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Attacking the Copyright Evildoers in Cyberspace

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INTRODUCTION

EVILDOERS are responsible for the rhetorical collision in cyberspace between copyright owners and users.[1] Evildoers are singled out for threatening the existence of the Internet, either by suppressing free speech or by usurping the technology for freewheeling copying. Although typically the term "evildoers" is not used explicitly to identify the actors involved, the concept is implicit in each of these accusations. Accusing evildoers for the adversarial nature of copyright policymaking may at first glance appear to be an overly simplistic characterization that minimizes the actual conflict between owners and users of copyrighted works. However, the term evildoers also captures the essence of the problem currently underlying debates concerning copyright law; all interested parties suggest that there is a sinister force at work, although the specific accusations are obviously more varied and sometimes contradictory.

In the context of copyrights on the Internet, different evildoers are identified, depending on *who* is asked to identify the evildoers. For example, to most consumers, the evildoers in cyberspace are the copyright owners that have stripped the Internet of its freewheeling nature by removing things such as the file-sharing tool Napster.[2] On the other hand, major copyright owners vilify consumers—and those who assist them—

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1. *See* President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html (applying the term "evildoers" to the un-identified terrorists responsible for the September 11, 2001 attacks on the World Trade Center) [hereinafter State of the Union].

2. *See, e.g.*, Larry Katz, *Yearn to Burn? It Won't Ail CD Sales*, BOSTON HERALD, May 31, 2002, at S21 (characterizing the file-sharing controversy as a "smokescreen for record company greed"); Patrick Goldstein, *A Music Lesson on Piracy for Hollywood*, L.A. TIMES, Mar. 12, 2002, at 6(1) (noting the portrayal of the music industry as "the personification of soulless corporate greed"). Moreover, the music industry as a whole could be construed as an "axis of evil" to consumers since there seems to be an evil conspiracy to prevent consumers from engaging in activities in which they feel entitlement. *See*, State of the Union, *supra* note 1. For example, new CDs and electronics are being configured to prevent CD burning, even if only for personal use. On the other hand, from

for making copies of copyrighted material with little regard for whether the consumers own original copies.[3] The identification of evildoers implicitly discounts the possibility that parties merely possess differing, but reasonable views. Rather, the current polarized vision of evildoers has created a situation in which consumers are immune to allegations of copyright piracy and content owners rush to create new methods—whether legal or technological—to halt consumer copying.

This essay moves beyond the name-calling to expose important myths that underlie competing concerns about copyrights on the Internet. In particular, this essay suggests that much of the current clash between consumers and copyright owners can be attributed to the existence of powerful and persistent myths about copyright law that have continued vitality in the Internet world. The interplay between reality and these powerful copyright myths remains an important, yet unexplored area. This essay begins to bridge the current divide between major content owners and copyright users, such as most consumers,[4] and by directly tackling the underlying myths. In so doing, this essay hopes to help pave the way towards a world where evil is eliminated from discussions concerning copyright issues on the Internet.

This essay is organized principally around three major myths that impact the operation of copyrights on the Internet. Part I explores the myth that everything on the Internet is free from copyright restrictions. Part II discusses the myth that copyrights need not be respected because they are primarily owned by greedy content-owners who have failed to adequately serve consumers, such that consumers are entitled to engage in a type of vigilante redistributive justice. Part III explains the important myth that consumer copying does not constitute a copyright violation. Finally, Part IV provides a recap of the myths and underscores the dynamic interaction between myths and the development of copyright law.

I. EVERYTHING ON THE INTERNET IS FREE (OF COPYRIGHT RESTRICTIONS)

A pervasive and stubborn myth is that anything found on the Internet is free—a whole new world to be exploited by those who subscribe to the

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the music industry perspective, consumers and makers of consumer technology that enables copying, could be viewed as an "axis of evil."

3. *See, e.g.*, Steven Levy, *The Customer Is Always Wrong*, NEWSWEEK, Mar. 11, 2002, at 65 (noting that the head of the National Academy of Recording Arts and Sciences, Michael Greene, used the Grammy ceremonies as a soapbox against music downloading, which he described as "the most insidious virus in our midst"). In addition, the vision of the consumer as cyber-pirate has fostered increasing use of technological controls that attempt to limit consumer use of content, with the much-maligned Hollings Bill as one of the most extreme attempts. *See, e.g.*, Security Systems Standards and Certification Act S. 2048 (2002) (mandating copy-protection technology in any content-providing device); Tony Smith, *May the Fraud Be With You*, GUARDIAN, June 6, 2002 (discussing the actions taken by Sony and other major media companies to technologically limit copying and thereby minimize piracy).

4. For this essay, the term consumer will be used synonymously to mean copyright user, as opposed to major copyright owners.

idea of "finders-keepers." The idea seems to be that whatever is not under virtual lock and key must be presumed free for the taking. In addition, this idea has developed into the major copyright myth that the entire Internet is free of copyright restrictions.

The major misconception that copyright law is inapplicable to the Internet is actually a mega-myth that includes several smaller myths. The first myth is that information on the Internet cannot be protected by copyright. The second myth addresses an appendix from the pure bricks and mortar era; namely, that without a photocopier, there is no copyright liability. Finally, the third myth is that copyright liability is not an issue unless a prominent copyright symbol is attached to the work in question.

A. MYTH 1: INFORMATION ON THE INTERNET CAN NOT BE COPYRIGHTED

A frequent misconception is that copyright laws only apply to works embodied in "tangible" objects, so that information appearing on a computer screen is (erroneously) perceived to be free from copyright restrictions. This misconception has some basis in law, although the distortion from copyright reality is a significant one. In particular, a copyright protects expressions of ideas that are "fixed" in some format from which they may be perceived.[5] However, the fixation need not be in an object that is published by a book company or manufactured by a record company. Rather, the fixation is satisfied for statutory purposes if the expression is in any medium that may be humanly perceived.[6] Accordingly, any expressive content that is found on the Internet would readily satisfy the requirement of fixation.

Some of the mechanics of Internet access may further perpetuate the myth that everything on the Internet is "free." Consumers are well aware that while some material is not restricted on the Internet, various sites require registration, and even subscription fees prior to access. The tiered access to Internet sites suggests to consumers that access is restricted only if a site requests money.[7] In addition, the abundant existence of material that is not restricted by copyright laws probably fuels further confusion. For example, many documents created by United States agencies are made available through governmental websites for

5. 17 U.S.C. § 102 (1995) (tangible medium of expression).

6. *See id.*

7. This view could be fostered by the public perception of copyrights as primarily methods of deriving compensation, rather than as an exclusive right and one of authorial control. *See, e.g.*, Celeste Katz, *Bill Targets CD Pirates With Costly 1-2 Punch*, DAILY NEWS, June 17, 2001, at 13 (articulating the public perception that copyright protection exists to provide money to its creator such that widespread copying of music results in inappropriate monetary loss). Of course, the "public" perception referred to in this essay is clearly the United States public; given the strong emphasis on moral rights of all authors and creators in Europe, there is likely a more nuanced perception of copyrights abroad than in the United States.

free.[8] However, less well known is that such access is freely available only because there happens to be a provision in the Copyright Act that specifically disqualifies works created by the federal government from copyright protection.[9] In addition, some websites further foster this myth by providing copyrighted information for free as a means to attract a solid customer base, although there is an intention of later charging customers; indeed, this was Napster's original game plan that was abruptly terminated while the service was still free. Some websites, such as those that provide electronic greeting cards, continue to release copyright content free-of-charge (albeit with banner ads) to consumers.[10]

The myth that Internet information is free from copyright laws is also supported by some studies in the psychology of human behavior. In particular, studies have shown that consumers try to abide by the law—assuming that they understand and believe the law to be reasonable.[11] In addition, because most consumers like to believe that they are law-abiding, behavior they consider to be normal and reasonable is difficult to internalize as illegal.[12] Accordingly, otherwise law-abiding citizens regularly disobey laws regarding speed limits, drug-use, and gambling.[13] Moreover, because laws are sometimes altered to fit the public norms, as in the case of the increasing speed limit, the public perception that only reasonable laws need to be followed is further reinforced.[14]

Consumer notions of what is fair and reasonable similarly temper

8. *See, e.g.*, Copyright Office, *at* http://www.loc.gov/copyright; U.S. Patent and Trademark Office, *at* http://www.uspto.gov; U.S. Food & Drug Admin., www.fda.gov.

9. 17 U.S.C. § 105 (1995) (providing that works created by the United States Government are ineligible for copyright protection).

10. *See* Hallmark e-greeting cards, *at* http://www.hallmark.com; Yahoo cards, *at* http://www.yahoo.com. However, Blue Mountain, the first web-based e-card vendor, appears to have implemented a version of Napster's original game plan by providing a two-tiered access to e-cards; free e-cards continue to be available, but a more complete selection is only available for an additional fee. *See* Blue Mountain Greeting Cards, *at* http://www.bluemountain.com.

11. *See* Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 226-29 (1997) (noting that studies show people feel obligated to obey the law and primarily stray from the laws when the laws diverge from public perception of what is fair).

12. *Id.* at 229-33.

13. *Id.* at 224-26; *see also* Jessica Litman, *Copyright Noncompliance (Or Why We Can't Just Say Yes to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 239 (1997) [hereinafter *Copyright Noncompliance*] (noting that citizens disregard laws they don't believe in, such as laws against consensual sodomy and age limits on cigarettes); Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPY. SOC'Y 1 (1997).

14. Although the maximum speed limits were only recently lifted from 55 to 65 mph, cars have been traveling at 65 mph and above for quite some time now. In addition, there is actually some historical "precedent" for this logic in the history of copyright laws. The Audio Home Recording Act was passed after *Sony* was decided to ensure that consumer VCR users were not transformed into copyright infringers after taping their favorite television shows for later viewing. *See* Audio Home Recording Act (AHRA), 17 U.S.C. § 1001-1010 (1992). *See also* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPY. SOC'Y 1 (1997) (noting that the *Sony* decision was likely influenced by the fact that "the Supreme Court just cannot hold that millions of Americans are committing copyright infringement every day").

awareness and understanding of copyright laws.[15] Many aspects of copyright law may seem unreasonable to a typical consumer. Accordingly, it may be challenging for consumers to internalize some of the Byzantine nuances of copyright law.[16]

B. Myth 2: Copyright Infringement Cannot Exist Without a Copier

Although we have evolved from a purely bricks and mortar world, most consumers still carry traditional notions of copyright infringement into the Internet context. In particular, the notion that impermissible copies can only be made by a photocopier is a myth that pervades both the use of information offline and on the Internet. The copyright owner's right to duplicate her original work ("reproduction" right), however, is not limited to copies made by a particular machine; any replication of the original—whether by computer, hand, or copier—may still fall within the official definition.[17] The cyber-equivalent of standing at a copier with an original in hand is to print or download original music, images, and text with a personal computer.

The mechanics of the Internet world can easily seduce users into impermissible copying. Unlike the bricks and mortar world where copyrighted content, such as books and music, must typically be purchased in locations free of copying facilities, the very means of accessing the Internet permits copying. There are millions of websites containing text, photographs, and music that may be easily "copied" without a cash register in sight, or any other traditional indicia that payment should be expected. Moreover, whereas public photocopiers frequently display warning signs about copyright laws, there is no such warning provided to consumers who boot up their computer or turn on their printer.

C. Myth 3: If There's No Copyright Symbol, There's No Problem

To further compound the confusion regarding what is copyrighted on the Internet, there is a myth that no copyright exists without the copy of the work bearing an explicit copyright symbol. However, copyrights exist for contemporary creations (post-1976) even without a copyright sym-

15. *See, e.g.*, *Copyright Noncompliance*, *supra* note 13, at 239-42; *see also* Tyler, *supra* note 11, at 226-33.

16. *See, e.g.*, Jessica Litman, *Copyright as Myth*, U. Pitts. L. Rev. 235, 237 (1991) (noting that copyright law is "tremendously counterintuitive" and difficult to grasp for most laypeople because of its "mind-numbing collection of inconsistent, indeed incoherent complexities").

17. *See* 17 U.S.C. § 106 (1995) (providing that the copyright owner has the exclusive right "to reproduce the copyrighted work in copies" without specifying how the reproduction must be accomplished); *see also* 17 U.S.C. § 101 (1995) (providing definition of "copies" to mean "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

bol.[18] Copyright protection actually exists from the moment material is written or recorded, without any need for immediate registration.[19] Accordingly, a document found on the Internet without a copyright symbol is not necessarily free for copying. Rather, copyright infringement remains an issue even without the reminder of a copyright symbol.[20]

II. COPYRIGHTS SHOULDN'T "COUNT" (VIGILANTE JUSTICE)

The second major myth of this essay is not exclusive to the Internet, but has definitely been promoted by clashes between copyright owners and users on the Internet. In particular, there is a strong myth that copyrights are solely utilized by corporations to increase their profits. Moreover, because consumers feel that corporations have failed to meet consumer demand, consumers readily justify vigilante action.

A. MYTH : COPYRIGHTS ARE ALL OWNED BY CAPITALISTS

Many consumers feel increasingly justified that content-owners are the truly evil ones. Consumers have reacted negatively to corporate campaigns that portray consumers as evil pirates. In contrast, consumers believe that they themselves are not inherently evil and accordingly assume that all their actions are justified.

A popular myth is that copyrights are only owned by profit-maximizing capitalists. Most consumers conceive of the Recording Industry Association of America (RIAA), as well as the individual major music labels, as proto-typical examples. Based upon the assumption that all copyright owners are inherently wealthy corporations, consumers readily assume that copyright protection excessively provides monetary benefits to those without need. In addition, a related theme is that copyright owners are overly greedy and poorly attuned to the needs of consumers.[21] Accord-

18. 17 U.S.C. §§ 401(a), 402(a) (1995) (providing that a copyright notice "may" be placed on copies of the work, but not requiring copyright notice on works created after 1976). However, although the 1976 Copyright Act eliminated the notice requirement, it has only become a complete non-issue since 1989. *See* 17 U.S.C. § 405 (1995) (providing that lack of copyright notice for works distributed prior to 1988 does not invalidate copyright if certain conditions are satisfied). In addition, for creations prior to 1976, a copyright notice was one of the requirements to obtain copyright protection; publication without notice would essentially forfeit copyright protection.

19. *See* 17 U.S.C. § 102(a) (1995) (noting that "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression").

20. In addition, Internet users need to beware not just of the invisible copyright symbol, but the more visible, although perhaps less understandable contractual lingo regarding copyright issues. *Cf.* ProCD, Inc. v. Zeidenberg (7th Cir. 1996) (holding that CD-ROM producer could enforce shrink-wrap license terms).

21. *See, e.g.*, Brad King, *Fans: Music Should Rock, Not Lock*, WIRED NEWS, June 6, 2002, *available at* http://www.wired.com/news/print/o,1294,52895,00.html (noting that some consumers are amenable to the concept of paying for music, but averse to the idea of security systems (such as digital rights management) controlling how consumers listen to music they have legally purchased).

ingly, some believe that "robbing" copyright owners of royalties is a justifiable transfer of wealth in a post-modern Robin Hood manner.

The issues attendant to Napster are a perfect illustration of this myth. In particular, many consumers felt self-righteous in utilizing Napster's services even after discovering that there were copyright violations implicated because of the perception that record companies had failed to provide the type of service that they desired. Thus, in the face of perceived inadequate services by copyright owners, consumers resorted to "self-service" by blatantly ignoring copyrights and trying to download music from Napster to beat the court-imposed preliminary injunction, which (to users) clearly seemed unjust.

Admittedly, copyright cases reported in the press do tend to be primarily cases waged by very wealthy plaintiffs.[22] They are, after all, more likely to be able to finance often lengthy and expensive litigation (as in any field of litigation).[23] However, copyrights may be—and are—owned by individuals.[24] In fact, within the past decade, there have been some notable decisions from the United States Supreme Court that have favored rights of individual creators.[25]

In addition, even when individual copyright owners take on mega-corporations such as Lexis and the New York Times, reports of such cases do not dominate the headlines. For example, although the United States Supreme Court recently ruled that freelance authors retained the right to

22. For example, the Recording Industry Association of America, which represents most of the record labels, has led the charge in many well-publicized cases against underdog opponents such as *2600* magazine, Napster, and Napster clones (such as Morpheus, Kaaza, Aimster and Audiogalaxy). *See, e.g.*, Brian Garrity, *The World of Digital Music—The Piracy War Wages on With New Emerging Strategies*, BILLBOARD, July 13, 2002, at 71. In addition, copyright infringement suits initiated by large corporations besides RIAA have also been well reported in recent years. *See, e.g.*, Sony v. Connectix, 203 F.3d 596 (9th Cir. 2000); Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001); Random House v. Rosetta Books, 150 F. Supp. 2d 613 (S.D.N.Y. 2001); Castle Rock Entertainment, Inc. v. Carol Pub. Group Inc., 150 F.3d 132 (2d Cir. 1998); Ticketmaster Corp. v. Tickets.Com, 54 U.S.P.Q.2d (BNA) 1344 (C.D. Cal. 2000). However, there is also another trend within copyright litigation that emphasizes the rights of individual artists who maintain copyright ownership. *See infra* notes 25-26 and accompanying text (noting cases that emphasize rights of individual creators).

23. Interestingly, the perception of a David-Goliath balance in the copyright arena may actually have helped finance more litigation in this area due to resources made available to those seeking to protect public interest *See, e.g.*, Electronic Frontier Foundation, http://www.eff.org/abouteff.html (noting it's mission to protect rights and needs associated with new technology); Berkman Center for Internet & Society, http://www.cyber.law.harvard.edu/projects/opencontent.html (noting the Berkman Center's effort to promote the public availability of literature, art, music and film); Stanford Law School Center for Internet and Society, http://cyberlaw.stanford.edu/about/dockets (noting representation of individuals against larger corporations such as eBay and MGM).

24. *See* 17 U.S.C. § 201(a) (1995) (providing that copyright ownership "vests initially in the author or authors of the work"). However, copyrights can also be owned by employers who commission works under certain circumstances. *See id.* § 201(b); *see also* 17 U.S.C. § 101 (1995) (defining a "work made for hire").

25. *See, e.g.*, Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989); New York Times v. Tasini, 533 U.S. 483 (2001); *see also* Jane C. Ginsburg, *The Last Ten Years in U.S. Copyright: Overreaching or Reaching Out?*, Fordam International Conference on International Intellectual Property Law & Policy, Tenth Annual Conference, Apr. 4, 2002.

additional royalties for the electronic compilation of their works in databases,[26] this is a fact not widely known outside the field of intellectual property lawyers. In addition, even though the legal holding underscored the rights of individual authors, the ramifications of the case ironically have continued to perpetuate the myth that copyright owners are capitalists. For example, the reaction of the defendant New York Times was to presumptively remove all material in question from their database, rather than to negotiate additional royalties with individual authors.[27]

The myth that copyright owners are all capitalists also may persist because consumers have an incomplete picture of the creation and licensing of copyrighted works. For example, songwriters often license their creations through centralized organizations that sell packages of performing rights in songs to stores and radios.[28] Accordingly, cases of small, independent copyright owners who obtain revenue through the licensing of their songs are not visible to the public. By contrast, newspaper headlines routinely trumpet the contracts of major recording stars that have agreed to trade their copyright interest to a record company for guaranteed revenue, as well as marketing. In addition, although many performers who have contracted with record companies would likely agree that the companies are all capitalists, the fact remains that this represents just one situation of copyright ownership.

III. CONSUMER COPYING "DOESN'T COUNT"

The last major myth of this essay is also one of the most important ones for both traditional contexts, as well as the Internet. The myth that consumer copying does not constitute copyright infringement is actually a mega myth comprised of three discrete myths that are more distinct: (1) only commercial actors, such as corporations, can infringe copyrights, (2) an intent to steal is required for copyright infringement, and (3) certain types of "good" copies are always permissible. Each of these myths will be addressed in turn.

A. MYTH 1: ONLY COMMERCIAL ACTORS CAN INFRINGE COPYRIGHTS, NOT INDIVIDUALS

A corollary myth to the capitalist copyright owner myth is that only commercial actors, not individuals, are liable for copyright infringement.

26. *Tasini*, 533 U.S. at 487-88 (ruling on whether the right to revise under the Copyright Act included the electronic databases at issue here); *see also* Greenberg v. National Geographic Soc., 244 F.3d 1267 (11th Cir. 2001).

27. *See, e.g.*, John Greenwald, *Cyber Payback: The High Court Upholds Freelancers' Online Rights*, TIME, July 9, 2001, at 38.

28. *See, e.g.*, Janet L. Avery, *The Struggle Over Performing Rights to Music: BMI and ASCAP vs. Cable Television*, 14 HASTINGS COMM. & ENT. L. J. 47, 51 (1991); *see also* Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617, 618 (2001) (describing similar function of Copyright Clearance Center with respect to photocopying copyrighted material registered with the Center).

Indeed, such a view would be reinforced by a casual observation of copyright suits reported in the popular press. For example, MP3.com, Napster, and Music City were all sued for copyright infringement, rather than the consumers who used the services offered by these companies.[29] Although the myth that only corporations should be liable may foster a sense of justice that resonates with consumers, it does not reflect the current state of law.[30]

The fact that corporations are common targets of copyright infringement suits is more a reflection of tactical considerations in litigation, rather than copyright law. Individuals are often direct infringers of copyrights, although typically they are not sued. Corporations, on the other hand, are often at least indirect infringers. A plaintiff may elect to sue a direct infringer, an indirect infringer, or all infringers.[31] However, corporations tend to be more readily identifiable than individuals; in addition, litigating against corporations is seen as more efficient to stop large-scale infringements, rather than suing each individual.[32] For example, Napster was sued for copyright infringement, rather than the millions of individual Napster users.[33]

However, this myth is beginning to be shattered. In addition to only slightly veiled threats of litigation against consumers and proposals for additional copyright-enhancing legislation, copyright actions against individuals are now entering the spotlight. Copyright owners have made it clear that individuals are no longer immune, particularly when they violate the new super-copyright provisions that forbid tampering with anti-

29. This example also illustrates the myth that good copies, including non-commercial copies made by consumers, are always permissible. *See infra* note Part III.C.

30. *See supra* part II (discussing the myth that copyright owners are all capitalists, such that consumers should be entitled to vigilante justice).

31. The copyright laws do not discriminate between corporations and individuals. *See* 17 U.S.C. § 501 (1995) ("anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer . . . ."). A copyright plaintiff may elect to sue the direct infringer or the indirect infringers, much as a plaintiff in a negligence action can elect to sue one or all joint tortfeasors.

32. Moreover, suing individuals may sometimes result in bad relations with the very individuals who companies want as consumers buying copyrighted material. *See, e.g.*, Edward A. Cavazos & G. Chin Chao, *Computer Bulletin Board System Operator Liability for the Infringement of their Users*, 4 TEX. INTELL. PROP. L.J. 13, 17 (1995); Steve Morse, *Burned? Last Year, Recordable Discs Outsold CDs for the First Time. With So Many People Copying Music, Is the Record Industry Toast?*, BOSTON GLOBE, Apr. 21, 2002, at L8 (quoting Hilary Rosen, head of RIAA as stating that the RIAA does not rule out suing individuals, but considers that to be a measure of last result).

33. In that case, Napster was alleged to be liable for contributing to the many direct infringements of Napster's users because Napster both provided the means to do so and had full knowledge of the likely results. *See* A & M Records, Inc., v. Napster, Inc., 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000), *aff'd* 239 F.3d 1004 (9th Cir. 2001); *see also* UMG Recordings, Inc. v. MP3.Com, Inc., No. 00 CIV.472, 2000 U.S. Dist. WL 1262568 (S.D.N.Y. Sept. 6, 2000); Zomba Recording Corp. v. MP3.Com, Inc., No. 00 CIV.6831, 2001 U.S. Dist. WL 770926 (S.D.N.Y. July 10, 2001). In addition, there was also an allegation that Napster was vicariously liable for the acts of its users because it was capable of stopping the infringement, but failed to do so. *See Napster*, 114 F. Supp. 2d at 920-21.

circumvention devices.[34] For example, Princeton professor Edward Felten was threatened with litigation when he wanted to present research at a conference that disclosed problems with technology created by the RIAA.[35]

In addition, criminal prosecution is now at stake for violation of some copyright laws. For example, Russian scientist Dmitry Sklyarov was arrested and subsequently criminally indicted for creating software that intentionally works against anti-circumvention devices, even though this was part of his job in a country outside the United States.[36] In addition, the *Wall Street Journal* recently reported that RIAA would now pursue individual copyright infringement in addition to infringement of the newer anti-circumvention provisions.[37] Ironically, the shattering of the myth that only corporations are liable for copyright infringement may further feed into the major myth that copyright owners are all capitalists, which would further encourage consumers to believe in vigilante redistributive justice.[38]

B. MYTH 2: IF I DON'T MEAN TO STEAL, I'M NOT GUILTY

A related myth to the idea that copyrights don't apply to consumer copying is that without explicit intent to steal, no liability will be imposed. This myth may have ironically become further entrenched as a result of the evildoer rhetoric that attempts to re-educate consumers about how copying can be evil. Consumers seem to have further fortified the original myth that they are not liable for copyright violations without some evil intent, rather than internalize the message that they are engaging in

34. *See* 17 U.S.C. § 1201 (1992); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (finding that publication of DVD anti-circumvention code, known as "DeCSS code," to be impermissible under the amended copyright laws), *aff'd sub nom* Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001) (holding web owners liable under the amended copyright laws for posting links to websites that made decryption software available).

35. *See* Letter from Matthew Oppenhiem, Vice President of the RIAA to Professor Edward Felten (Apr. 9, 2001), *available at* http://www.cs.princeton.edu/sip/sdmi/riaaletter.html; Felten v. RIAA Complaint, dated June 6, 2001, *at* http://www.eff.org/Legal/Cases/Felten_v_RIAA/20010606_eff_complaint.html; *see also* Hiawatha Bray, *Silly Law, Silly Lawsuit*, BOSTON GLOBE, June 7, 2001, at C1 (discussing Felten's participation in a contest sponsored by the RIAA that eventually resulted in the litigation threat); *Tinkerers' Champion*, ECONOMIST, June 22, 2002 (describing Felten's experiences with the RIAA, as well as his more recent activities against the DMCA); Steve Kettmann, *Dutch Cryptographer Cries Foul*, WIRED NEWS, Aug. 15, 2001 (noting concerns of a Dutch cryptography expert in publishing his findings regarding Intel's technological protection of digital video, based upon the action taken against Prof. Felten).

36. *See, e.g.*, Steven Levy, *Busted by the Copyright Cops*, NEWSWEEK, Aug. 27, 2001; Brenda Sandburg, *Arrest May Trigger Copyright Fight*, RECORDER, July 20, 2001.

37. Brad King, *File Trading Furor Heats Up*, WIRED, July 3, 2002, *available at* http://www.wired.com/news (noting a news leak to the Wall Street Journal that the recording industry would sue aggressive file-traders, although officials have since backed away from this stance); *see also* Joy Russell Perez, *Music Industry May Sue File-swappers*, BOSTON HERALD, July 4, 2002, at 18 (noting that top record label executives, as well as the RIAA are contemplating law suits against individuals, rather than companies who assist in making music free for downloading).

38. *See supra* Part II.

evil activities. Intent to steal or profit from the works of others, however, is *not* required for direct copyright infringement.[39] Rather, direct infringement of the copyrighted work is established by showing (1) access to the copyrighted work and (2) substantial similarity between the infringing work and the original, copyrighted work.[40] Accordingly, people have been found liable for copyright infringement even when they were not intending to misappropriate someone else's work. For example, one of the most famous cases involved a finding that the late George Harrison's *My Sweet Lord* infringed the copyright of the popular song *He's So Fine*, despite Harrison's assertion that he independently created the song. The court was convinced that in light of the original work's popularity, Harrison's defense was implausible.[41]

Ironically, campaigns to re-educate consumers to understand that they are engaging in mass piracy have not defused this myth.[42] Rather, these efforts further reinforce the myth that copyright owners are unjustified and greedy evildoers. In addition, because consumers tend to believe that they are generally law-abiding citizens, the allegation of bad acts likely encourages further denial of any wrongdoing.[43] Also, the characterizations of copyright infringers as criminals may further bolster the myth that copyright liability only exists if there is criminal intent.

C. Myth 3: Copies For "Good" Uses Don't Count as Copyright Infringement

The myth that certain copies are for good uses and thus do not count as copyright infringement is one of the most pervasive and persistent myths surrounding the operation of copyrights on the Internet. The persistence of the myth is likely attributable to the fact that it contains a grain of truth. The copyright act provides many statutory exceptions from what would otherwise constitute infringement.[44] In addition, there is a broadly written exception for "fair use" that provides a complete defense to what would otherwise be copyright infringement.[45] However, "fair use" is only

39. *See generally* 17 U.S.C. §§ 106, 501 (1995) (providing that "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121 or of the author as provided in section 106A . . . is an infringer of the copyright or right of the author").

40. § 501.

41. *See* Bright Tunes Music Corp. v. Harrisonsongs Music, Ltd., 420 F. Supp. 177, 181 (S.D.N.Y. 1976) (finding the defense of independent creation unbelievable because of how well-known the copyrighted original was).

42. *See generally Copyright Noncompliance*, *supra* note 13, at 244 –45 (criticizing a prior proposal to re-educate consumers concerning copyright law); Morse, *supra* note 36, at L8 (describing the results of Hilary Rosen's informal survey of her Harvard law student audience in which only one third of students admitted to illegally downloading music, but most admitted burning CDs for friends).

43. *See supra* notes 11-14 and accompanying text.

44. However, other parts of the copyright act do provide categorical exemptions, albeit in fairly narrow categories such as library archiving. *See, e.g.*, 17 U.S.C. §§ 108-22 (1995).

45. 17 U.S.C. § 107 (1995) (noting that "the fair use of a copyrighted work . . . is not an infringement of a copyright.").

determined after weighing the statutory factors of (1) the creativity of the copyrighted work, (2) a commercial use of the copyrighted work, (3) amount of copying relative to the original, and (4) an adverse impact on the market or value of the work.[46] No single factor is dispositive of a finding of fair use. Accordingly, there are no categorical *per se* exemptions for what constitutes fair use.

Although there are no *per se* categories in reality, they are definitely persistent myths. For example, the fair use *factor* of whether the copying is for commercial use has developed into the myth that any non-commercial use of copyrighted material fails to raise copyright infringement problems. However, non-commercial use is not a determinative factor in a fair use finding. In fact, some commercial uses have been found, on balance, to be within the scope of fair use.[47] In addition, the definition of "commercial" in the context of fair use extends beyond the lay definition of "commercial," to include activity that does not yield an immediate economic benefit; accordingly, Napster was found to be engaging in commercial use, with respect to the fair use factors even though it had not yet charged subscribers for provision of content.[48]

Similarly, the counter-myth that all commercial uses constitute copyright infringement is an unfair blanket characterization. Although some courts have stated that a presumption against a finding of fair use arises when the use is for commercial purposes, the balancing of *all* fair use factors is nonetheless required by statute.[49] Indeed, courts ultimately have found some commercial uses to be fair uses, including when there have been substantial amounts of original material taken, based upon the weighing of the other fair use factors.[50]

The prevailing myth about categorical types of activities that should always be considered fair may persist because of an over-broad reading of

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46. *Id.* (noting that in determining in a given case whether the use constitutes a fair use, these factors shall be considered).

47. *See, e.g.*, Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986) (finding fair use despite appropriation of an entire advertisement where the copying was done to rebut derogatory advertisement and defend the defendant's name).

48. A & M v. Napster, 114 F. Supp. 2d at 921-22 (expectation of revenue sufficient). In addition, the repeated copying facilitated by Napster's web site was found to further support a finding of commercial use. *Id.* at 913-14. *Cf.* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (finding defendant engaged in commercial use despite lack of sales where the defendant had registered a domain name to extort the owner of the related trademark). Of course, *Napster*'s emphasis on the copyright owner's "right" as first entrant in a market was somewhat surprising with respect to prior law. *See, e.g.*, Shubha Ghosh, *Turning Gray into Green: Some Comments on Napster*, 23 HASTINGS. COMM. & ENT. L. J. 563, 574-77 (2002)

49. *See, e.g.*, NIMMER, 13 NIMMER ON COPYRIGHT, 154-55 (noting that most courts do in fact utilize all the fair use factors, although discussion is sometimes cursory). However, the presumption against commercial use is not to be woodenly applied. *See id.*

50. *See, e.g.*, Sony Corp. of Am. v. University Studios, Inc., 464 U.S. 417 (1984) (hallmark case for the proposition that wholesale copying can nonetheless constitute fair use in certain cases). In addition, this was a contentious issue in a recent case before the Eleventh Circuit in which the court rejected the argument that a novel providing a slave's perspective was an unauthorized sequel to the story *Gone With the Wind*. *See* Suntrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001).

the fair use provision, in combination with the popular concept that fair use is equivalent to what the public considers fair and reasonable.[51] For example, although the fair use provision explicitly lists statutory factors to balance, it also provides examples of what *may* constitute a fair use, including use for teaching, scholarship and research.[52] However, as any astute reader of the copyright statute realizes, these situations are only intended to be proto-typical categories *limited* by the balancing test. Accordingly, only copying for teaching that meets the balancing test for fair use will be justified, despite the myth that any use remotely related to educational purpose should suffice for the fair use defense.

The legal nuances attendant to fair uses in teaching and research are far more complex. Court precedents have banished simplistic assumptions, such as the mythic fair use assumption that all commercial use is impermissible. On the other hand, some educational uses may nonetheless *not* be fair uses once the balancing test is applied. For example, the copying of articles into course-packs for use in university classes has been held to constitute impermissible copyright infringement.[53] Similarly, the finding that a scientist who kept an archival copy of a research article for personal use could be nonetheless infringing further supports the fact that consumer perception of what is fair may not always predict how a court will rule.[54]

Similarly, fair use based upon a "limited" use of the copyrighted work is also difficult to predict. For example, while there exists a myth that anything short of wholesale copying is fair,[55] the courts have not applied fair use so woodenly. Courts, in fact, have found that copying of far less than the entire work may be copyright infringement, if it constitutes the "heart" of the work.[56] In addition, courts may come to differing results regarding whether a "transformative" use of a copyrighted original constitutes fair use. Although a myth exists that any transformative use is *per se* fair under some mythical artistic license, case law has not created such an exception.

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51. *See* Ginsburg, *supra* note 13, at 17 (describing the current phenomena in the Internet context where web creators unabashedly state that all material is used without authorization and essentially imposing the burden upon the copyright owner to protest the unauthorized use, contrary to legal presumptions, but ultimately noting that public perceptions have such a strong influence that they may be ultimately controlling).

52. *See* 17 U.S.C. § 107 (1995).

53. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) (affirming liability for Michigan Document Services' impermissible copying of course packs).

54. Am. Geophysical v. Texaco, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd.*, 60 F.3d 913 (2d Cir. 1994).

55. The existence of this myth is also explained by the fact that consumers are loath to consider many of the activities they ordinarily engage in to be in violation of the law.

56. Even small amounts of copying can exceed fair use if the "essence" of the original work is taken. *See, e.g.*, Harper & Row v. Nation Enter., 471 U.S. 539, 569 (1985) (copyright infringement found where only 300 words out of 200,000 copied because these constituted the "heart" of the work).

For example, some courts have found that a digitally manipulated copy of a photo may constitute impermissible copyright infringement even if the end product only contains a fraction of the original.[57] Similarly, "sampling" portions of existing music to use in new songs, as is commonly done in rap music and other music genres, may also constitute impermissible copying.[58] On the other hand, the Ninth Circuit recently held that a thumbnail version of a copyrighted picture *could* be permissibly shown in a search engine under the fair use doctrine.[59] Accordingly, the reality is much more complex and unpredictable than the myth that all altered or transferred works are free from copyright liability.

IV: REVISITING THE INTERPLAY BETWEEN MYTH AND REALITY

This section will revisit the issue of how myths can have a major influence on the evolution of copyright law. In particular, this section will briefly outline how myths can impact the creation of new copyright laws, as well as how the enforcement of copyright laws may impact the continued existence and power of myths.

A. THE MORPHING OF MYTHS INTO COPYRIGHT REALITY

The popular myth that copyrights do not exist on the Internet played an important role in the rapid enactment of enhanced copyright laws under the Digital Millennium Copyright Act (the "DMCA"). While it is true that international treaties impacted the enactment of these new laws, the prevalent myth that consumers would fail to respect copyrights in cyberspace likely played a more prominent role. For example, an extrapolation of the myth that copyright infringement cannot exist without a photocopier easily leads to a mind-boggling number of infringements by almost every consumer who owns a personal computer, printer, or scanner. Accordingly, the potential of infinite numbers of infringements contributed to significant lobbying for the rapid enactment of the DMCA.

In addition, copyright owners' awareness of the many myths limiting consumer perception of what copies "count" for infringement further feeds into the philosophy of enhanced controls under the Copyright Act. For example, the DMCA introduced super-copyright provisions that make acts illegal that are well beyond the borders of traditional copyright infringement. Unlike the traditional copyright provisions that governed

57. *See, e.g.*, Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113 (D. Nev. 1999) (finding that scanning a photograph constitutes a copy even if the scanned photograph is later manipulated and largely unused because the temporary copy constitutes an infringement). However, this ruling is complicated by the fact that there were actually two violations of the copyright owner's rights: the right to prevent copying (reproduction right), as well as the right to prepare derivative works. *See* 17 U.S.C. § 106 (1995).

58. *See, e.g.*, Grand Upright v. Warner Bros., 780 F. Supp. 182 (S.D.N.Y. 1991) (beginning the opinion by citing the bible [verse] "though shalt not steal," to further underscore the inappropriateness of music sampling).

59. *See* Kelly v. Arriba, 280 F3d. 934 (9th Cir. 2002).

unauthorized use of copyrighted originals, the super-copyright provisions create liability for circumvention of technological devices that aim to protect copyrighted works.[60] In other words, copyright owners were not content to rely on technological means to thwart consumer access; rather, they created a new type of liability that extended beyond the traditional concepts of copyright law.[61] In addition, these new super-copyright provisions provide their own exceptions that are narrowly drawn to make previously permissible activity illegal. For example, even those engaged in legitimate research to identify and analyze encryption systems must first make a "good faith effort" to obtain actual authorization before proceeding to circumvent the normal technological means.[62]

B. Fueling the Fire of Myths by Enforcing Super-Copyright Rules

The enactment of laws and new technology based upon existing myths may have only fueled the fire behind the myths themselves. The anti-circumvention provisions feed into the myth that all copyrights are owned by capitalists trying to maximize returns for their copyrights. Similarly, testimony and actions by the manufacturers of machines that limit copying similarly reinforce the myth that copyright owners primarily are greedy corporations. Accordingly, consumers faced with ever-increasing restrictions on their copying abilities will likely feel even more justified in engaging in further acts of "self-service."

Moreover, highly publicized enforcement activities have further enhanced the power of certain myths. The litigation against Napster has highlighted the discontent of many consumers with the major record companies and reinforced the idea that consumers have the moral right to ignore the unreasonable requests of capitalist copyright owners. Similarly, high profile litigation against scientists like Professor Felten who appear to be maligned for doing their job further enforce the myth of capitalist copyright owners. Indeed, because the super-copyright provisions that make activity beyond copying illegal seem so unreasonable to consumers, consumers will likely have difficulty believing that these law should exist, let alone be enforced.

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60. For example, reverse engineering of technological devices is limited with respect to the anti-circumvention provisions to situations involving the "sole purpose of identifying and analyzing . . . elements of the program . . . necessary to achieve interoperability . . . . and that have not previously been readily available." 17 U.S.C. § 1201(f) (1995); *see also* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERK. TECH. L. J. 519 (1999). This limited exception is particularly notable because it limits reverse engineering even in cases where there is legitimate access to a computer program in general, albeit not a particular portion. *See* § 1201(f).

61. *See* § 1201.

62. *See id.* § 1201(g)(2)(c).

CONCLUSION

The themes of this essay should resonate with consumers and copyright owners alike and help foster greater consideration of the importance of myths, and the role they play in the creation of copyright laws. The brief illustrations shown here should underscore the inevitable interplay between myths and reactionary copyright laws; the more power that myths hold, the more copyright owners are likely to push for increasingly stringent laws. However, this power struggle is unlikely to end with a final determination of who is the ultimate evildoer.

This essay seeks to halt the blame game and instead, move toward consensus building that will enable a productive inquiry into the source of the problems that face both content owners and users on the information super-highway. After all, the open issues surrounding many of these myths will require either courts or Congress to determine the proper balance between these divergent groups. And, the closer these groups are able to come to understanding each other, the closer they hopefully will be to reaching a mutually agreeable (or, at least not an entirely disagreeable) outcome.