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Copyright Law in the Digital Age: Malum In Se and Malum Prohititum

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NIES MEMORIAL LECTURE*

COPYRIGHT LAW IN THE DIGITAL AGE: *MALUM IN SE* AND *MALUM PROHIBITUM*

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Good afternoon. I need to establish my credentials as an academic, so I should use a pretentious title for this talk. I will call it *Malum in Se and Malum Prohibitum: The Digital Technological Threat to a Normative Role for Copyright Law,* or in short, *Why Don't People Pay Much Attention to the Law?*

For that, let me tell you a couple of stories. There was an article on CD piracy that appeared not very long ago in the *New York Times*.[1] People were burning copies of popular music CDs and then peddling these pirated copies on the streets of New York. No question at all, you don't have to be a copyright expert to know that making a digital copy of a copyrighted digital work is an act of infringement.[2] These guys were peddling the pirated CDs all over New York at prices considerably lower than what you would have to pay for the same music otherwise. Of course, because it is digital music in the

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1. *See* Brian E. Zittel, *The Pirates of Pop Music Fill Streets with $5 CD's*, N.Y. TIMES, Sept. 9, 1999, at B1.

2. *See* 17 U.S.C. § 106 (1994 & Supp. IV 1998).

first place on the CD, and a digital copy is pretty much identical in terms of the quality of the final product, you are getting the same thing. So the *Times* was interested in these guys and in the people who bought from them, and they asked people why—why you bought from a particular person—because each of these pirates had territories of their own. And people said how I would buy from pirate *X*, and I would buy from pirate *Y*, and the *Times* asked why. And the answer was: "Everybody buys from [him]. The quality is very good. He's reputable, and he's honest."[3] Think about it. "He's reputable, and he's honest." The people buying from him know exactly what he's selling. This is not a situation of the public acting in ignorance of the law. This is an example of people acting in disregard of the law.

Another story appeared just recently relating to the Internet service called Napster, which encourages people to upload CDs and encourages other people to then download the uploaded CDs.[4] This looks like a real good business, and an entrepreneur, a venture capitalist, was very happy to put money into it. And so the *Times* was again doing a survey of people and asked someone who used the service about the morality of doing what they're doing, and the answer was: "But how illegal is it, really? . . . Is it illegal if you go three miles over the speed limit? . . . So yeah, you're breaking the law, but how big a law is it?"[5]

That's what I want to talk about today: How big a law is it? Or how big a law ought it to be? Now the *it* that I am talking about particularly is copyright law.[6] Perhaps we need to say something in general about copyright law and the way people talk about copyright law today. In the academic world, it has become quite fashionable to view copyright law as a terrible thing. In the general scheme of things, copyright is bad, many people who write about it say, because it is somehow taking things away from the public. Copyright owners are uniformly characterized as big predators. The biggest predator of all, of course, is Disney. So anything that supports a claim for copyright infringement or anything that supports the rights of the copyright owners is often dismissed as "Oh, this is just Disney stuff." On the other hand, users are virtually sanctified. Users can do no wrong. There is somehow, in the minds of many people who are writing currently, a kind of absolute right of anybody to take anything, particularly if it's out there.

If I have any message at all, it is that copyright law just isn't that simple.

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3. Zittel, *supra* note 1.

4. *See* Amy Harmon, *Potent Software Escalates Music Industry's Jitters*, N.Y. TIMES, Mar. 7, 2000, at A1.

5. *Id.*

6. *See generally* SHELDON W. HALPERN ET AL., FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, AND TRADEMARK 1-179 (1999).

It is not simply the Disney Corporation that profits from copyright. All kinds of people make livelihood out of copyright. Copyright law can't easily be dismissed. It can't easily be characterized as something that is inherently good or inherently bad. One may construct some natural law principle about not reaping where one has not sown. At the same time, we get principles about how you can never have a creative process if all the product of creativity is simply kept in a tight little box.

Today, I don't want to launch into any great debate about the underlying purpose and function of copyright law or about whether copyright law is a good or a bad thing. The fact is, copyright law is with us, copyright law is going to be with is. The more important issue to me is, how does one tailor the law to accommodate to technological change, and how does one have a law that is meaningful and that will be to some extent at least respected? An act of infringement needs to be defined such that it is indeed *malum in se* rather than simply *malum prohibitum.*

This issue is itself nothing that's terribly new. What is new is how technology has served to make the issue more important. Even in the more recent past, people have knowingly violated the law with a wink, with a shrug. You have a copy of a piece of computer software, you put it into your computer, you make a copy of it. It's easy, you do it. You don't think too much about it. You do it—it's not quite right—but it's pretty easy to do it. The scale over all of that kind of copying is not particularly large. Nobody worries about it a lot. The problem we have is that we now have the technological capability to have enormously expanded copying or other infringing activity with respect to creative works and the ability with the click of a mouse to distribute this kind of copying—this form of piracy—all over the world. The scale has changed. The scale of the area in which people operate in disregard of the law has changed to the point where it is almost big enough to swallow up virtually everything.

The question that we have to deal with is, does this change of scale then produce a change in kind of public attitude, or a change in degree? I would submit that what is produced is a change in kind. When it's so easy to copy a song or a work of art that's posted on the Internet, and it's so easy to change it, and so easy to distribute this changed copy to the entire world, there is just not enough time in the process of infringing to think that you may be doing something that you ought not do. The total mindset to approaching someone else's creative efforts is different from what it was before the advent of digital technology in the creative process. Therefore, we are dealing with something that is very different.

Well, before looking at some of the ways in which we deal with it, we ought to look at some of the ways in which copyright law deals with issues.

The copyright law was not full-blown. Many of you are quite familiar with the history of the copyright law. I don't want to take us back to the Statute of Anne, but just to take a look at copyright as it arose in the United States as a constitutional issue. We all know the copyright power derives from Article I, Section 8 of the Constitution. Congress has been granted the power to act with respect to copyright and patent. Now Congress could choose not to act. There's nothing holy about a copyright law in that sense. Congress could have acted in a very minimalist way. There could have been a view that says, "This is a monopoly that is being created, and we want to keep it very limited." And Congress over the years has enacted copyright legislation pursuant to its constitutional power. What you find if you simply trace the legislation from the late Eighteenth Century to the present is a continuing expansion of the scope of copyright, the scope of copyright owners' rights, and the term of copyright, reflecting some kind of consensus that this kind of protection is needed.

Meanwhile, the constitutional-mandated self carries with it something that makes it almost impossible to speak in broad, general, moral, perceptual terms. It carries with it the very idea of compromise. The Constitution in granting to Congress the copyright power has also said that copyright must be limited. Article I, Section 8 grants Congress the power to grant the monopoly of copyright and patent for "limited Times."[7] That represents an underlying compromise: We must have copyright protection presumably to facilitate the creative process. We must limit that protection so that the creative process can be further developed by building on the works of predecessors. And that way, Congress is to, in the constitutional words, "promote . . . Science and [the] useful Arts."

But how does it work? Well, Congress in enacting copyright legislation is as Congress is—a political body. When one seeks to implement the compromise that the Constitution creates, one has to make political determinations. For example, Congress in the 1976 Act says that any "original work[] of authorship fixed in any tangible medium of expression" is protectible by copyright.[8] Fixation is the key to the attachment of the copyright. Let's assume that you've got a client who says, "I've written a book, how do I copyright it?" Well, if you tell the client the truth, you will say, "You already have." The client will say, "I don't believe you," and will go away. The client will go to somebody else who will tell the client, "If you

7. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;").

8. 17 U.S.C. § 102 (1994).

pay me some money, I will file some papers in the Copyright Office." But the fact is that the first answer is the correct one. The work is in copyright as soon as it is fixed in a tangible medium of expression.

At the time of the 1976 Act, this of course concerned the National Football League, which televises football games. Under the language of the Copyright Act as it would have been if we simply followed the principle of fixation, the broadcast going out over the air would not be a copyrightable event because it is not fixed. In response to this pressure, Congress defined fixation in the way we always thought it to be defined. Except it added something that says that in the case of a transmission, meaning a broadcast, a work will be deemed fixed if simultaneously with the transmission it is fixed.[9] So if ABC, while broadcasting Monday Night Football, has a tape running at the same time, then the game that you are watching at home is indeed fixed, and your act of copying it or your act of showing it to thirty-seven of your closest friends is an act of infringement because the work is fixed. Part of the compromise.

The "first sale" doctrine of the Act recognizes the right of the lawful owner of a copy of a copyrighted work to make any and all kinds of distributions of that work.[10] So Blockbuster Video can rent videotapes as well as sell videotapes. Bookstores could, if they wanted to, rent books as well as sell them. But record companies and record stores can't. Why can't record stores rent copies of CDs? Because Congress said they can't. Congress said that in the case of phonorecords, the "first sale" doctrine does not extend to commercial rental.[11] Similarly, it does not extend to commercial rental of software.[12] This was the congressional response to pressure from the music industry. The music industry is concerned every time they have a falloff in sales, and they blame pirates. It's all because people are not buying the records. They are buying one and then making unlawful copies. That's the response in an industry that is keyed totally to the whims of teenagers and is generally run by people who had a couple of years practicing law and then a couple of years in the business. That's the way the music business works. And so you blame copying for the problems instead of marketing, and Congress responds by saying, "Well, we can head off copying if we say rental

9. *See id.* § 101 ("A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.").

10. *See id.* § 109; *id.* § 109(a) ("[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

11. *See id.* § 109(b)(1)(A).

12. *See id.*

is not covered by the 'first sale' doctrine."

The Copyright Act is filled with these kinds of compromises. I am not using the word compromise in a pejorative sense. I am using it basically to suggest that when we begin with a legal construct of copyright that has built into it the idea of compromise, that it doesn't simply say, "Thou shalt never copy." But rather, it says, "Thou shalt not copy under certain circumstances and certain conditions," and the compromise process becomes a part of a continuing copyright revision. So one really can't speak in global terms about all of this. You're looking at a legal construct. It's not very clean—it's a dirty construct—but we live in a world that isn't all that clean. That's the reality, and I don't think that it is terribly productive for people to spend a great deal of time either bemoaning the reality or searching for some set of pure concepts to govern our approach to the creative process.

Those of you who have familiarity with the law of copyright already know the problem with pure concepts. Copyright protection extends to the expression of an idea and not to the idea itself.[13] This solves all problems, right? No First Amendment issues, no other issues. We protect expression, we don't protect idea. Everything's easy. Well, of course, we know this isn't true. Everything is very complicated. The reason everything is very complicated is because we not only have our copyright constructs in the statute, but we also have judicial construction. Going back to Learned Hand, we take the view that expression subject to copyright protection goes well beyond verbatim expression.[14] It goes well beyond literal expression. Expression extends to the non-literal elements of a work. The detailed plot sequence and character development of a novel or a play will be considered expression. So if you turn this novel into a motion picture, and you don't take a single word out of the novel, but you still take really all of the structure of the novel, you have created an infringing derivative work because of our expansive view of what is protected by copyright law. Now again, this was not inevitable, but it is where we are as the result of judicial development.

Similarly, the courts developed the doctrine of "nondiscrimination," which basically says it is beyond the capability of the judicial system to make aesthetic judgments.[15] So a commercial has just as much societal value for copyright purposes as a play. We don't make distinctions. Everything and

13. *See* 17 U.S.C. § 102 (1994).

14. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.").

15. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

anything that we can call an original work of authorship fixed in a tangible medium of expression is subject to copyright protection. Okay, let's put the nondiscrimination doctrine in one corner.

The courts, again not Congress, originally interpreted the power to act with respect to copyright to include a whole bunch of people whom we would not normally consider to be authors who create writings. Article I, Section 8 of the Constitution grants the copyright power with respect to the writings of authors. Quite a long time ago, the Supreme Court decided that "Author[]"[16] is a very, very plastic term. An author is anyone to whom something owes its origin, and a writing is any product of an author so long as it is fixed.[17] So while copyright can extend to a book, a play, or a poem, it can also extend to a song, a piece of sculpture, a piece of computer software, or a work of choreography. This again was not an inevitable development of the law. It is the way, in fact, that our law developed.

Throw into this mix the problems that arise with digital technology and a history of congressional tinkering in response to the concerns of very parochial interests, and look what we get. Let's take an example. I'll go to my favorite target, the music industry, which has always been behind the times. Almost as bad as the motion picture industry. The music industry was terribly happy to see CD technology development. CDs were great because CDs were not really something that you could duplicate very easily. Someone buying a music CD could not easily make a copy of it that was any good. Making an analog tape of a music CD didn't really give you very much. That is why you saw the recording industry, the music industry, jump immediately onto the CD bandwagon. It did not take very long for CDs almost completely to wipe out vinyl. And then along came the companies in Japan starting to make digital audio tape (DAT) recorders. Digital audio tape recorders that do one thing: they make perfect or almost perfect digital copies of digital sources. So if you have a digital CD, and you pipe it into a digital audio tape player, you are going to get a very good quality tape.

The music industry went into a state of abject terror and immediately

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16. U.S. CONST. art. I, § 8, cl. 8.

17. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-58 (1884) (citation omitted):

> An author in that sense is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature." So, also, no one would now claim that the word "writing" in this clause of the constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression.

started making noises. They wanted to band together to have contributory infringement actions brought against the manufacturers of digital audio tape players. They were threatening to shoot off the kneecaps of all the executives of the companies. They were going to do anything and everything to keep the DAT players out of the United States. Then one of those great cataclysmic events occurred as they frequently do in the motion picture industry: The Japanese makers of the DATs bought the music companies. So now we have Sony owning Columbia, Matsushita owns the MCA library, and everyone was talking to one another. They came to Congress with a grand compromise in the Audio Home Recording Act of 1992, which basically says that all this equipment can come into the United States so long as it has a device that prevents sequential copying.[18] That is, you can make a digital tape of a digital CD, but you can't make a digital tape of the digital tape. There will be a copy protection device to prevent that kind of serial copying so that you can't have wholesale manufacturing of it. Then there will be royalties to be paid on the digital audio tape equipment and royalties to be paid on sales of digital audio tape, and everybody will be happy. And because everybody will be happy, says Congress at the tail end of all of this, we will grant an immunity. We will grant an immunity so that people can make personal noncommercial copies of music—digital or analog. Everybody will be happy.

Well, the problem was that Congress was doing something that Congress tends to do. It was overspecifying. It was dealing with this very specific problem brought on by very specific technology, and it enacted a hunk of legislation that was directed to that problem and that technology. But while it was being highly specific in the problem it was attacking, it also granted at the very end a very, very broad exemption. So look what happened. Does anyone here own a noncommercial home use digital audio tape player? One person; you're the first one I've seen in the past year. People don't do it. That business is largely dead. However, does anyone here download MP3 files? Yeah. You think you're infringing copyright when you download an MP3 file? No, you're not. You thought you were doing something wrong. The exemption, the immunity, that was built into the Audio Home Recording Act directed to audio visual tape is broad enough so that when you download an MP3 music file from a website onto your hard disk, you are not committing an act of infringement. And when Diamond Multimedia sells you a Rio™ digital audio player that you can plug into your computer to make a further copy of this copy that you downloaded, it is not violating the Act because the Rio device does not come within the specifications of the kind of recording device that Congress specified in the Act.

18. *See* 17 U.S.C. §§ 1001-1010 (1994).

These are the kinds of problems that the music industry now has and is basically going crazy trying to solve. Well, how do we then solve any problems? I want to take a couple of examples from the world of visual imagery to see how we might approach some problems. There are now available wide-ranging libraries of digitized works of art—public domain works or even works for which the copyright owner has granted consent. It is perfectly possible for you to get a copy of that digital work of art. At the same time, it also is perfectly possible for you to use relatively inexpensive software, and starting with that digital work of art transform it almost completely into something radically different. You have now created a new work of art. Have you created an infringing derivative work? Technically, you've created an infringing derivative work because the definition of derivative work is that you have incorporated some expressive material that belonged to somebody else.[19] You've incorporated this material, but you have eaten it up. You have engaged in a creative act such that anyone looking at the end product wouldn't know that you've taken somebody else's work.

Can the copyright concepts of derivative works apply to this kind of digital transformation of an image? Nobody really knows. The real answer to the technical question is "Yeah, you've got an act of infringement." And when you distribute your image to 2.5 million people all at once by the press of a button, you have greatly infringed the rights of somebody else assuming that the initial work was copyrightable work. But is that what the law ought to be doing? We don't quite know how to deal with this kind of technology. We have our legal construct about the creation of derivative works, but we don't have a legal construct about what you do when you've incorporated a work so much that you have fully ingested and digested it so that it's not even visible in what you're doing. Do we need to alter our view of derivative works? If we do, does that mean that we need one definition of derivative work when we're dealing with books and plays, and another definition when we're dealing with digital images? What does this do to yet another concept of copyright—that the copyright law is somehow unitary; that we apply certain principles to all kinds of works; that we live in the fiction that a piece of computer software is a literary work, and therefore, in looking at acts of infringement, we apply things we've learned with respect to literary works?

Do we have to rethink the fundamental idea that there is only one copyright law? We have a bundle of rights when we speak about copyright and a copyright owner. We really should be speaking of copyrights and a

19. *See id.* § 101 ("A 'derivative work' is a work based upon one or more preexisting works . . . ."); H.R. REP. NO. 94-1476 (1976) ("the infringing work must incorporate a portion of the copyrighted work in some form").

copyrights owner because, as you know, the copyright owner has the exclusive right to distribute a work; the exclusive right to reproduce a work; the exclusive right to prepare derivative works; and the exclusive rights to publicly perform and to publicly display a work.[20] They are all separate. They are discrete rights. You can exercise one without exercising the other. You may infringe one without infringing another. We're used to that idea, but perhaps we need to think in terms of copyrights and copyrights laws. Perhaps we need different standards for different kinds of works. That gets a little scary. We are departing from some foundational stuff that we've come to accept, but the digital world may make it necessary for us to say that in dealing with certain creative processes our focus on copy is misplaced.

Copy is at the center of copyright. When we deal with the kind of copying I've just described in transforming a derivative work, are we really implicating matters that are central to copyright concerns? Should our concerns be with copying, or should they be with exploitation, which may be different from copying? We haven't really started to look at that stuff because, frankly, it hasn't been necessary. We couldn't do the kinds of virtually exact copying that we can now do. We couldn't do the kinds of wholesale distribution at nominal costs that we can now do. That may mean we have to rethink how we apply copyright law. It's been suggested, to go back to my original concern about disregard when the law is out of touch with what people are doing, that people need to be educated more. I'm not at all convinced that the problems we have arise from the educational process as much as they arise from a problem of relevance. When we keep trying to apply a legal construct as a single legal construct, when we keep looking for some degree of purity, the inevitable result is that we are either going to get people on one side who say, "This is a lousy construct, throw the whole thing out," or we are going to get people who say, "What we need are more police."

Our world is somewhere in the middle. There are a myriad of devices out there for enforcing copyright. Some of them are actually used, and some of them are effective. Even if people don't believe, for example, that the performance right is any good, the performing rights societies in fact do a job. Even if people believe you should be able to copy anything for research purposes, generally the Copyright Clearance Center does a job and it keeps a balance. We have something of a balance.

The concern that I am expressing with digital technology is that the balance has now been radically upset. In order to deal with that radically upset balance, I believe we need to have a radically different approach to some of the fundamental principles that have governed copyright law from the

20. *See* 17 U.S.C. § 106 (1994 & Supp. IV 1998).

beginning. Let me quote from something in which I have been trying to consider what, if any, is the normative role of copyright. I have become more convinced that it doesn't have a normative role. In some contexts, the law is there because we need the law. The law may be *malum prohibitum* even if not *malum in se*, but we've got to have it. Therefore, our focus is on enforcement. In other areas, it's much clearer. Certain things are clear; certain things are *malum in se*. The law is not a singular unitary construct. In short, what we have is a rather messy, complicated, and compromise-laden schema. But I think that we need to have that mess and that complication because we have a rather messy, complicated, and compromise-laden world. And I think that the mess is desirable, rather than undesirable, even if we are the ones who have to clean it up.

QUESTIONS AND ANSWERS

Question:

What role will fair use play in the digital age?

Response:

The fair use doctrine will be a key place to start. The problem is that, while fair use began life as an equitable rule of reason, and Congress said that in enacting section 107 it did not intend in any way to change the prior law, the fact is that the courts treat it as a codification. It is rare that you find a fair use case that does not go through the four factors or the preamble.

The concern I have is that we're applying one set of fair use standards to very, very different situations. I think the *Sega/Accolade*[21] case is a very important straw in the wind, even though its context was not the general digital context. The context was that of reverse engineering, in which the Ninth Circuit said that intermediate copying for the purpose of reverse engineering can be a fair use. There's some language in the court's opinion that says essentially, "This may not rest too comfortably with some purists, but be that as it may, that's what we have to do in the face of the realities."

So fair use could very well be expanded to cover digital uses, but I think it has to start with a different analytic base. We can't simply go in and say, "Let's apply the four factors here to this situation and to this situation and to this situation." I think we have to look at the kinds of creative effort that we're seeing around us somewhat differently from the kinds of creative effort

21. *See* Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 24 U.S.P.Q.2d (BNA) 1561 (9th Cir. 1992).

that motivated the Copyright Act in the first place.

Question:

What problems do you see in congressional attempts to adapt copyright law to changes in technology?

Response:

One of the problems I'm concerned about, and that's why I referred to the Audio Home Recording Act of 1992, is that the response almost always is to the specific technology we have. If you look at the Digital Millenium Copyright Act (DMCA),[22] you'll see that the longest section relates to specification definition for VCRs. This is crazy. It really does demonstrate the inverse relationship between the number of words and the importance of the materials in the Copyright Act. Congress is keying to a very, very specific technology. That is the result of the fact that in most cases in the legislative process, what you have are very parochial interests fighting one another in some congressperson's office.

One of the changes that occurred—I'm sure this is dear to the heart of many people in the state of Wisconsin—was when Robert Kastenmeier was not reelected. For literally decades, he was the center of all intellectual property activity in Congress. He was the most knowledgeable member of Congress with respect to these issues, and nothing could happen to change the Copyright Act without his intervention. The result was that the learning—the expertise that had been developed—also served as a kind of public interest representation in Congress. Well, he's not there, and no one has really emerged to take his place. What you have now in Congress, as exemplified by the Digital Millenium Copyright Act, is a group of very specialized interests with very specialized concerns fighting about minutiae. The congressional response has been to try to accommodate those interests, so we get very specialized, overspecified legislation. I think that would not have happened with the kind of leadership that Kastenmeier had.

The danger that we have now is that we will get congressional action relating more to the digital world, and to digitally created or digitally copied works, but it will be overspecified again. As technology develops further, we're going to find ourselves exactly where the recording industry is now with Diamond and its Rio. The reality of the world is that the technology has in fact overtaken the law. When Congress enacted the '76 Act, they generally assumed that it was broad enough to cover everything. And they created

22. Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C. and 28 U.S.C.; enacted by Congress on Oct. 28, 1998).

CONTU (National Commission on New Technological Uses of Copyrighted Works), whose job it was to see what else we need to do. They came back and said, "Well, we need to do a little tinkering with section 117 of the Act for computer software. We need to stick in it a definition of computer programs. And that's it." In fact, it turned out to be wrong. The Act does not accommodate very well to technological change. I'm very much concerned about how we're going to deal with further change.

Question:

What are some of the key copyright issues arising in the Internet context?

Response:

Some of them were actually pinpointed several years ago with the ill-fated White Paper.[23] Certain basic definitions: Is a transmission through the Internet of a work a distribution of the work? I would think it is. Many people say we don't know. Bruce Lehman having gotten so much fire for the report, the Congress never adopted even the rather simple statement to the effect that it would be a distribution.

Where it affects things is in the area of what is a copy and what is a distribution. For the normal purpose of the Copyright Act, up until we had the Internet and digital copying, a copy, a distribution, meant very simply, "I have a copy of this work. I give it to you. I've now distributed it." Well, this is a zero-sum game. You have it. I don't. With the use of digital technology, I can give you a copy of what I have and I still have it. We need to adjust the Copyright Act to consider that.

I think the area of greatest concern with the Internet is the realization, finally, that we are not alone. We have this view that American copyright law is the best thing; American law in anything is the best thing; and to hell with the rest of the world. Primarily because of the Internet, the reality is that most of the intellectual activity that's going on in intellectual property these days is not in the United States. It's in the European union. The great push is for globalization and harmonization. We cannot continue simply to say that the American model is the way and the light and the only one because we don't have a border anymore. That's because of the Internet. Creative works are now available all over the world simultaneously. You cannot simply operate with local law. I think that's the area where we have to see much more in the way of change.

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23. *See* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995).

Question:

Do you think that Napster and MP3.com, like Sony in the Betamax case of the 1980s, will escape liability for contributory infringement?

Response:

No, I think the courts would step in. I think the Betamax case[24] illustrates that hard cases make bad law. You read the 5-to-4 opinion there, and you come away thinking, well, Blackman got the law right, but Stevens got the policy right, and this was an inevitable result. But with Napster and with the MP3 litigation,[25] you have acts that are far more blatantly acts of infringement. I don't see that there's going to be that much in the way of contributory infringement. I think it's still going to be more in the way of direct infringement. Napster's role is a weird one. It's a facilitation that goes beyond the kinds of things we're talking about with contributory infringement.

Question:

How do the DMCA and encryption alter the contributory infringement landscape?

Response:

The Digital Millennium Copyright Act attempts to sidestep the whole issue of contributory infringement where we have encryption. Obviously, we're going to have more and more encryption. That's got to be the norm. For the record companies and the movie companies, DVDs are encrypted now. I expect that sooner or later CDs are going to be even more encrypted. In the past, you'd always have a fuzzy issue of contributory infringement: Is the guy who makes the little black box that you can hook up between two VCRs so you can rent a movie and make a playable copy of that movie—is the inventor of that black box, the distributor of that black box, a contributory infringer? There are arguments that the ability to enhance home videotape perhaps creates noninfringing uses. I may think they're specious arguments, but they're arguments.

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24. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984).

25. *See generally* Courtney Macavinta, *Recording Industry Sues Music Start-Up, Cites Black Market*, CNET NEWS.COM (Dec. 7, 1999) <http://news.cnet.com/news/0-1005-200-1485841.html> (Recording Industry Association of America (RIAA) v. Napster); *Copyrights: Battle over Music on Internet Heats Up as MP3.com Files Suit Against RIAA*, BNA PAT., TRADEMARK & COPYRIGHT L. DAILY, Feb. 10, 2000, at D4.

With the DMCA, you don't have to get to that issue. You've got direct congressional action that says, "That black box is illegal, and it's actionable to have it." The implications of this are quite extreme because obviously what we're witnessing and what we will see to a much greater extent is limitation of access as a way of preventing infringement. There are some people who are immediately screaming that this is the end of the world as we know it. I'm not prepared to do that, but I think it presents a serious problem that in the DMCA was not really dealt with except for very specific compromises. I expect we are going to see an awful lot in the next few years as various interest groups start screaming with pain over the limitations of access imposed by encryption and the fear of liability resulting from any attempt to circumvent encryption.

Question:

How do you expect the current DVD encryption disputes to be resolved?

Response:

DVD encryption has many manifestations. In the present litigation involving Linux and Microsoft,[26] they'll have to come to an accommodation. That I think was an unintended consequence. I don't think the Motion Picture Association of America (MPAA) has a particularly vested interest in Microsoft. But on the broader scale, DVD encryption is perfectly within the DMCA. Technically, I don't see how the defendant has much of a chance here. With respect to the ability to use DVD under Linux, I can't imagine that the Motion Picture Association is not going to settle that part. They're not going to give in on the fundamental issue of liability for circumventing certain types of encryption. They've worked much too hard to let that into the Act. I think that encryption is here to stay. I don't think the courts are going to do very much in that area.

26. *See generally* Courtney Macavinta, *Coalition Sues to Block Distribution of DVD "Cracking" Tool*, CNET NEWS.COM (Dec. 29, 1999) <http://news.cnet.com/news/0-1005-200-1508245.html>.