



Chapter 2: Copyright in the Age of Uncontrolled Distribution October 8, 2007

For the past two years, I have been exploring the theme of “the end of control” in the context of copyright, and 3 thorny issues have arisen repeatedly: 1) Does the meaningfulness of copyright (as we know it today) actually depend on having, maintaining, and enforcing a controlled distribution environment? 2) If we are indeed unable to control distribution (which, you may have noticed by now, is a recurring theme in this book), do we ultimately kill the very idea of copyright? 3) Is there still a difference between ‘Performance’ and ‘Copy’?

The concept of copyright has been the very foundation of media monetization for a long time: Every time a copy (i.e., something you could “keep”) was made, a payment had to be made, a royalty was due, a toll for ownership was extracted. For more ephemeral uses, such as broadcasting — performances you could enjoy only momentarily, but (easily) not keep — only a reduced royalty was due. In fact, for all master recordings used by terrestrial radio broadcasts in the U.S. there is still no public performance royalty provision.

This was the simple logic in the good old days of Media 1.0: Pay nothing or very little — or suffer through the ads — for simple access, but pay a lot to keep it. Simple access meant few choices and no on-demand playback (i.e., how-and-what-they-want, when-they-want). Keeping it meant physical artifacts, such as videotapes, DVDs, and CDs. Plus, of course, the consumers had to pay even more for actual experiences such as concerts, shows, and events.

Every use is now a Copy - digital devices are content-copying machines. Today, except for those real-life experiences (!), this long-lived logic is ruined by one simple fact: In a digital network, every performance, every transmission, every mere broadcast is also providing a “free” copy for anyone who cares to have it. Every media file arriving in my computer is stored, cached, buffered, whatever you want to call it, in order to make it visible or audible to me. Every webcast can be stream-ripped (or as we used to say, recorded), and every digital radio signal can be stored and reused. Digital technologies and low-cost, mobile personal computers (such as those that Nokia, Samsung and Motorola used to call mobile phones) have ushered in the era of powerful and gigantic copy machines — of a zero-cost reproduction of anything that can be shipped in zeros and ones.

There goes the whole idea of charging more for a copy — a keeper — and charging much less for “just listening.” There goes the idea of controlling at what point listening actually becomes keeping. There goes the idea of selling “units.” There goes the nicely controlled value chain that sat on top of the copyright canon of most Western countries for the past 100-plus years.

The more technology advances, the more it provides faster access to larger content stockpiles with deep metadata browsed by fast and intuitive search engines on ever cheaper, faster, cooler, and totally mobile devices, the less the traditional principle of “making money because we own and enforce exclusive copyright” applies. The Net Generation is now in fact serving themselves freely with “stuff to keep, share, and use anytime, anywhere, for anything” that was only meant to be “stuff to listen to, when we say so, on devices we approve, for the uses we had in mind.” For users, it’s just access, but for the industry it’s a copy — and they want to get paid for the copy.

The existing codex of copyright laws will not solve this problem. The principles of intellectual property in content (as opposed to property that is “real stuff” like cars or refrigerators), while still crucial in its principles, intentions, and implications, will not help us to return control to media in the same way it has existed for the past 100 years.

The new principles of Un-Control

The dawning principles of un-control, however, may just take their place. As a content creator, I want attention and exposure first — i.e., an audience that watches, listens, or uses my creations in whatever way. I don’t want to punish them for being interested in me. I don’t want to put up hurdles because I am worried about the lack of control over my users and their behavior.

Only if and when my creations prove to be something they like, I want to get rewarded for creating in the first place, so that I can spend more time to create the next piece. In other words, I would like to receive remuneration for the use of my work, be it a copy or a performance or whatever other term you can come up with. And for the primary use of my work, i.e., its use or consumption (rather than its secondary use in a new context, such as music for ads or in TV productions), I would beyond a doubt agree that more use is always better than less use. The more people “consume” my work the better for me; and I would ultimately expect to receive more remuneration the more people pay attention.

The Dilemma of the Media Intermediaries

And therein lies the rub: as a creator, my intention is not to control the spread of my work; my intention is to create the largest possible trajectory, the biggest velocity, and the most efficient spread of my work. Only if and when, and after this happens am I concerned about a process of getting something back from those users, and rightly so — income comes after exposure; revenues come after attention.

As a middleman between the creator and the audience (e.g., a record label, publisher, or rights organization) however, I am facing an entirely different problem: I really don’t want the user to have “too much” for free; I don’t want to miss or even delay that crucial point where I — as a gate-keeping entity — could charge them for just taking a look. My dream come true is to set up a tollbooth that will make money even if there is another road to the same destination.

This is, simply put, because as a middleman who usually gets the biggest chunk of the proceedings from “selling copies,” I very likely will not have the same unique benefits that the creator himself may have by achieving the largest possible level of exposure. My brand is not his brand. My record company does not benefit from his audience outside of those who buy copies.

As a traditional record label, for example, I may only earn my dollars from some specific chunks of the creator’s total output (such as CDs or a la carte downloads). Therefore, I need to make sure that the creator himself does not provide “for free” what used to be paid-for (i.e. in return for the exposure that he may find more valuable - see the latest Prince debacle, or the Radiohead's new release strategy), and that the user does not just get those things “for free”, either. Thus, publishers may not give blanket permission for non-commercial synchronization deals on behalf of their writers, performing-rights organizations declare on-demand streaming on social networks to be outside their jurisdiction, record companies offer certain records (and downloads) only in certain markets, and many book publishers don’t want all of their books’ content searchable online.

Selling Friction Removal?

This thinking harks back to the popular media mogul's illusion that one can indeed be successful in creating new friction points that the user will need to navigate, i.e. by making payments to unlock the goodies. In other words, it is not the content I sell, it’s the removal of friction to get to it. You, the user, simply buy the green light to “make a copy.”

I believe that this approach is now deeply flawed: The much-cherished friction is vanishing more quickly every day, and every access point is now a copy point as well. Will the media industries now face the revenge of the victims of friction?

Consider this: What good is the idea of a copy of digital content — and of the exclusive right of the author to allow that copy to be made in the first place — when in fact every single transmission of digital content, and every use of a computer, inadvertently creates multiple and perfect copies along the way? This inadvertence essentially creates serial copyright infringers every nanosecond.

King Kopyright vs. Godzilla

If anyone can make a perfect digital copy, and share it, and redistribute it, what does that say about the traditional media industry mantra that ownership and enforcement of copyrights is what really drives revenues? Which is worth more: ownership of copyrights (which includes the right to deny a copy), or simply providing access to copyrighted materials (see Google and other search engines, ISPs, software companies, etc.)? Is Content King or is Attention Godzilla?

Here is one fact I think we urgently need to face in this age of explosive growth in wireless broadband and the increasingly ubiquitous presence of all content: While it may, in principle, be desirable to be able to block or otherwise control access to one’s content (e.g., via release windows or territorial release schedules in the film business), or to put up hurdles that the users need to overcome by making a payment, this concept does not seem very realistic – to say the least - when looking at how content is flowing through digital networks today. And we don’t even have the most populous countries in the world (China, India, Brazil, etc.) connected to broadband yet! Furthermore, once they

are connected, they won't be using computers, by and large. They will use mobile devices, further boosting the viral spread of content.

Consider the concept of the Moral Rights (which is prevalent in Germany and France but not in the U.S.), i.e., the concept that even beyond the question of adequate remuneration, an author has the total and exclusive right to guard the integrity of his work — for example, approving the use of his music within another product or service, such as film or advertising, commercial or not. How can this high-aiming principle be maintained in a world of flawless digital file copying, cheap and fast network access, and frictionless sharing of content? How will I keep people from playing my music along with their wedding video, or as the soundtrack to a political activist's website, when the tools for doing so are becoming widely available and more easy to use at every turn? From YouTube to Apple's GarageBand (included with every Mac sold) to Eyespot, SplashCast, Jamglue, Webjam, Jumpcut and Kyte - there are hundreds of offerings that can instantly violate this very concept of total author's control out there already.

The Berne Convention for the Protection of Literary and Artistic Works states, "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

So should we close these new copyright-remixing companies down, declare them copyright violators, require them to license every bit of content their users put up, tell them to ask for permission every single time? And whom would they ask, who would they make payments to, for what? Should we once again do what we did with radio, i.e., declare it illegal and refuse to license it until 90% of the population is engaged in illegal behavior, and only then come up with a collective license to legalize it?

Maintaining exclusive rights after release?

The very concept of controlling access to my work after I initially release it in digital form is only realistic in a perfect-world scenario where those tools of control are still available — and that era has come and gone, beyond a doubt. Be it for good or bad (and I think it is the former), digital content is now totally unchained, and even if it were technically feasible, we would probably end up throwing out most of the Fair Use rights along with the alleged unfair uses, and that would be a huge threat to free speech and the rights of new creators.

The chance of survival for some of the exclusive rights previously granted under the traditional copyright regimes now seems highly unlikely - what's more, it seems highly undesirable as well. In a world that is restricted to physical embodiments of my creations, be it sheet music, piano rolls, CDs, or DVDs, I may be able to argue that I can derive some benefits from being the sole warden of my creative "honor and reputation": Everyone has to come to me (or more likely, my representatives) to get permission and I can — maybe — explore potential economic or social gains in the process. However, in a world where most if not all embodiments of my work are not physical, I gain nothing from barring access. I simply cease to be considered an option or I am facing thousands of inadvertent infringers and tacit collaborators such as ISPs, and this is, of course, especially true for 99% of most media — the long tail stuff, the niches, the lesser-known content.

Controlling the Mouse is...Toast!

Simply put, “controlling the mouse” to the utmost extent of the law and business convention — as Disney is (in)famous for — is simply going to be impossible in the very near future. Tens of thousands of infringers are now taking to the web, morphing and remixing images, videos, soundtracks, lyrics and texts, with dozens of new (and sometimes very large) companies providing the tools. And now comes the device formerly known as the mobile phone, upping the ante by a factor of 100, especially in Asia, Africa, and South America.

Given the rapid pace and viral velocity of ways new content can be monetized in the future, I would argue that this kind of control obsession is outmoded and can no longer serve as a valid business or societal objective. The same goes, in my view, for the ever-expanded terms of copyright: Even as the cycles of content consumption are speeding up tremendously, and despite the fact that it seems extremely likely that global hits will give way to local (or virtually local) niches that quickly come and go but generate very large revenues in a very short time, copyright terms are constantly being extended.

Why would you need to keep control of every possible embodiment of your copyrights for the next 100 years when you can likely monetize much faster, more quickly, cheaply, and globally than ever before? Would it not be wiser to start the “public sharing” process earlier and tone down the emphasis on one’s exclusive rights so that new creators can indeed stand on the shoulders of the giants, and base their own work on what was before them, without running afoul of the copyright regimes?

But once again, this is a clear case of the creators themselves not objecting to a more realistic and open regime: It is their representatives who have the most to lose here. For them, this is a business they simply want to milk as long as possible — after all, in most cases those intermediaries make between 50–90% of the cash that is generated!

Chasms of Interest between Creators and their Representatives

In this age of Un-control this becomes a significant chasm of interests, of course. Many publishers would prefer ‘their’ content not be used at all rather than have to bend the rules they have lived by for so long — and that includes the paradigm of having total control. As an example, witness the utterly inexcusable inability of most of the music performing-rights organizations (PROs) to provide pan-territorial and global licenses for online performances of music, or the continued refusal of music publishers to provide blanket clearance procedures for non-commercial and personal uses of music in online videos.

The reasons behind this are perfectly understandable, but are a serious obstacle for content monetization nevertheless — it certainly seems like a move towards a usage license - rather than a continued emphasis on the principles of copyright law that was written before there even were computers - would make a lot of sense here.

The consoling factor is that these changes are inevitable. Either the commercial entities that, for now, still represent the creators move on quickly and issue voluntary collective licenses for these uses (and this goes back to the discussion of the Flat Rate for Music, too), or almost every web user is bound to become a copyright infringer before long. And that sounds like a perfect case for government intervention to me - something that is very likely to happen here in Europe.

A new, lesser-control kind of 'permission-to-use' license may be a painful leap to make if you grew up with the idea that you can somehow prevent any copying or other use of your work, but I think this license will be a crucial requisite for how authors and creators will get paid in the future.

After all, let's face it, the vast majority of creators are in no economic or social position to dwell on their exclusive rights anyway, since they are simply not in a position of having any leverage to begin with. The idea of tightly controlling copyright in order to achieve the maximum possible payday has never been relevant for 99% of all creators — it is the 1% on the very top that got to enjoy the benefits of total control, and of course the representatives and middle men.

The Net . . . Like Radio

In the future, and for the average creator, insisting on exclusive rights will in fact hinder progress more than further it. If we compare the Internet to radio (a favorite theme of this book that seems to be making more sense by the minute), we could argue that just like it makes no sense whatsoever to not want to be broadcast by a radio station (i.e., to refuse blanket permission for public broadcasts) it ultimately does not make any sense to refuse to have your music 'used' on the Internet.

Yes, a radio station that plays my music could have political views I don't like; they may make fun of my lyrics or music; they may intersperse ads between my songs; they may pitch my song up or down or boost the bass settings. But for the sake of being in the system, of being available to everyone, of getting attention, I am still going to have to allow it. In other words, I don't get the positive results without a certain amount of risk that some my rights will get abused. The big difference is, of course, that music on radio is licensed and music on the Internet, by and large, is not. Isn't it time to tackle this issue — now — or do we need another ten years to get to that point?

We Need a "Permission Granted" Default License

The traditional negative right (No, you can't use my music) must become a positive right (Yes, you can use my music — permission is always granted as follows...), and the solution is to no longer bother with selling the right to make a copy, but to just sell access — and then upsell to copies, i.e., physical manifestations of content.

Here are the new paradigms we need to embrace - whatever their impact on the concept of copyright is, we will need to amend our assumptions and legal logic accordingly:

- "Prevent" must become "Enable"
- "Ignore" must become "Embrace"
- "Forbid" must become "Engage"
- "Permission Denied" must become "License Provided"

As a consequence of the end of distribution and copy control, copyright is now simply the fertile soil on which a new set of usage rights needs to be grown.

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