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John Tehranian

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INFRINGEMENT NATION: COPYRIGHT REFORM AND THE LAW/NORM GAP

John Tehranian*

I. INTRODUCTION

> *As a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the communications revolution of our time, [and] then to pronounce upon the inadequacies of the present copyright act.*[1]

Benjamin Kaplan's wry admonition, made over four decades ago in his seminal tome *An Unhurried View of Copyright*, rings just as true today. As the rapid pace of technological change continues to force a reconsideration of the vitality of our intellectual property regime, it is tempting indeed to cite the "communications revolution" of *our* time—the Internet—as disrupting to the delicate balance struck by pre-digital copyright laws between the rights of owners and users of creative works. After all, it was no less than the Supreme Court that succumbed to this inexorable urge in its first encounter with cyberspace by famously proclaiming the Internet "a unique and wholly new medium of worldwide human communication."[2] But the rush to tout the revolutionary potential of the Internet has subsided; the Panglossian cybernauts have faded like other fin-de-siècle perpetrators of the "this time, it's different"[3] myth—the dot-com boomers who embraced wild predictions of Dow 100,000[4] and the speculators

* Professor of Law, University of Utah, S.J. Quinney College of Law. I would like to thank all of the participants in this symposium for their outstanding contributions, Dean Hiram Chodosh, Associate Dean Bob Adler, and my colleague Amy Wildermuth, the faculty advisor to the *Utah Law Review*, for their generous support, and Dan Rosenthal and Maral Vahdani for their invaluable comments and assistance. I would also like to express my gratitude to the members of the *Utah Law Review*, especially Allison Behjani, Kim Hansen, Joe Loosle, Clemens Muller-Landau, and Austin Riter, for their hard work and tireless efforts in making this symposium possible.

[1] BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1 (1967).

[2] Reno v. ACLU, 521 U.S. 844, 850 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

[3] *See, e.g.*, ROBERT ZUCCARO, "DOW, 30,000 BY 2008!" WHY IT'S DIFFERENT THIS TIME (2001).

[4] *See, e.g.*, DAVID ELIAS, DOW 40,000: STRATEGIES FOR PROFITING FROM THE GREATEST BULL MARKET IN HISTORY (1999); JAMES K. GLASSMAN & KEVIN A. HASSETT, DOW 36,000: THE NEW STRATEGY FOR PROFITING FROM THE COMING RISE IN THE STOCK MARKET (1999); CHARLES W. KADLEC, DOW 100,000: FACT OR FICTION (1999).

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who rode the recent real estate wave. A tide of skepticism[5] has followed the euphoria epitomized by John Perry Barlow's influential *Declaration of the Independence of Cyberspace*.[6] The Internet, it turns out, can be regulated, even in the face of the fractured and anarchic international legal regime. Ironically, no less than the Supreme Court has so held, finding that the Internet is not sufficiently different to warrant wholesale reform of numerous long-standing legal doctrines.[7]

All the while, as Congress and the courts chart the course of regulation, a turf battle over intellectual property rights in cyberspace continues to rage. Copyright maximalists, such as the Motion Picture Association of America (MPAA) and Recording Industry Association of America (RIAA), have bemoaned the Internet's potential to transform any teenager with a computer into a grand larcenist. They argue that the ease of digital reproduction has enabled piracy on a scale never before witnessed in human history, and they have lobbied vigorously for statutory weapons with which to fight this scourge.[8] Meanwhile, copyright skeptics such as Larry Lessig and Pamela Samuelson have asserted that the digital revolution has radically enhanced the rights of owners rather than users.[9] They argue that development of digital rights management technology has enabled copyright owners to exercise unparalleled dominion over their property, thereby constraining

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[5] *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200–01 (1998). As Goldsmith argues, regulation skeptics

> make three basic errors. First, they overstate the differences between cyberspace transactions and other transnational transactions. . . . Second, the skeptics do not attend to the distinction between default laws and mandatory laws. . . . Third, the skeptics underestimate the potential of traditional legal tools and technology to resolve the multijurisdictional regulatory problems implicated by cyberspace. Cyberspace transactions do not inherently warrant any more deference by national regulators, and are not significantly less resistant to the tools of conflict of laws, than other transnational transactions.

Id.

[6] John Perry Barlow, A Declaration of the Independence of Cyberspace (Feb. 8, 1996), http://homes.eff.org/~barlow/Declaration-Final.html. The manifesto opens: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." *Id.*

[7] *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 564, 584–85 (2002) (upholding the Child Online Protection Act's use of local contemporary community standards, despite objections from the plaintiffs that, inter alia, the standard was quixotic in light of the inherently national, if not transnational, nature of Internet publication and distribution).

[8] *See, e.g.*, Digital Millennium Copyright Act, 17 U.S.C. §§ 1201–1205 (2006) (providing criminal penalties against, inter alia, anyone who traffics in devices that circumvent digital rights management measures taken by copyright holders).

[9] *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 175 (2006); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 135.

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fair use rights.[10] Digital fences have begun to dot the online landscape, bringing a new enclosure movement to our cyber commons every bit as significant as the eighteenth-century edition.[11]

So what are we to make of this paradoxical gestalt where the Supreme Court has simultaneously embraced and rebuffed the Internet's status as a unique medium and where educated observers recognize that digital technology has simultaneously spurred unparalleled rates of piracy and granted heretofore unknown levels of control to copyright owners? And, with Benjamin Kaplan's caveat in mind, what are we to make of a symposium entitled *Fixing Copyright*, a designation that presupposes a broken system in need of reform?

Clearly, we are only beginning to grasp the massive changes afoot with the advent of digital technology. Yet amidst the flux, one constant emerges: the 1976 Copyright Act lies always at the heart of these debates, inextricably mediating our relationship with cyberspace and new media. Three decades have passed since the current Copyright Act went into effect. Without dispute, tremendous economic, technological, and social changes have occurred in that time. And although these changes do necessarily warrant concomitant reform, this symposium follows on the premise that we have reached an appropriate point to evaluate the efficacy of the extant Act and think holistically about the issue of reform.

At this juncture, three key trends bear close observation. First, copyright law is increasingly relevant to the daily life of the average American. Second, this growing pertinence has precipitated a heightened public consciousness over copyright issues. Finally, these two facts have magnified the vast disparity between copyright law and copyright norms and, as a result, have highlighted the need for reform.

II. COPYRIGHT RELEVANCE

In decades past, developments in copyright law only received the attention of special interest groups representing the movie, music, and publishing industries as well as the small number of intellectual property academics and attorneys then in existence. Once relegated to the legal hinterlands, copyright has taken center stage in recent years. Now, copyright law is of direct importance to the hundreds of millions of individuals who download music and movies for their iPods, engage in time- and place-shifting with their TiVos or Slingboxes, own CD or DVD burners, operate their own websites, write blogs, or have personal pages on MySpace, Facebook, or Friendster. Copyright law has a profound impact on two leading sectors of our economy—technology and media/entertainment. It is also affecting both new industries and ancient professions alike. The birth of the software industry brought copyright law to an entirely new sector. Meanwhile, the architectural profession is undergoing a fundamental transformation with the

[10] *See* LESSIG, *supra* note 9, at 175; Samuelson, *supra* note 9, at 191.

[11] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 34–37, 40–41 (2003).

expansion of copyright protection to architectural works.[12] Recent litigation in the industry has challenged the traditional norms of borrowing so essential to the development of post-modern architecture.[13]

Copyright law is playing a profound role in shaping our very identities. Copyright's regulation, propertization, and monopolization of cultural content determine who can draw upon such content in the discursive process of identity formation. Thus, the contours of our intellectual property regime privilege certain individuals and groups over others and intricately affect notions of belonging, political and social organization, expressive rights, and semiotic structures. In short, copyright laws lie at the heart of "struggles over discursive power—the right to create, and control, cultural meanings."[14] As Madhavi Sunder has powerfully argued, we are in the midst of a "'Participation Age' of remix culture, blogs, podcasts, wikis, and peer-to-peer file-sharing. This new generation views intellectual properties as the raw materials for its own creative acts, blurring the lines that have long separated producers from consumers."[15] In the digital age, we are all regular consumers and producers of copyrighted content.

III. COPYRIGHT CONSCIOUSNESS

With the tools for the creation, manipulation, and widespread dissemination of copyrighted works in the hands of an ever-increasing number of individuals, a remarkable thing has happened: copyright has infiltrated the public consciousness like never before. Take, for example, the growing awareness of copyright issues since the turn of the century. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act (CTEA), which lengthened the copyright term of all subsisting and future creative works by an additional twenty years.[16] By altering the terms of the state-granted copyright monopoly for millions of creative works, the Act represented a multibillion dollar allocation decision made by Congress and ensured that virtually no creative works would enter the public domain over the following two decades. Yet the Act somehow slipped through the House and the Senate with little debate. Indeed, it passed through both houses of Congress via voice vote, thereby making it impossible to ascertain who had voted yea or nay.[17]

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[12] *See* Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5133 (1991) (codified as amended in scattered sections of 17 U.S.C.).

[13] *See, e.g.*, William Hablinski Architecture v. Amir Constr. Inc., No. CV-03-6365 CAS(RNBX), 2005 WL 4658149, at *1 (C.D. Cal. Feb 27, 2005) (alleging unlawful use of copyrighted drawings for a custom-designed home).

[14] Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 70 (2000).

[15] Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 263 (2006).

[16] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(g), 112 Stat. 2827, 2827–28 (1998) (codified at 17 U.S.C. §§ 301–304 (2006)).

[17] Lawrence Lessig, *The Balance of Robert Kastenmeier*, 2004 WIS. L. REV. 1015, 1018.

Just a year later, however, the copyright maximalists were not so fortunate. In late 1999, at the behest of the RIAA, Congress amended the definition of "works made for hire" to explicitly include sound recordings.[18] In many industries, including the music business, the ambiguity over what types of works may qualify as works for hire has profound implications.[19] First, the designation affects copyright duration.[20] Second, and most importantly, the designation affects the exercise of § 203 rights. A remarkably powerful provision buried in the 1976 Copyright Act, § 203 grants authors and their heirs the inalienable right to terminate, after thirty-five years, any copyright assignment or license made after January 1, 1978.[21] However, works made for hire are exempt from termination.[22] Since most musicians assign their copyrights in their sound recordings to their record labels,[23] musicians can begin to terminate such assignments starting in 2013[24]—unless, of course, their sound recordings are deemed works made for hire.[25] Thus, the ambiguity surrounding works for hire has become a billion-dollar question for the music industry.

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[18] Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 375 (2002).

[19] Under the Copyright Act, a work made for hire is either "a work prepared by an employee within the scope of his or her employment," or "a work specially ordered or commissioned" through a written agreement for use in one of nine statutory categories: "as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas." 17 U.S.C. § 101. Thus, it is unclear whether sound recordings made by nonemployees can ever constitute works made for hire.

[20] Works made for hire enjoy copyright protection for 120 years from creation or 95 years from publication, whichever comes first. *Id.* § 302(c). All other works receive protection that lasts until 70 years after the death of the last surviving author. *Id.* § 302(a)–(b).

[21] *See id.* § 203(a).

[22] *Id.* As Mary LaFrance notes, individual recording artists who create their works as employees of their own loan-out corporations also risk having their termination rights waived as the sound recordings are likely considered works made for hire. LaFrance, *supra* note 18, at 403–04.

[23] Of course, such an assignment is only meaningful to the extent that musicians are considered the authors of a sound recording in the first place. One could argue that, by literally fixing the music in a tangible medium, the record labels are actually the authors of sound recordings since they literally press the 'record' button. *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (deeming that the author is "the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection"); Taggart v. WMAQ Channel 5, 57 U.S.P.Q.2d 1083, 1086 (S.D. Ill. 2000) (finding plaintiff interviewee had no copyright interest in interview by defendant, a broadcasting station, and noting that "[t]herefore, if anyone was the 'author,' it may very well have been the cameraman who fixed the ideas into a tangible expression, the videotape").

[24] Notification of the termination must be given at least two years, and no more than ten years, prior to the termination date. 17 U.S.C. § 203(a)(4)(A).

[25] The termination right itself is subject to an exemption for derivative works contained in 17 U.S.C. § 304(c).

Once again, like the CTEA, this amendment to the Copyright Act sailed through Congress unblemished and President Clinton quickly signed it into law. But, this time, a grassroots effort immediately struck back. The CTEA's constriction of the public domain had rallied individuals and groups concerned about users' rights and the perceived excesses of industry lobbyists. The result was nothing short of extraordinary. As Mary LaFrance recounts, "When outraged musicians and scholars discovered that, virtually overnight, the substantive law of copyright had undergone this dramatic change, the reaction was swift, loud, and overwhelmingly disapproving. Reeling from the bad press, Congress held a brief hearing and retroactively repealed the amendment."[26] The issue of ownership and termination now remains unresolved and is likely to be litigated in the next few years as musicians begin to exercise their § 203 termination rights.

The repeal of the works-made-for-hire amendment epitomized the exceptional awakening of public consciousness over copyright issues. In recent years, mainstream publications have regularly featured large spreads on copyright issues that would have previously appeared arcane and esoteric.[27] Groups such as the Electronic Frontier Foundation the Creative Commons, and the Future of Music Coalition have emerged as powerful forces to offset the lobbying interests of the entertainment and publishing industries, and programs such as Stanford Center for Internet and Society's Fair Use Project have begun public interest litigation to vindicate fair use rights against overly aggressive copyright holders. Indeed, copyright activism has become commonplace. Witness the recent furor over the Copyright Royalty Board's proposed increase in webcasting fees,[28] or the successful efforts to increase the number of exemptions to the Digital Millennium Copyright Act (DMCA) granted by the Library of Congress.[29]

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[26] LaFrance, *supra* note 18, at 375–76.

[27] *See, e.g.*, Jonathan Lethem, *The Ecstasy of Influence: A Plagiarism*, HARPER'S MAG., Feb. 2007, at 57 (brilliantly critiquing our existing copyright regime's suppression of transformative use and appropriationist art); D. T. Max, *The Injustice Collector*, THE NEW YORKER, June 19, 2006, at 34 (documenting the overzealous copyright enforcement of the James Joyce Estate); Richard A. Posner, *On Plagiarism*, ATLANTIC MONTHLY, Apr. 2002, at 23 (discussing notions of plagiarism and arguing that we could use, in some instances, "more plagiarism!"); James Surowiecki, *Righting Copywrongs*, THE NEW YORKER, Jan. 21, 2002, at 27 (critiquing copyright term extensions).

[28] *See, e.g.*, *Assessing the Impact of the Copyright Royalty Board Decision to Increase Royalty Rates on Recording Artists and Webcasters: Hearing Before the H. Comm. on Small Business*, 110th Cong. (2007) (statement of Richard Eiswerth, President, Cincinnati Public Radio), *available at* http://www.house.gov/smbiz/hearings/hearing-06-28-07-internet-radio/testimony-06-28-07-eiswerth.pdf (addressing a March 2, 2007 decision by the Copyright Royalty Board that increased royalty expenses for commercial and noncommercial webcasters).

[29] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472 (Nov. 27, 2006) (to be codified at 37 C.F.R. pt. 201) (enacting, pursuant to 17 U.S.C. § 1201(a)(1), the recommendation of the Register of Copyrights to add a record six new DMCA exemptions).

A more balanced struggle between copyright maximalists and skeptics has resulted, leading to a policy stalemate. During this impasse, the fundamental disconnect between our copyright laws and our copyright norms has grown increasingly apparent and has highlighted the need for reform.

IV. COPYRIGHT'S LAW/NORM GAP

The dichotomy between copyright law and norms is profound yet underappreciated. On any given day, for example, even the most law-abiding American engages in thousands of actions that likely constitute copyright infringement. The widespread use of peer-to-peer (P2P) file-sharing technology, which has enabled ordinary Americans to become mass copyright infringers with spectacular ease, has brought the law/norm gap to light. However, the problem extends far beyond P2P activities. We are, technically speaking, a nation of constant infringers.

A. Infringement Nation

To illustrate the unwitting infringement that has become quotidian for the average American, take an ordinary day in the life of a hypothetical law professor named John. For the purposes of this *Gedankenexperiment*, we assume the worst-case scenario of full enforcement of rights by copyright holders and an uncharitable, though perfectly plausible, reading of existing case law and the fair use doctrine. Fair use is, after all, notoriously fickle and the defense offers little ex ante refuge to users of copyrighted works.[30]

In the morning, John checks his email, and, in so doing, begins to tally up the liability. Following common practice, he has set his mail browser to automatically reproduce the text to which he is responding in any email he drafts. Each unauthorized reproduction of someone else's copyrighted text—their email—represents a separate act of brazen infringement, as does each instance of email forwarding.[31] Within an hour, the twenty reply and forward emails sent by John have exposed him to $3 million in statutory damages.[32]

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[30] *See* John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1215–1216.

[31] 17 U.S.C §§ 102(a)(1), 106(1), 501(a). Although one could attempt to distinguish the existing case law on the matter, courts have deemed fair use rights to a previously unpublished work, such as a piece of correspondence, to be exceedingly limited. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985) (noting the strong presumption against fair use of unpublished works); New Era Publ'ns Int'l. v. Henry Holt & Co., 873 F.2d 576, 583–84 (2d Cir. 1989) (noting that "a small, but more than negligible, body of unpublished material cannot pass the fair use test" and that under ordinary circumstances "the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use" (quoting Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987))).

After spending some time catching up on the latest news, John attends his Constitutional Law class, where he distributes copies of three just-published Internet articles presenting analyses of a Supreme Court decision handed down only hours ago. Unfortunately, despite his concern for his students' edification, John has just engaged in the unauthorized reproduction of three literary works in violation of the Copyright Act.[33]

One could also argue that John had an implied license. However, such a defense is problematic. As the Copyright Act notes, "[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object." 17 U.S.C. § 202. For example, in an infringement case involving letters penned by J.D. Salinger, the Second Circuit deemed Salinger the owner of the copyrights thereto, even though he no longer owned the letters themselves (he had mailed them). The court then rejected a fair use defense and enjoined the publication of the letters. *Salinger*, 811 F.2d at 94–95. § 202 and its application, as illustrated in *Salinge*r, call into question the viability of an implied consent defense in the email example.

Under existing secondary liability principles, the maker of this email software also faces potential liability for contributory and vicarious infringement. *See, e.g.*, Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (imposing contributory liability when defendant has knowledge of an infringement and materially contributes to it and vicarious liability when a defendant has the right and ability to control the activities of an infringer and gains a direct financial benefit from these activities). Courts have read these doctrines with increasing liberality in recent years. *See* Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L. J. 1363, 1369–70 (2006).

[32] This figure assumes the availability and the assessment of maximum statutory damages in the amount of $150,000 for each of the twenty distinct acts of infringement. 17 U.S.C. § 504(c)(2) (2006).

[33] 17 U.S.C §§ 102(a)(1), 106(1), 501(a). Despite the explicit text of the 1976 Copyright Act, which states that "the fair use of a copyrighted work, . . . for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright," 17 U.S.C. § 107, the courts have still managed to find a plethora of instances where use of a copyrighted work for teaching, research, or scholarship constitutes infringement. *See, e.g.*, Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996); Am. Geophysical Union v. Texaco, 37 F.3d 881 (2d Cir. 1994), *superseded by* 60 F.3d 913 (2d Cir. 1994); Duffy v. Penguin Books, 4 F. Supp. 2d 268 (S.D.N.Y. 1998); Television Digest, Inc. v. U.S. Tel. Ass'n, 841 F. Supp. 5 (D.D.C. 1993); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991). The reason these cases have usually dealt with course material providers is simple: Professors lack the deep pockets that universities and photocopiers often posses.

Additionally, while one might blithely dismiss the infringement here by positing an absence of market harm, the courts have frequently found liability under the most attenuated claims of economic damage. To assess market harm in a fair use defense, courts often extend the analysis "to the *potential market* for as yet *nonexistent* derivative works." Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 955 F. Supp. 260, 271 (S.D.N.Y. 1997) (emphasis added). On numerous occasions, therefore, courts have rejected a fair use defense by speculating about harm to a hypothetical market for derivative works. *See, e.g.*,

Professor John then attends a faculty meeting that fails to capture his full attention. Doodling on his notepad provides an ideal escape. A fan of post-modern architecture, he finds himself thinking of Frank Gehry's early sketches for the Bilbao Guggenheim as he draws a series of swirling lines that roughly approximate the design of the building. He has created an unauthorized derivative of a copyrighted architectural rendering.[34]

Later that afternoon, John attends his Law and Literature class, where the focus of the day is on morality and duty. He has assigned e.e. cumming's 1931 poem *i sing of Olaf glad and big* to the students. As a prelude to class discussion, he reads the poem in its entirety, thereby engaging in an unauthorized public performance of the copyrighted literary work.[35]

Before leaving work, he remembers to email his family five photographs of the Utes football game he attended the previous Saturday. His friend had taken the photographs. And while she had given him the prints, ownership of the physical work and its underlying intellectual property are not tied together.[36] Quite simply, the copyright to the photograph subsists in and remains with its author, John's friend. As such, by copying, distributing, and publicly displaying the copyrighted photographs, John is once again piling up the infringements.[37]

In the late afternoon, John takes his daily swim at the university pool. Before he jumps into the water, he discards his T-shirt, revealing a Captain Caveman tattoo on his right shoulder. Not only did he violate Hanna-Barbera's copyright when he got the tattoo—after all, it is an unauthorized reproduction of a

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Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (finding that a satire of the O.J. Simpson trial based on *The Cat in the Hat* infringed Dr. Seuss's copyright); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (finding that modern artist Jeffrey Koons's kitschy appropriation of a photograph to satire suburban American aesthetic sensibilities infringed the copyright of the original photographer); *Castle Rock*, 955 F. Supp. at 260 (finding that a humorous guidebook to the *Seinfeld* series violated Castle Rock's copyright in the television show). The holdings of *Dr. Seuss*, *Koons*, and *Castle Rock*, combined with John's failure to obtain reproduction licenses (which arguably undermined the not-even-hypothetical photocopying market), could certainly lead a court to reject a fair use defense in this example.

[34] 17 U.S.C. §§ 102(a)(5), 102(a)(8), 106(2), 501(a). If John circulated his doodles too widely and Gehry were feeling extraordinarily litigious, John could find himself in court. There is no reason why this example should not constitute fair use. However, given the market harm analysis above, *see supra* note 33, a fair use outcome is by no means assured.

[35] *Id.* § 102(a)(1), 106(4), 501(a). *See, e.g.*, BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005) (noting that, for poetry, "copying of more than a couplet or two is deemed excessive" and not fair use). While John might rely § 110(1)'s liability exemption for certain public performances at nonprofit educational institutions, 17 U.S.C. § 110(1), the exemption does not apply to for-profit schools, of which there are many. One could even argue that the conspicuous absence of for-profit schools from the exemption implies that a public performance at such an institution is necessarily infringing and not fair use.

[36] 17 U.S.C. § 202.

[37] *Id.* §§ 102(a)(5), 106(1), 106(3), 106(5), 501(a). *See supra* note 31 (regarding unpublished works and implied licenses).

copyrighted work[38]—he has now engaged in a unauthorized public display of the animated character.[39] More ominously, the Copyright Act allows for the "impounding"[40] and "destruction or other reasonable disposition"[41] of any infringing work. Sporting the tattoo, John has become the infringing work.[42] At best, therefore, he will have to undergo court-mandated laser tattoo removal. At worst, he faces imminent "destruction."[43]

That evening, John attends a restaurant dinner celebrating a friend's birthday. At the end of the evening, he joins the other guests in singing "Happy Birthday."[44] The moment is captured on his cellphone camera. He has consequently infringed on the copyrighted musical composition by publicly performing the song and reproducing the song in the video recording without authorization.[45] Additionally, his video footage captures not only his friend but clearly documents the art work

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[38] *Id.* §§ 102(a)(5), 106(1), 501(a). *See, e.g.*, Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313 (2006) (using the recent infringement suit involving NBA star Rasheed Wallace's tattoo as the starting point for analyzing the minefield of ink-related copyright issues). *See supra* note 33 (regarding market harm). Based on existing jurisprudence, a court may well find that donning a Captain Caveman tattoo is a commercial use that deprives Hanna-Barbera of the licensing revenue it might gain for selling animated character tattoos, should it chose to enter that market.

[39] 17 U.S.C. §§ 102(a)(5), 106(5), 501(a).

[40] *Id.* § 503(a).

[41] *Id.* § 503(b).

[42] Paraphrasing J. Robert Oppenheimer's haunting words upon the first successful test of the atomic bomb, my friend Daniel Rosenthal quipped: "John is become tattoo, infringer of works."

[43] 17 U.S.C. § 503(b). For the sake of posterity, I have no such tattoo in real life.

[44] Time Warner claims copyright ownership over the lyrics to "Happy Birthday" and vigorously enforces its purported exclusive rights based thereon. *See, e.g.*, KEMBREW C. MCLEOD, FREEDOM OF EXPRESSION: RESISTANCE AND EXPRESSION IN THE AGE OF INTELLECTUAL PROPERTY 15–18 (2007). For example, the makers of the documentary *The Corporation* have a minute of silence in their movie during a birthday party scene since they elected not to license the rights to the song—a use that allegedly would have cost them several thousand dollars. THE CORPORATION (Big Picture Media Corp. 2003).

[45] 17 U.S.C. §§ 102(2), 106(1), 106(4), 501(a). Described as "[o]ne of the greatest sources of revenue in the music industry," a copyright holder's exclusive control of public performances of a musical composition extends to such public venues as restaurants. Woods v. Bourne Co., 60 F.3d 978, 983–84 (2d Cir. 1995) (citation omitted). Although one might posit a de minimus use defense here, it is often ignored by the courts. In the related area of sound recordings, for example, the slightest unauthorized sample can result in a multimillion-dollar judgment, even if a significant and expressive new musical work is created through use of the sample. *See* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004) (holding that any unauthorized sample of a sound recording, no matter how small, constitutes copyright infringement); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (quoting Exodus, equating the Seventh Commandment with the law of copyright, admonishing "Thou shall not steal" and rejecting a fair use defense in a music sampling case).

hanging on the wall behind his friend—*Wives with Knives*—a print by renowned retro-themed painter Shag. John's incidental and even accidental use of *Wives with Knives* in the video nevertheless constitutes an unauthorized reproduction of Shag's work.[46]

At the end of the day, John checks his mailbox, where he finds the latest issue of an artsy hipster rag to which he subscribes. The 'zine, named *Found*, is a nationally distributed quarterly that collects and catalogues curious notes, drawings, and other items of interest that readers find lying in city streets, public transportation, and other random places. In short, John has purchased a magazine containing the unauthorized reproduction, distribution, and public display of fifty copyrighted notes and drawings.[47] His knowing, material contribution to *Found*'s fifty acts of infringement subjects John to potential secondary liability[48] in the amount of $7.5 million.[49]

By the end of the day, John has infringed the copyrights of twenty emails, three legal articles, an architectural rendering, a poem, five photographs, an animated character, a musical composition, a painting, and fifty notes and drawings. All told, he has committed at least eighty-three acts of infringement and faces liability in the amount of $12.45 million (to say nothing of potential criminal charges).[50] There is nothing particularly extraordinary about John's activities. Yet

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[46] 17 U.S.C. §§ 102(5), 106(1), 501(a). *See, e.g.*, Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 77–78 (2d Cir. 1997) (reversing summary judgment for defendants on fair use defense and allowing case to proceed to trial on claim of infringement for the unauthorized use of a poster as part of the set decoration in the background of a five minute scene in a single episode of a television sitcom). One could try to distinguish *Ringgold* by arguing that there is no commercial use here. However, courts have frequently adopted broad readings of commercial use. For example, in *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit held that P2P trading, a sharing activity with no quid pro quo attached, constituted commercial use because users were not paying the "customary price" for the copyrighted works they received. 239 F.3d 1004, 1015 (9th Cir. 2001). Similarly, in *Worldwide Church of God v. Philadelphia Church of God, Inc.*, the Ninth Circuit held that *giving away* 30,000 free copies of a religious work constituted a commercial activity because the defendant "profited" from the use of the work by attracting new members who ultimately tithed. 227 F.3d 1110, 1117–18 (9th Cir. 2000). Based on these cases, one could argue that virtually all use is commercial since, at some level, any unpaid use of a work causes someone to lose potential revenue.

[47] 17 U.S.C. §§ 102(1), 102(5), 106(1), 106(3), 106(5), 501(a). As previously unpublished works, the materials featured in *Found* are subject to only severely limited fair use rights. *See supra* note 31.

[48] *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement . . . ."). By subscribing to *Found*, John is quite arguably encouraging and materially contributing to *Found*'s acts of infringements by making them profitable.

[49] 17 U.S.C. § 504(c)(2).

[50] *Id*. §§ 504(c)(2), 506; 18 U.S.C. § 2319 (providing for criminal penalties against certain copyright infringers). The $12.45 million figure assumes that, for the purposes of tallying statutory damages, one uses the number of works infringed (83) and multiplies it

if copyright holders were inclined to enforce their rights to the maximum extent allowed by law, barring last minute salvation from the notoriously ambiguous fair use defense, he would be liable for a mind-boggling *$4.544 billion* in potential damages each year. And, surprisingly, he has not even committed a single act of infringement through P2P file-sharing. Such an outcome flies in the face of our basic sense of justice. Indeed, one must either irrationally conclude that John is a criminal infringer—a veritable grand larcenist—or blithely surmise that copyright law must not mean what it appears to say. Something is clearly amiss. Moreover, the troublesome gap between copyright law and norms has grown only wider in recent years.

B. The Default Rule of Use as Infringement

As noted earlier, digital technology has enabled unparalleled manipulation and use of creative works by ordinary individuals. But before the passage of the 1976 Copyright Act, most creative works did not enjoy copyright protection. Quite simply, authors could only enforce exclusive rights to works whose copyrights had been properly registered (and, subsequently, renewed).[51] As a result, the vast majority of our society's creative output automatically belonged in the public domain and use of this output did not raise any legal flags.[52] With the passage of the 1976 Copyright Act, however, we radically altered our default regime from one of nonprotection to one of protection. Under the current Act, copyright subsists in authors the moment they fix a creative, original work in a tangible medium, regardless of the observance of any formalities such as registration.[53] Thus, virtually the entire universe of creative works created after 1978 is now subject to copyright protection. Any use of a creative work is now, as a default matter, viewed as an infringement.[54] By making even more obscure works profitable, the "long tail" [55] has also exacerbated matters by extending what might be dubbed the "long copyright chastity belt." Enforcement has become increasingly worthwhile for a growing number of copyright holders, making copyright law relevant to any growing number of creators and, concomitantly, users.

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by the maximum award for willful infringement ($150,000 per infringed work). I also assume that neither an acquiescence nor fair use defense excuses the conduct.

[51] Copyright Act of 1909 § 10 (codified as amended at 17 U.S.C. 11, 61 Stat. 652 (1947)) (repealed by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541).

[52] Save the Music & Creative Commons: Proceedings Before the U.S. Copyright Office at 13 (Mar. 25, 2005), http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf (Comments of Creative Commons and Save the Music).

[53] 17 U.S.C. § 102 (2006).

[54] This fact is exacerbated by the status of fair use as an affirmative defense which places the burden of proof on a user. *See* John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 495 (2005).

[55] CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 10 (2006).

C. Technological Change and the Law/Norm Gap

Finally, by facilitating superior tracking of the use of copyrighted works, technology is now forcing us to address the uncomfortable and ultimately untenable law/norm disparity. While there may be a vast disparity between what activities the Copyright Act proscribes and what the average American might consider fair or just, a lack of aggressive enforcement has long prevented this fundamental tension from coming to a head. As technology improves, however, and as privacy rights continue to erode, enforcement is becoming increasingly practicable.

Take the example of piracy. In the past, most piracy took place in the private realm, well beyond the Panopticonian gaze of copyright holders. For example, individuals would record songs from the radio, duplicate their friends' albums on cassettes, or swap mix tapes. But there were few practical means for the record labels to monitor such activity and haul infringers into court. With the advent of P2P technology, individuals could share music not only with their best buddies, but with millions of their closest "friends" around the world. As we all know, P2P networks have vastly expanded the scope of piracy to previously unknown levels. But P2P technology also did something else—it brought individual piracy into the light of day and made enforcement a viable option for copyright holders. Specifically, Internet Protocol addresses and log databases retained by Internet Service Providers made previously undetectable "sharing" both visible and traceable.

The expanded enforcement of copyright laws precipitated by the P2P revolution has forced us to reexamine the rationality of our reigning intellectual property regime. For example, the statutory damages provisions of the Copyright Act have enabled the RIAA to file multimillion dollar infringement suits against thousands of individuals, including many children and grandparents,[56] on the basis of P2P activity. The cases rarely advance to an adjudication on the merits, as all but the bravest (or, perhaps, most foolhardy) defendants quickly settle instead of fighting the well-financed behemoth and the powerful threat of statutory damages—up to $150,000 per infringing act.[57] In one pro bono case that I handled, the RIAA sued my client, a middle-aged, terminally ill Mexican immigrant on welfare who could not speak English, for the alleged file-sharing activities of his son.[58] He ultimately diverted funds from his welfare checks to finance the settlement.

The P2P example is just one way in which technology has enabled expanded enforcement of copyright laws—a trend that is accelerating as technology improves. Imagine a world where every act currently deemed infringing under the

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[56] *See* Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry's File Sharing Litigation*, 4 NW. J. TECH. & INTELL. PROP. 133, 146 (2006).

[57] 17 U.S.C. § 504(c)(2).

[58] *See* Arista Records LLC v. Haro, No. CV-05-5350 (C.D. Cal. Oct. 17, 2006).

law were actually prosecuted. Take, for instance, something we all do: sing along with our car stereo. Currently, such an activity (especially if the windows are rolled down) is possibly infringing,[59] but completely unenforceable. The very technologies that enhance our media experiences are rapidly bringing us closer to the Panopticon state in which a near-total enforcement of intellectual property rights becomes viable. With the requisite advances in voice recognition software, every car stereo could be equipped with ears that monitor the noise in a car. Like a radio-frequency identification toll card, the mechanism could determine each song being hummed inside the car during the course of a month and then automatically bill the car's owner for the licensing rights to perform those copyrighted musical compositions or create such derivatives of the sound recordings. One can readily imagine a future dystopian world where the record labels, long since irrelevant to the development and distribution of new music, become nothing more than copyright trolls, drawing their revenue entirely from collections (or litigation) of this kind.

As surveillance technology grows more sophisticated, thereby allowing acts of infringement increasingly to come under the detection and enforcement power of copyright holders, we will be forced to confront the law/norm disparity. In response, we have already begun to reexamine our norms.[60] It is also incumbent upon us to reexamine the vitality of our copyright regime.

V. CONCLUSION

In recent years, legislators, judges, and practicing attorneys have critiqued law reviews for their excessively theoretical bent, arguing that their contents have become increasingly devoid of any real-world value. At the risk of alienating my academic colleagues and shocking the members of the copyright bar, I would like to think that this symposium is different. By bringing together a group of leading copyright scholars, including Tom Bell, Dan Burk, Wendy Gordon, Justin Hughes, Peter Jaszi, Bobbi Kwall, David Nimmer, Pam Samuelson, and Rebecca Tushnet, to contemplate the issue of legal reform in practical terms, this symposium strives to foster a dialogue that could impact future revisions at a concrete level. It is a first step in what will hopefully become a broader debate over copyright reform.

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[59] This scenario is not nearly as far-fetched as it may initially appear. Recently, a U.K. performing rights society sued Kwik-Fit, a car repair chain, for £200,000, claiming Kwik-Fit's mechanics were engaging in unauthorized public performances simply by playing their radios too loudly. The suit has survived an initial dismissal motion and underscores the very real threat of liability should the sing-along hypothetical be pursued in court. *See Kwik-Fit Sued Over Staff Radios*, BBC NEWS, Oct. 5, 2007, http://news.bbc.co.uk/1/hi/scotland/edinburgh_and_east/7029892.stm (last visited Dec. 6, 2007).

[60] All sides of the copyright debate have engaged in efforts to alter norms, from the RIAA's anti-piracy advertising and the MPAA's "Respect Copyright" Boy Scout Merit Badge to the efforts that Peter Jaszi documents in his symposium article to foster norms supporting fair use in the documentary filmmaker community. Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 UTAH L. REV. 715.