The Digital Rights War

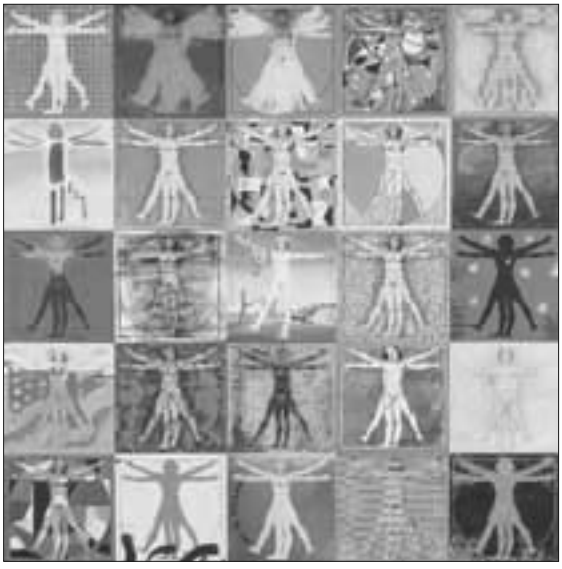
by Pamela Samuelson

Digital technology is opening up new worlds of potential, few more enticing than the emerging global marketplace for information products and services. Imagine being able to call up news articles, short stories, photographs, motion pictures, sound recordings, and other information any time, day or night, almost anywhere in the world. This is the vision that until recently sent the stocks of obscure Internet enterprises soaring and propelled relatively new companies such as Microsoft to the front ranks of American industry.

The great advantage of digital information—and a key source of its potential—is that, once produced, it is easy and cheap to disseminate. There is, however, a threat as well as a promise in this unique quality. Digital information is the equivalent of what land, factories, and equipment are in the conventional economy: essential property. And the very same low costs of reproduction and dissemination that are its great virtue also make possible unauthorized uses—including everything from copying a page from a magazine to pirating thousands of copies of a Frank Sinatra CD—on an unparalleled scale. It is no longer just commercial pirates peddling mass-produced bootlegs that alarm the Hollywood movie studios and the publishing industries; it is also the ordinary Tom, Dick, or Harriet who may be inclined to share copies of

a favorite film or book with a thousand of his or her closest friends.

To guard against this possibility, some established copyright-based enterprises—including film studios, book and magazine publishers, software companies, and others that trade in intellectual property—have been spending hefty sums to create technological "locks" for their products. They are also seeking amendments to federal copyright law that would outlaw any tampering with these locks. But they are asking copyright law to perform tasks very different from those it has performed in the print world, tasks with alarming implications for our national life.



Universal Man III *(1992), by Paul Giovanopoulos*

The new future of technically protected information is so far from the ordinary person's experience that few of us have any clue about what is at stake. So comfortable are we with the way in which copyright law matches up with our everyday experience, practices, and expectations that we find it hard to imagine the dramatic changes the digital world may bring. If I buy a copy of *A Streetcar Named Desire* today, for example, I know I can read it, share it with a friend, and perform scenes in my home or in a classroom. I can also make a photocopy of a favorite passage to send to my sister. If I am short of cash, I can go to a library and borrow a copy, making the same uses of it as I would of a purchased copy. But I also know that I should not run off dozens of copies or stage a production unless I get the copyright owner's permission.

In the familiar world we take for granted, principles and practice seem to form a seamless whole. Virtually all private and noncommercial uses of information are lawful. Yet the underlying law is somewhat more complicated. From the standpoint of copyright law, it is permissible to read a play not so much because one has paid for a copy, but because the law does not confer on owners a right to control the reading of protected, or copyrighted, works. It is okay to borrow a copy of the play from a library or share a personal copy with a friend because the law treats the first sale of a copy to the public as *exhausting* the copyright owner's right to control further distribution of that copy. Photocopying a favorite passage from a play would generally be considered a "fair use." Performing the play among friends or in a classroom also passes muster thanks to special "carve-outs" for these activities. The main concern of the law has been to stop people from becoming alternative publishers of a work (by, say, making many photocopies) or

undercutting other commercial exploitations (such as controlling the licensing of theatrical performances of *A Streetcar Named Desire*).

But the rules that have served the print world so admirably do not carry over very well to the digital world. For one thing, it is impossible to use any work that exists in digital form without also making a number of temporary copies of it. When you visit the CNN Web site, for example, or look at entries in a CD-ROM encyclopedia, your computer has to make temporary copies so that you can see the material. This simple fact has profound implications for copyright. After all, the principal right of authors and publishers (as the term *copy-right* implies) is to control reproduction of their works.

In 1995, the Clinton administration issued a policy white paper, *Intellectual Property and the National Information Infrastructure*, that spelled out just how profound it thought these implications were. The white paper made the controversial assertion that because temporary copies do get made, copyright owners are entitled to control all browsing and reading of their works in digital form. Never mind that Congress, in writing the laws in an earlier era, probably never contemplated that the rights of copyright owners would extend so far.

The white paper also endorsed a view shared by many copyright owners—including big companies such as Disney, Time-Warner, and Microsoft—that "fair use" is going to wither away in the digital world, and by analogy in the print world. Why? Because it is now technically possible (or soon will be) for consumers to get a license from the publisher whenever they want to use a copyrighted work. These copyright owners contend that the real reason certain uses of such works were formerly considered *fair* is that it was simply too expensive and cumbersome to require a license for each use. Now that technology is curing this "market failure," they assert, fair use goes away. In the new order they envision, if a use can be licensed, it *must* be licensed, even a photocopied passage from *A Streetcar Named Desire*.

It is also contended in the white paper that the "first sale" principle is outmoded. The principle doesn't apply, according to this argument, because lending a digital copy of a work to a friend requires making a copy, not just passing along your copy. In addition, digital copies of works tend to be offered on *licensed* terms, not by sales of copies. When you buy a copy of word processing software, for example, the publisher includes a so-called license agreement—that often includes a prohibition on retransfer of the copy and other restrictions on sharing the content. Increasingly, other digital works, such as encyclopedias and CD-ROMs of telephone listings, also come with such licenses. If these "shrinkwrap" licenses are legally enforceable—an issue on which the courts are currently split—there is no reason why they could

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not also be applied to the print world. Then it would be illegal to sell second-hand books, for example, or even to give them away—a prospect that must surely delight publishers of college textbooks. This is not just a theoretical prospect. The National Conference of Commissioners on Uniform State Laws will soon complete a new model commercial law, designed to serve as a template for state law (which governs these matters), that validates all mass-market licenses of information, whether in digital or print form.

The abolition of the "first sale" principle would have a powerful effect on libraries. In the past, when a library stopped subscribing to a particular journal, for example, it still had back issues available for patrons. But in a world of licensed information, canceling a subscription may mean losing all access. So all information in a particular database would become unavailable. Owning a licensed physical copy of the information, such as a CD-ROM of reference materials, might not make a difference. Publishers would be entitled to demand their return, or to trigger embedded technological locks to keep users out.

Some publishers envision an information future ruled by a pay-per-use system. Users would license from the publisher each and every access to and use of protected works, even those for private, noncommercial purposes. If you want to read an article in *Time* but don't have a subscription, these publishers argue, why shouldn't you have to pay 50 cents or a dollar to read it—even at a library—and twice as much if you want a printout? The Clinton administration's white paper, with its assertion that copyright owners are entitled to control all uses of works in digital form, strongly endorsed this vision.

The white paper also foresaw the use of technological "locks" and self-destructing copies to help copyright owners protect their works against unauthorized uses. Try to make a copy of a movie on one of the new digital videodisks (DVDs) available today, for example, and you will quickly find your path blocked by such a lock. In fact, you probably won't be able to play your disk on a DVD player purchased in Tokyo or London because the players contain built-in technical locking systems coded by geographical location. (This gives the studios greater control over the distribution and marketing of their goods.) The DivX format for movies is an example of a self-destructing copy system already in the marketplace. If you purchase a DivX disk, you can play it on your own player for 48 hours, but after that, the data on the disk is inaccessible unless you pay another license fee. There is no technical reason why this can't happen with other kinds of information as well. Why shouldn't recording companies issue CDs that are coded to self-destruct or lock up after 15 plays, forcing those who want to hear more to pay more?

But some copyright owners worry that what one technology can do, another technology can often undo. They have lobbied Congress to make it illegal to circumvent or bypass technical protection systems and to outlaw the manufacture or sale of software that make circumvention possible.

Chinese police heap pirated music CDs and other contraband for burning. One trade group estimates that pirates cost film studios, software makers, and other U.S. firms up to $20 billion annually.

Congress debated the issue earlier this year, pondering three options. One, pushed strongly by Hollywood, was a total ban on circumvention. The studios implausibly liken circumvention to burglary, insisting that it should never be allowed.* Libraries and educators were among those arguing for a second approach: banning circumvention only when the purpose is to infringe a copyright, which is, after all, the real evil that concerns the studios. Congress, however, chose a third option, a general ban on circumvention with specific exceptions in a number of cases, such as for law enforcement agencies.

What about the vitally important issue of circumvention to make fair use of a protected work? A friend of mine, for example, recently defeated the technical protection on a videocassette in order to get a film clip to demonstrate the negative connotation of the word *redskin* in a lawsuit. This seemed to him fair use. Alas, it might not be permitted under the new rules.

The Senate version of the bill makes no allowance for circumvention for fair use, a position that has won the legislation the backing of Hollywood and software giant Microsoft. The House bill, recognizing the stakes involved, calls for a two-year study of the fair use issue and carves out a temporary suspension of the ban for nonprofit institutions. (Delegates negotiating an international copyright treaty in Geneva in 1996 rejected a ban on circumvention sought by the Clinton administration for similar reasons, including concern about the implications for

*In practice, people frequently circumvent protection systems, and social custom often supports them. Some years ago, for example, when software publishers offered their products only on copy-protected disks, users frequently bypassed the protection in order to make backup copies. A federal court even upheld the legitimacy of selling a program that could bypass these systems, reasoning that making such backups is a legitimate, noninfringing use.

fair use.) A House-Senate conference committee should resolve the differences this year, but that will hardly end the debate. How the new provisions will be applied in the marketplace—where, for example, consumers may resist new controls—and how the new law will meld with existing law and constitutional principles, such as the right to free speech, will keep contention very much alive.

In this year's debate over the new law, as in others surrounding the seemingly less than scintillating subject of intellectual property, the general public has not had a strong voice. The American Library Association, the Electronic Frontier Foundation, and a handful of other groups have sought to speak for the ordinary Americans whose lives will be profoundly influenced by what Congress decides, but without an aware and aroused public, these advocates' effectiveness will remain limited.

Americans need to have a broader public conversation about the kind of information future they want to create, a conversation that must include the role of copyright. The loudest answer to the copyright industries today comes from technological optimists such as Nicholas Negroponte, the director of the Media Lab at the Massachusetts Institute of Technology and a columnist for *Wired*. The optimists stake out the opposite extreme of the argument, insisting that because the economics of bits is so different from that of atoms, copyright is, or soon will be, dead. Good riddance, they add. All information must ultimately be free.

But Negroponte and his allies do not explain how creators will be able to make a living if they have no right at all to charge for the use of their works. If they are to thrive, authors, moviemakers, painters, software creators, and others do need a way to control commercial uses of their work. Preserving copyright looks to be the best way to achieve this goal. But copyright works well in part because creators can also make fair uses of the work of others and because people have reasonable freedom to privately share information. These values, too, need to be preserved.

An "information society" in which all information is kept under high-tech lock and key, available only under terms and conditions dictated by a licenser, would not be worthy of the name. We need to work instead toward a new status quo that preserves the values that are already built into copyright law, allowing authors and publishers to thrive while also promoting the widest possible use of their creations.
