concerns. One concern is the desire to protect digital distributors from the kind of secondary markets that publishers have long complained about. But this partisan worry is balanced by the advantage that consumers and users obtain from such markets, and the argument need not detain us. The other concern, however, is the difficulty of policing a forward and delete scheme. How, we must ask, can we ensure that forwarded files will subsequently be deleted from the sender's computer?

The 2003 BALANCE Act, discussed above in regard to non-negotiable contracts, also attempted to amend the first sale doctrine to permit digital forward and delete.⁴⁷ In that legislation, the concern about enforcing deletion is really addressed in a very obvious and practical way; because it proposed an amendment to the copyright law, the enforcement would be exactly the same as any other exception to the exclusive rights. If the terms of a forward and delete scheme were not followed, the exception would not apply, and the copyright holder would have all the available remedies for copyright infringement available to him or her. As Long notes, the advantages of such a scheme for facilitating new secondary markets outweighs this concern:

The Balance Act, if passed, would most likely have provided not only explicit statutory first sale protection for users engaged [in] electronic transmissions of media copies in digital second hand markets, but also would have authorized technology companies to produce viable software mechanisms to assist those buyers in accessing (or "de-tethering") the works they purchase. ...These measures would have facilitated legal protection for the development of secondary markets for digital media.⁴⁸

Such secondary markets would have obvious benefits for consumers. But, as libraries increasingly obtain content for their patrons in digital format, a forward and delete mechanism to facilitate the same first sale doctrine that we are accustomed to with print materials in the digital environment is equally necessary to preserve traditional library functions. Thus the legislative enactment of such a scheme, similar to what was



proposed in the BALANCE Act of 2003, is our fourth suggestion for steps toward a library-friendly copyright law.

A Brief Digression on Peer-to-Peer File Sharing

It is virtually impossible to discuss a “forward and delete” scheme for creating a digital right of first sale without considering the current “moral panic”⁴⁹ about peer-to-peer file sharing and downloads of unauthorized copies of music and movies. In most respects, these are not really library issues. Libraries have no interest in seeing the copyright law flouted, and the problem with moral panics is that they frequently trample on perfectly legitimate activities that merely look somewhat like the practice being condemned.

Thus, libraries have something to lose in the fuss over peer-to-peer file sharing; it is quite likely that legitimate library activities will become more difficult as the entertainment industries press for more and more draconian measures to try to suppress illegal downloads. Libraries need to find ways to remind lawmakers that there are many legal and important uses for file-sharing

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technologies without appearing to defend, much less facilitate, the illegal downloading that is such a concern to the music and movie industry.

One very specific way in which the panic over file sharing may have a chilling effect on library activities is around statutory damages. Recent court cases over P2P downloads have resulted in extraordinarily high damage awards, based on the vast range of statutory damages available under the Copyright Act,⁵⁰ and the content industries have been very anxious to get maximum press coverage for these awards, precisely in order to scare off those they see as would-be infringers. The panic over high damage awards may frighten some libraries (and their legal counsels) from pursuing activities that they may otherwise feel are fair use. There are two possible responses to this concern about the chilling effect of high statutory damages.

First, there are several movements to rein in statutory damage awards. The legal team in one of the P2P file-sharing cases has announced the intention to challenge the nearly 2 million dollar award against their client by asserting that such damages are unconstitutional as a violation of due process.⁵¹ Supreme Court precedent has supported this claim about excessive punitive damage awards,⁵² although the situation with statutory damages may be rather different. Although there is little doubt that such awards are partly intended to be punitive, the fact that the range of damages is set out in the law itself (hence they are “statutory” damages) makes it far less likely that they will be seen as a due process problem because every infringement defendant is aware when going into trial of the possibility of such damage awards. So reformers also suggest legislative solutions to reduce statutory damages or to more clearly circumscribe those situations in which the very high range of damages is appropriate.



Librarians may well choose to support efforts to reform the statutory damages scheme in the Copyright Act, and such revision would reduce the chilling effect these awards may have on legitimate library activities.⁵³ But the second response to that chilling effect, which is to remind libraries that they get some special protection from statutory damage awards that is already articulated in the law, really reduces the need to worry too much about this issue. Librarians need to be familiar with the provision of section 504(c)(2) of the Copyright Act, which says that statutory damages shall not be assessed against employees of non-profit libraries of educational institutions if they had a good faith belief that their activities were fair use, even when a court ultimately determines otherwise. That provision, and the fact that there has never been an award of statutory damages granted against a library for its activities related to copyright, should reduce the chilling effect of the statutory damages awarded in P2P file-sharing cases on libraries.

Step Five: Limitations on the Copyright Transfers and Exclusive Licenses

With our fifth suggested step, we turn our attention to issues involving authors and authorship, based on the conviction that the copyright incentives are fundamentally intended to benefit authors and that it is authors, rather than intermediaries, whose motivation to exploit their own works will best coincide with the public interest in maximum access and use rights. In an article explaining the economics behind this conviction, Professor Tim Wu notes that “the question of whether copyright should serve authors or publishers is as old as copyright. While sentiment has always favored authors, I argue that the economics of copyright also support more authorial control over the enforcement of copyright.”⁵⁴ This point is reiterated in more traditional economic terms by the arguments made by William Landes and Richard Posner that “congestion externalities” would be reduced and “maintenance incentives” increased when copyright is held by authors rather than publishers.⁵⁵

One of the obstacles to authorial control over copyright is that so many intermediaries demand either a copyright transfer or an exclusive license for reproduction and distribution as a precondition for publishing a work. In a fascinating article published shortly after the 1976 Copyright Law took effect, then professor and now Supreme Court Justice Stephen Breyer suggested that it was important to limit the market power of intermediaries and that restricting the ability to transfer or exclusively license copyrights was one way to accomplish that goal.⁵⁶ Such restrictions, he argues, would stimulate competition to the overall benefit of authors. He speculates that authors tend to agree to exclusive arrangements with intermediaries either because they are unaware of the alternatives or because of the market power exercised by publishers.⁵⁷ In a digital environment, of course, the market power of intermediaries is substantially reduced, making a reduction in the number of exclusive agreements regarding copyright even more urgent than it was when Breyer was writing.

Some limits on the transfer of copyright are already in place. It is not uncommon, for example, for contracts for the publication of books to include a provision whereby the copyright, which has been transferred to a publisher, either reverts automatically to the author when the book goes out of print or reverts upon request from the author.



As Breyer suggests, authors do not always know that they have the right to reclaim a transferred copyright and do not know when rights have reverted. This is even more the case in regard to the statutory provision that allows an author or the heirs to reclaim a transferred copyright after 35 years.⁵⁸ Section 203 of the Copyright Act provides for the termination of transfers only when a written request is made by the author or the author's heirs within a specified window of time.⁵⁹

Obviously, since many heirs do not even realize they have inherited copyrights, such requests are very infrequent.

If we take seriously the argument that copyrights will be more productive in the hands of the author, especially after the relatively short period of time during which commercial sales are usually made, the period of time after which a transferred copyright can revert to the author should almost certainly be shortened. Also, the mechanism by which a reversion is requested could be made much easier and a requirement included in section 204 to require that all transfers of copyright include notice to the author of his or her reversion rights. In addition to these steps, it would be helpful for the copyright community to arrive at a definition of "out of print" that does not allow on-demand copies of a work, either as digital files or as print-on-demand hard copies, to undermine those provisions of publication contracts that allow authors to recover their rights. As digitization of books continues to accelerate, new, more explicit contract provisions may become necessary to preserve the old tradition of allowing authors to regain their copyrights after the period of reasonable commercial exploitation is finished, even if digital copies of the work will remain available.

These steps, taken to improve the mechanisms already in place to return copyright to the hands of authors, form one part of the fifth suggestion for making copyright law more library and user friendly. They should be combined with the suggestion made by Justice Breyer many years ago that limits be placed on exclusive licenses. These licenses are also subject to the 35-year reversion rules of section 203, but it is quite possible to imagine other ways to limit such licenses so that authors would preserve their options. One suggestion is that additional formalities be introduced into the process of granting an exclusive license so that such grants would be difficult to make without reflection. In the absence of a clear intention to license a right exclusively, expressed by compliance with these formalities, the default canon of interpretation would then be to read all licenses as non-exclusive. This suggestion would be one more way to ensure maximum exploitation of copyrighted works by leaving rights in the hands of the author whenever possible, and steps toward this general goal are the fifth suggestion for improvement to the law.

Step Six: Taxation of IP in Non-authorial Hands

In some ways, the suggestion that the ownership of copyright should be taxed in certain situations is the most radical suggestion made in this article—and the one least likely

Authors do not always know that they have the right to reclaim a transferred copyright and do not know when rights have reverted.



to be adopted. Yet it is not as radical as it first sounds, and it may be more practical than some other, more familiar suggestions for addressing the problem of the immense gap between the short period during which a work is economically productive so that distributors have an incentive to make it available for sale and the very long period of copyright protection.⁶⁰ The result is that most works “lie fallow” for many, many years, during which they can neither be freely exploited (such as in library digital collections) nor purchased through normal commercial channels. Landes and Posner, in their analyses of the economic structure of copyright, have recognized that this is a significant flaw in the current economic system.⁶¹

Interestingly, both Landes and Posner, from the relatively conservative perspective of economic analysis, and Lawrence Lessig, from the much more radical perspective of users’ rights and “free culture,” endorse a return to a renewal system for copyright. In *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity*, Lessig advocates a revival of the system of registration and renewal but calls for a decentralized system that would not be the sole province of the Copyright Office and that would encourage competition among registrars in order to reduce the costs and burdens of the system.⁶² From Lessig’s perspective, the goal is to encourage rights holders to release those rights to the public when a work is no longer economically worth the cost of renewal. Landes and Posner, from a slightly different perspective, would also impose a renewal requirement in order to encourage the commercial exploitation of works, and they would allow indefinite renewals to encourage the marketing of more works that are currently in the public domain.⁶³ Both suggestions understand that works should either be subject to commercial exploitation or available in the public domain, and both run afoul of the commitment the United States has made, by its membership in the Berne Convention and other international treaties, not to impose formalities on “the enjoyment and exercise” of copyrights.⁶⁴

What is suggested here is that, instead of a renewal system, which would require an extensive apparatus to implement, the United States could simply impose a tax on copyright ownership when, and only when, the copyright is held by someone other than the author, and the work is not subject to normal commercial exploitation. The effect of such a system would be similar to that advocated by Lessig and Landes and Posner. A copyright holder who has ceased to exploit a work would have to decide if it were to his or her economic advantage to continue to possess that copyright (and pay tax on it) or to release the rights either to the public domain or to the author. Note that this suggestion would not tax copyright in the hands of the author, based on the conviction—explained above—that the author has the best incentive to exploit his or her copyright in ways that will ultimately benefit the public. Thus authorial possession of copyright is to be encouraged almost as much as is the public domain. A tax system in which it was possible to avoid the tax by either dedicating the work to the public domain or by transferring rights back to the author would serve the purpose, also described above, of encouraging only limited transfers and exclusive licenses.

A proposal for a tax system to remedy the problem of works that are simultaneously unavailable for use and not subject to commercial exploitation is not entirely unprecedented. In an op ed published in the *Los Angeles Times* in 2008, scientist and businessman Dr. Dallas Weaver suggested exactly such a system, although he did not develop



specifics in the limited space available. He summarized his idea thusly: "If all copyrights were taxed at a fixed (but significant) amount per year to maintain the copyright (all registered through the copyright office and searchable), there would be a significant carry cost and most of the copyrighted material would revert to public domain and become available to 'promote the progress of science and the useful arts.'" ⁶⁵ The suggestion offered here would modify Weaver's suggestion in several ways. For one thing, it does not seem appropriate to tax copyrighted material that is subject to normal commercial exploitation for two reasons. First, such works are available to serve the socially valuable functions that copyright is intended to foster. Libraries do not have any interest in making market entry for copyright holders more difficult because their business also depends on a functioning market for copyrighted materials. Second, when a work is subject to normal commercial exploitation, the profits from that commercialization are already taxed, so it would be an excessive burden to add an additional tax. ⁶⁶ Another difference between Weaver's idea and this proposal is that here I suggest that copyright ownership not be taxed when the rights are held by the author of the work, for reasons that have already been discussed. ⁶⁷ Thus, a rights holder who wished to avoid the tax, which would not begin until a work was out-of-print or otherwise not being commercialized, could either return the rights to the author or dedicate the work to the public domain.

It is useful to note, in regard to this suggestion as well as to the previous one and the one that follows, that support for an increased role for authors in controlling the use of their own copyright material is fully in keeping with the values of librarianship. Although the relationship between libraries and publishers can be thorny and contentious, it is quite natural for librarians to respect authors and authorship. Libraries are a major source of support for authors not only as purchasers of a great deal of creative output but also as the great "incubator" of authorship, the source of inspiration and research for so much new creation. ⁶⁸ In his paper on copyright and authorship, Tim Wu says that "it has long been the stated aspiration of copyright to make authors the masters of their own destiny." ⁶⁹ To this aspiration librarians should whole-heartedly agree. In so far as copyright law supports authorial control and authors' own intentions toward their works, the needs of libraries and their users are in good hands. Hence, our sixth step toward a more library- and user-friendly law is this idea for a tax on IP that would put more copyrighted material into the public domain or under the control of authors.

A proposal for a tax system to remedy the problem of works that are simultaneously unavailable for use and not subject to commercial exploitation is not entirely unprecedented.

Step Seven: Recognize a "Moral" Right of Attribution

Perhaps the single fact about U.S. Copyright Law that most surprises people, even librarians who are relatively familiar with its broad outlines, is that there is no right of attribution in our law. This is in spite of the clear obligation to protect this and other "moral rights" that are contained in the Berne Convention, to which the United States



is a signatory.⁷⁰ Of course, librarians are so accustomed to teaching proper citation techniques that it seems particularly unaccountable that such citation practice is not a

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requirement of a law that otherwise seems so restrictive. As Professor Jane Ginsburg says in an article on the subject, “Few interests seem as fundamentally intuitive as that authorship credit should be given where credit is due.”⁷¹ But the development of copyright as an economic right that was primarily exercised by publishers helps explain this lack of a right of attribution. Whereas many countries developed their copyright laws with rights of attribution and

integrity from a tradition that recognized the importance of personal expression and individual labor in creation, the United States law has always been based on economic considerations alone.⁷²

In many countries the right of attribution is protected under the rubric of “moral rights,” along with a right to protect the integrity of the work, and it often spills over into the sphere of economic rights. For example, the set of exceptions to the exclusive rights in the copyright law of the United Kingdom that are known as “fair dealing” includes proper attribution as one of their prerequisites.⁷³ A requirement of attribution would make perfect sense from the perspective of academic libraries, since it would preserve the chain of influence and assist users in following that chain as they research and create new works. As Ginsburg says, such attribution “is instinctively appropriate because it furthers the interests both of authors *and of their public.*”⁷⁴ Whereas so much else in copyright law seems unfair to subsequent users of a work, whose use is a *sine qua non* for further creativity, the right of attribution seems eminently fair. Even in their book proposing a radical re-envisioning of copyright law to accord with an absolutist reading of the First Amendment guarantee of freedom of speech, Professors David Lange and H. Jefferson Powell acknowledge that,

the more intimate personal rights [in the moral rights tradition] pose little or no corresponding threat. The right to be identified as the creator of an original work (a right that copyright itself does not directly afford at present) need not interfere with the ability of another to make subsequent use of that work.⁷⁵

It is interesting to note that attribution, more than economic profit, is the most important value for many academic authors, to whom little direct economic benefits flow from most publications but who gain promotion and tenure on the basis of the reputation they garner from their scholarship. The importance of attribution for such authors helps explain the appeal of the Creative Commons licensing scheme, which allows authors and other creators to essentially leverage their copyright to allow many “downstream” uses of their work while enforcing attribution as a condition of the licensing.⁷⁶ A right of attribution adopted into U.S. law would help support this basic value of academic and non-academic authors alike, without seriously impeding the subsequent uses by others that are so important for the continuing progress of science, arts, and learning.



Indeed, Professor Ginsburg proposes such a right and outlines the form it should take, based on her conclusion that “ultimately, an amendment to the U.S. Copyright Act to provide an explicit and general right of attribution of authorship may be necessary to afford meaningful rights to authors, as well as to preserve Berne compliance.”⁷⁷ Such an amendment would serve the scholarly and creative community well, and it would enhance the basic values of librarianship of respect for authorship and proper attribution of sources as a condition for learning. For these reasons, the adoption of a right of attribution into U.S. copyright law is the seventh and final suggested step toward a library-friendly copyright law.

Coda: The Google Books Settlement

Since the announcement in late 2008 that Google and the groups of authors and publishers who were suing them for alleged copyright infringement over the Google Books project had reached a settlement agreement, it is hard to imagine any discussion of copyright reform that is focused on libraries and library values that does not take some account of that settlement. The Google Books project, of course, promised unprecedented access to the world’s printed literature, and it has been welcomed by librarians and scholars alike. In his 2008 book on copyright and free speech (published before the settlement announcement), Neil Netanel is enthusiastic about the promise of the book digitization project. He writes, “For the Internet user, then, Google’s Book Search project is roughly akin to having ready access to a virtual card catalog for a significant portion of the world’s books, with the added value of being able to apply search engine queries to the entire text of every book, view the full text of public domain materials, and receive information about where to locate or buy copyright-protected materials.”⁷⁸ Since the terms of the settlement have been announced, we know that the amount of free access to each in-copyright title is likely to grow, but the number of titles included may shrink. Full-text access to protected works will become a possibility if the settlement receives final approval, although that access will require payment for either individual access to specific titles or an institutional subscription to the full database.⁷⁹ So the project, both before and after the settlement of the copyright infringement lawsuit, clearly offers a tremendous opportunity in terms of access to materials; and, as such, it clearly advances a key value of librarianship.

There are, nevertheless, troubling aspects of the settlement from the point of view of libraries.⁸⁰ Since the Google Books project moves, under this agreement, from an aggressive assertion of fair use to a commercialization of out-of-print but still copyright protected books, libraries seem to have rather lost a champion in the struggle for expansive and clearly defined fair use rights. A ruling on the merits of Google’s fair use claim would have given the library community a great deal of clarity on that difficult issue, and the abandonment of that claim must give rise to some regret. Furthermore, fair use has been replaced, in the Google Books project, by a commercial model that will inevitably cost libraries a good deal of money. Unfortunately, no specifics about how much the institutional subscription will cost have been made public, so libraries are left to worry about whether or not the pricing model will ultimately be fair to them or will create another “big deal,” which they cannot afford but can also ill-afford to pass up.⁸¹



The biggest concern about the Google Books settlement from the perspective of this article, however, is in regard to the way copyright reform is carried out. All of the suggestions for “copyright renewal” made here would be accomplished by public law-making, either through the legislature or through the court system. The Google Books settlement, on the other hand, was negotiated in private and will be approved, if it is, based on its fairness only to the three private parties to the lawsuit.⁸² Yet, the settlement will have a tremendous effect on both the way libraries relate to the public and the application of copyright law. For one thing, access to copyrighted works will cost money, which runs counter to the library mission of equal access, and that cost will be determined with little or no input from the library community. Also, Google will be able to collect information about the reading habits of consumers and use that information to target advertising. Again, this practice would conflict with libraries’ commitment to protect the privacy of circulation records. As for impact on copyright law, one obvious implication is the reduced incentive for Congress to address the orphan works problem. Since the class action mechanism will allow Google to commercialize all such works, Congress may well feel that the orphan works problem has been solved, even though libraries will still face the uncertainty of digitizing orphan works if they wish to do so for focused digital collections or to provide no-cost access as an alternative to Google. Another possible impact on copyright law as it relates to libraries is the worry that a commercially available copy of an out-of-print work on Google will undermine the application of those library-specific exceptions for copying in section 108 that require as a condition of their application that no copy of the work be commercially available at a reasonable price. Google Books for sale, in short, may make many of our preservation and interlibrary loan activities more difficult.

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All of these impacts will be accomplished, if the settlement is approved, by means of “private law” negotiations. This seems a poor way to make such dramatic changes to the copyright environment in the United States. As frustrating as copyright reform legislation can be, with its endless set of negotiations and compromises, it is, at least, almost always carried out in public, even if the public seldom cares enough to watch. These kinds of private negotiations that dramatically change the conditions for public access and use of copyrighted materials actually make the case even more strongly that comprehensive, public copyright renewal is needed.⁸³

conditions for public access and use of copyrighted materials actually make the case even more strongly that comprehensive, public copyright renewal is needed.⁸³

Conclusion

These seven steps toward a renewed copyright law that would be more useful to and accommodating of both libraries and their users roughly divide into three categories. The first two are suggestions for reform to the kinds of “paracopyright” practices that make the very application of copyright law uncertain, and they are raised as steps toward greater predictability. The next two steps directly address limitations and exceptions that would improve the copyright environment for libraries. Finally, the last three

suggestions are aimed to improve authorial control over copyright works in the belief that such control and the broad incentives that authors have to share their work and encourage its use for new creation will ultimately benefit both libraries and their users. All these suggestions are offered in hopes that, by contemplating the conditions and arguments they raise, librarians can achieve a greater understanding of the copyright environment in which they currently operate and of the myriad opportunities available to them to advocate for a more library-friendly copyright law.

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Note to the reader: This article is formatted according to correct legal citation and style.

Notes

1. The Copyright Law of the United States is codified in Title 17 of the U.S. Code. The current version of Title 17 has its roots in the Copyright Act of 1976, Pub. L. No. 94-553, which dropped the requirement of renewal and based the duration of copyright protection on the life of the author plus a fixed number of years, rather than a renewable term.
2. U.S. Constitution, art. 1, sec. 8.
3. The Copyright Act of 1976 marked a sea change in copyright protection when it shifted from the requirement of formalities to secure copyright protection to automatic protection as soon as a work of authorship is fixed in tangible form. See 17 U.S. Code § 408(a). It is true, however, that the changes that upset the balance of copyright in the United States had been underway for some time; see, for example, the history of copyright and authorship in the United States during the nineteenth century recounted by Oren Bracha in "The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright," *Yale Law Review* 118 (November 2008): 186-271.
4. "Rigid enforcement of copyright laws harms consumer interests: Int'l survey," *ONLINE: International News Network* (May 11, 2009), <http://www.onlinenews.com.pk/details.php?id=145026> (accessed October 5, 2009).
5. *Id.*
6. A potential problem with compulsory licensing schemes is that they may run afoul of the Berne Convention "three step test" for copyright limitations and exceptions. This possibility is raised and discussed by Alina Ng in "Authors and Readers: Conceptualizing Authorship in Copyright Law," *Hastings Communication and Entertainment Law Journal* 30 (Summer 2008): 30-1.
7. One such voluntary licensing program that is aimed to reduce peer-to-peer sharing of music files is Chorus, about which a pro and con discussion can be found at the Web site of the Electronic Frontier Foundation. Fred von Lohmann, "More on Chorus, Pro and Con," Electronic Frontier Foundation (March 20, 2009), <http://www.eff.org/deeplinks/2009/03/more-chorus-pro-and-con> (accessed October 5, 2009).
8. The Shawn Bentley Orphan Works Act of 2008, H.R. 5889, was the most recent such effort. It was a clumsy "solution" that tried to reconcile essentially irreconcilable positions, and it failed to pass both houses before the Congressional term ended.
9. 17 U.S. Code 107.
10. The recent release of a model "Draft Law on Copyright" by the international group eIFL (Electronic Information for Libraries) is both a sign of how urgently this kind of reform is needed throughout the world and a model to which the United States, and U.S. librarians, might look as they consider what a library-friendly copyright law might look like. The eIFL draft can be found on the Electronic Information for Libraries Web site, <http://www.eifl.org>.

- eifl.net/cps/sections/services/eifl-ip/training/draft-law - <http://www.eifl.net/cps/sections/services/eifl-ip/training/draft-law> (accessed October 5, 2009).
11. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). The DMCA became effective on January 1, 2000.
 12. Codified at 17 U.S. Code 512.
 13. See 17 U.S. Code 1201.
 14. Although the DMCA contains language asserting that fair use rights are unaffected by the legislation, an influential judicial decision held that circumvention for the purpose of a fair use was not permitted under section 1201 because fair use does not contain any guarantee of access. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd*, 273 F.3d 429 (2d Cir. 2001).
 15. This delegation of legislative authority to an executive agency is authorized by the Administrative Procedure Act of 1946, 60 U.S. Stat. 238, codified at 5 U.S. Code 500 *et seq.*
 16. This language has proved problematic since the terms of designated legislative authority must be followed very strictly, but it is not the classes of works but users and uses that the exceptions to anti-circumvention rules must be directed to. This conflict has been used by major corporate interests to keep the scope of the declared exceptions astonishingly narrow.
 17. The 2006 exemptions were announced in the Federal Register on November 27, 2006 (Volume 71, Number 227) and are codified at 37 C.F.R part 201.
 18. See the announcement and background materials from the Copyright Office at <http://www.copyright.gov/1201/> (accessed October 5, 2009).
 19. The text of this legislation can be found at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1201>: (accessed October 5, 2009).
 20. Timothy K. Armstrong, "Fair Circumvention," *Brooklyn Law Review* 74, 1 (2008): 1-50, University of Cincinnati College of Law Public Law & Legal Theory Research Paper, no. 08-08 (February 20, 2008), http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=360850 (accessed November 5, 2009).
 21. *Id.*, 35.
 22. *Id.*, 38.
 23. Neil Netanel, *Copyright's Paradox* (Oxford: Oxford University Press, 2008), 213-15.
 24. *Id.*
 25. 17 U.S. Code 109.
 26. This respect for private law agreements is enshrined in our Constitution as the notion of "freedom of contract." See Article 1, section 10, clause 1, known as the Contracts Clause.
 27. The Yahoo! Terms of Service can be read at <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (accessed October 5, 2009).
 28. In a recent case involving the anti-plagiarism software "Turnitin," a district judge held that the click-through agreement was fully enforceable even when the user took steps to indicate his/her unwillingness to accept all of its terms since they had been obligated to click "I accept" in order to communicate the reservations about the agreement to the company. Thus a "Catch-22" situation is created that makes negotiation of these licenses a logical impossibility. For a report about the district court's ruling, see Jeffrey R. Young's article "Federal Judge Rules that Plagiarism-Detection Tool Does Not Violate Students' Copyrights" from the March 26, 2008 online edition of the *Chronicle of Higher Education*.
 29. Elizabeth I. Winston, "Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property," *George Mason Law Review* 14 (2006): 93-133, <http://www.law.gmu.edu/gmulawreview/issues/14-1> (accessed November 5, 2009). See especially p. 2-5.
 30. Many librarians will recall the struggles over UCITA, the proposed Uniform Computer Information Transactions Act that was adopted in two states, Virginia and Maryland, but was ultimately withdrawn in 2002 by its proposers because of the controversy it generated. UCITA would have added article 2(B) to the Uniform Commercial Code in order to, among

other things, recognize the legitimacy of “shrinkwrap” and even “browsewrap” licenses. Its withdrawal was certainly good news for consumers, including libraries, who are subject to these licenses; but a cynic might argue that the revision of the UCC became unnecessary because courts began to over-enforce these licenses in just the fashion UCITA envisioned. A proposal to preempt non-negotiable licenses when they conflict with copyright law is intended as another kind of protection against such over-enforcement.

31. The Executive Summary of the Digital Millennium Copyright Act, as well as the full report, can be found at http://www.copyright.gov/reports/studies/dmca/dmca_study.html (accessed October 6, 2009).
32. *Id.*
33. Introduced in the 108th Congress as H.R. 1066.
34. Quoted in Henry S. Long, III, “Commentary: Reconsidering the ‘Balance’ of the ‘Digital First Sale’ Debate,” *Alabama Law Review* 59 (2008): 1197. The title referred to is Title 17 of the U.S. Code.
35. The report of the Study Group is available at <http://www.section108.gov/> (accessed October 6, 2009). For the inconclusive discussion of contract preemption, see p. 120–2.
36. Another issue regarding the licenses that libraries sign is the prevalence of non-disclosure agreements, or NDAs, that prevent libraries from talking with each other to determine the range of differential pricing and the scope of differing terms of use to which they are subject. These NDAs serve no beneficial purpose for the libraries and should be resisted whenever possible. This is not, of course, an issue of legislative or judicial reform but merely a matter of collective will power. The Association of Research Libraries adopted a resolution in 2009 calling on its members to refrain from signing contracts containing such nondisclosure clauses, the announcement of which can be found at <http://www.arl.org/news/pr/nondisclosure-5june09.shtml> (accessed October 6, 2009).
37. *Id.*, 129–30.
38. See 17 U.S. Code 301(a). The exception, as noted below, is found in section 301(c).
39. The full text of the ARSC recommendations can be found at <http://www.arsc-audio.org/copyright-recommendations.html> (accessed October 6, 2009). These recommendations have been endorsed by six major library associations, including the American Library Association; see news release at <http://www.arsc-audio.org/pdf/pr801.pdf> (accessed October 6, 2009).
40. Study Group report, 129.
41. See the additional recommendations made in the ARSC document.
42. First sale is codified in 17 U.S. Code 109. In international treaties, this same principle is referred to as the doctrine of exhaustion, although the major agreements do not dictate a particular position in regard to the doctrine; see article 6 of the “Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),” for example, at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (accessed October 6, 2009).
43. First sale is a limitation on the distribution and display rights only; nothing in section 109 authorizes the making of copies of a work that has been lawfully obtained.
44. See Long, 1194.
45. Long notes that many licensing agreements already authorize a “makeshift forward and delete scheme” in order to accommodate the desire of many consumers to transfer digital media they have purchased when they upgrade hardware. See Long, 1195.
46. See the Executive Summary of this report at http://www.copyright.gov/reports/studies/dmca/dmca_executive.html (accessed October 6, 2009).
47. See notes 32 and 33 and accompanying text.
48. Long, 1197.
49. See William Patry, *Moral Panics and the Copyright Wars* (New York: Oxford University Press, 2009).
50. In *Capitol Records v. Jammie Thomas-Rassett*, tried in June 2009 in a federal district court in Minnesota, a jury returned a damage award of \$80,000 per song infringed, for a total

- of \$1.92 million. Only a little more than a month later, a federal jury in Massachusetts awarded \$22,500 per song, or \$675,000, in the infringement trial of *RIAA v. Joel Tenenbaum*.
51. The announcement of an appeal in the *Tanenbaum* case is covered by, among others, *The Harvard Crimson* in an August 6, 2009 story, <http://www.thecrimson.com/article.aspx?ref=528654> (accessed October 6, 2009).
 52. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).
 53. For a full discussion of efforts by the Association of Research Libraries and other library associations to reform copyright statutory damages, or at least maintain the status quo, see Jonathan Band, "The Three P's: A Tribute to Duane Webster," *portal: Libraries and the Academy* 9, 3 (2009): 368–72.
 54. Tim Wu, "On Copyright's Authorship Policy," *Columbia Public Law Research Paper No. 07-148* (2007): 1–23, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=159088 (accessed November 5, 2009).
 55. William Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: The Belknap Press of Harvard University Press, 2003), 227–8.
 56. Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs," *Harvard Law Review* 84 (December 1970): 319–21.
 57. *Id.*, 320.
 58. See 17 U.S. Code 203.
 59. 17 U.S. Code 203(4)
 60. For a study of the economic harm caused by this gap and the conclusion that the optimal length of copyright protection is only 14 years, see Rufus Pollock, "Forever Minus a Day? Some Theory and Empirics of Optimal Copyright" (July 2007), unpublished, <http://mpira.ub.uni-muenchen.de/5024/> (accessed October 6, 2009).
 61. See Landes and Posner, especially pages 228–9, as well as Landes and Posner, "Indefinitely Renewable Copyright," *University of Chicago Law and Economics Olin Working Paper No. 154* (August 1, 2002), available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319321 (accessed October 6, 2009).
 62. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), 289–90.
 63. See Landes and Posner, "Indefinitely Renewable Copyright."
 64. See article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works. The convention is available at <http://www.wipo.int/treaties/en/ip/berne/> (accessed October 30, 2009). It might be possible to reconcile the proposals made by Lessig and by Landes and Posner by imposing them only on U.S. citizens. As we shall see, the tax scheme proposed below would also apply only to U.S. citizens and would not, in any case, constitute a formality imposed on the enjoyment and exercise of copyright.
 65. Dallas Weaver, "Copyright This: Intellectual Property's Social Value May Trump Copyright Law," *Los Angeles Times*, February 20, 2008, <http://www.latimes.com/news/opinion/la-oe-w-weaver20feb20,0,1675278.story> (accessed October 6, 2009).
 66. It is interesting to note that some countries already use the tax on income derived from IP to vary the incentives for rights holders and further encourage creation. See, for example, the article "New Luxembourg Tax Regime for Intellectual Property Income," [http://www.ey.com/Publication/vwLUAssets/new-lux-tax-regime-intellectual-property-income-0508/\\$FILE/new-lux-tax-regime-intellectual-property-income.pdf](http://www.ey.com/Publication/vwLUAssets/new-lux-tax-regime-intellectual-property-income-0508/$FILE/new-lux-tax-regime-intellectual-property-income.pdf) (accessed October 30, 2009).
 67. For detailed discussion of why copyright is more efficient in the hands of the author than in almost any other situation, see the article by Tim Wu.
 68. Testimony to this fact can be found from the authors who come each year to speak at the annual conferences of the American Libraries Association, where almost every speech begins with a declaration about how much libraries have meant to the author, especially in childhood and early in their career.
 69. Wu, 3.

70. See Article 6bis of the Berne Convention, <http://www.wipo.int/treaties/en/ip/berne/>.
71. Jane Ginsburg, "The Right to Claim Authorship in U.S. Copyright and Trademark Law," *University of Houston Law Review* (2004): 1. Available on SERN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=515882 (accessed October 6, 2009).
72. For the development of U.S. copyright and the impact of the dichotomy between these two views, see L. Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), especially chapter 12. See also the comments on moral rights in David Lange and H. Jefferson Powell, *No Law: Intellectual Property in the Image of an Absolute First Amendment* (Stanford, CA: Stanford University Press, 2009), 183–7.
73. See section 29 on "Research and private study," for example, of the Copyright, Designs and Patents Act of 1988, p. 39–40, <http://www.ipo.gov.uk/cdpact1988.pdf> (accessed October 6, 2009).
74. Ginsburg, 1 (emphasis added).
75. Lange and Powell, 184.
76. See the explanation of Creative Commons licenses at the Creative Commons Web site, <http://creativecommons.org/license/> (accessed October 6, 2009).
77. Ginsburg, 20.
78. Netanel, 25.
79. For a comprehensive and relatively succinct explanation of the settlement terms, see Jonathan Band, "A Guide for the Perplexed: Libraries and the Google Library Project Settlement" (The American Library Association and the Association of Research Libraries, November 13, 2008), <http://wo.ala.org/gbs/wp-content/uploads/2008/12/a-guide-for-the-perplexed.pdf> (accessed October 6, 2009).
80. The Association of Research Libraries has provided a collection of summary documents to explain the settlement agreement to librarians, including both parts of Jonathan Band's excellent "Guide for the Perplexed," <http://www.arl.org/pp/ppcopyright/google/> (accessed October 6, 2009).
81. The recent agreement between Google and the University of Michigan includes details about pricing, but those details will almost certainly not translate to other libraries, especially those who are not participants in the digitization project. See the explanation of the Google-Michigan deal by Jonathan Band, <http://wo.ala.org/gbs/wp-content/uploads/2009/06/google-michigan-amended.pdf> (accessed October 6, 2009).
82. Those parties are Google, the Association of American Publishers (AAP), and the Author's Guild. Because it is a class-action lawsuit, there must be a determination that the plaintiffs (AAP and the Author's Guild) adequately represent the interests of the whole class of authors and publishers; but, because of the settlement, the usual challenge to that representation, which would normally come from Google as the defendant, will not take place.
83. It is an easy mental step from discussing the mass digitization of the Google Books project to thinking about open access as, at least, a partial solution to the copyright impasse in higher education. Open access arrangements are themselves private solutions to a public law problem, but they rely on management of copyright by the authors/rights holders themselves. Such management is an indispensable part of the solution to the copyright problems that plague higher education. Yet, even if open access—and especially self-archiving—becomes widespread, copyright law will still present obstacles to legitimate uses of a great many works. In short, open access movements and advocacy for comprehensive copyright law reform must proceed together, and neither will fully resolve the issues raised in academia without parallel developments in the other arena.

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