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James Gleick

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WHO OWNS WHAT IN THE DIGITAL WORLD?

James Gleick[†]

"Who Owns What in the Digital World" is my title, and I am tempted to state a simple answer: *Whoever Owned It Before.* If musicians owned their performances – or more to the point, their licensees, the record labels – then that is who owns them in the digital world. If we authors own our words – along with our licensees, the publishers, and now databases – then likewise that is who owns them in the digital world. Why should anything have changed, in the fundamental relationships between the people who create and the people who consume intellectual property?

But we know something has changed. There is more turmoil now around the issue of copyright than at any time in our lifetimes. The Supreme Court has a really extraordinary and difficult ruling to make, which will be a milestone either way. All in all, there is a lot of weight being thrown around.

I stand here as a card-carrying representative of the copyright industry. I own copyrights. I earn my living from my copyrighted work. I believe in copyright as public policy, to reward the hard work and creativity of people whose work product is fundamentally composed of bits – which is the case for me, and for Britney Spears, and for Steven Spielberg (not that we have a whole lot in common otherwise). When I first wrote about copyright and the Internet for the *New York Times* six years ago, my title was "I'll Take the Money, Please," and my opening sentence was, "I own these words."[1] I quoted an anonymous correspondent who had posted my work online and e-mailed me to say:

> We'll let you in on a little secret. Copyright as we know it is dying, just like the Catholic Church died a kind of death with the invention of the printing press. However, not everyone understands this yet, including yourself.

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† James Gleick (www.around.com) is an author and journalist. He worked as an editor and reporter at the New York Times for ten years and often writes for the Times and other publications as a free-lance. His new book is ISAAC NEWTON, published by Pantheon in May 2003.

1 James Gleick, *I'll Take the Money, Thanks*, NEW YORK TIMES, § 6 (Magazine), at 16.

I referred to this gentleman as a "self-indulgent creep."[2]

Meanwhile, I serve on the council of the Authors Guild, an organization devoted to the professional interests of working writers, and this group is now fighting all sorts of battles – mainly losing battles. We have gotten into an ugly debate with Jeff Bezos at Amazon.com because it officially bothers us that they are being so efficient about arranging sales of used books. On the actual publication date of my last book, you could already buy it *used* from the same screen at Amazon where you could buy it new. Press one button and I get paid; press the other button and I do not get paid. Either way, you get the book. They seem to be working toward a world where every book will be sold and resold to dozens of people with each transaction generating a new cut for *Amazon* but nothing for the author. The publishing industry is seriously worried about this, and no one knows what to do.

In a way, I have already digressed, because the online market in used books has nothing to do with copyright. Does it? Even the Authors Guild cannot claim there is anything illegal, or even wrong, with passing a book from one person to another, with or without money changing hands. Nobody is printing new copies; they are just reusing the old copies. This is what libraries are about, after all, and no one can be against libraries. If it is proper for you to resell my new book to your mom for five dollars plus shipping, surely it is proper to do the same thing on Amazon. If it is proper for a hundred people to do it, then surely, from a legal point of view, it is proper for a hundred thousand people to do it. All that Amazon does, all that the online world does in general, is make things easier. It removes the friction.

So when the Authors Guild complained, we did not get a lot of sympathy. And we have to wonder, when the Public Library buys one copy of my book, and puts it online for all the world's readers to "borrow" at once, will anyone *not* take the side of the librarians and the readers? Librarians and readers are popular. All that schlepping of physical books back and forth; losing books; forgetting to return books – that is just quaint and obsolete. Good riddance. Hurray for efficiency. Hurray for the perfect library, hurray for the perfect marketplace in used books. And goodbye royalty checks.

But it is not my intention here to be in the mode of Pity the Poor Author. Just the opposite. Because more and more I seem to be rebelling, emotionally at least, against my own best interests.

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[2] *Id.*

More and more I catch myself drifting over to the side of the "self-indulgent creeps" who think, "Yo, copyright is dead, and no cause for sorrow." I am not sure exactly why this is, but I want to explore it.

Fundamentally, I believe that we owners of intellectual property are losing the copyright wars, and the way we are losing them is we are fighting too hard. We are overreaching. When I say "we," I'm being disingenuous, because of course I do not mean people like me, I mean people like Disney. They are my natural allies, at least in terms of economic interests, and suddenly I seem to hate them.

I want to offer some examples, from the banal to the truly insidious. Maybe it won't even be clear which is which. Let me start with something banal: DVDs. DVDs have swept through the consumer market faster than any new entertainment technology in history. I got one a few months ago, and the first thing I noticed had to do with the item known to copyright aficionados as The FBI Warning. There is one at the beginning of most commercial videotapes, and now there is one at the beginning of most DVDs. If you are like me, the first time you play your brand new DVD and the FBI warning appears, your thumb is pressing on the fast-forward button before the thought has time to form in your brain. And what happens? *Nothing*! You are not allowed to skip the FBI warning – not now, and not ever. You are condemned to a special circle of Dante's hell. It is trivial, and I have been trying to figure out why it bothers me so much. I think it is because it is a new, special form of powerlessness. And it is not the FBI exerting power over me. It is Hollywood.

Is it clear what has happened here? Some human being, just a few years ago, when the standards for digital video discs were being designed, had the idea for a "feature" – a flag in the software, to instruct the hardware, to *disable* the user's control. No one ever thought to do this with CDs. Now, who owns what in the digital world? I thought I owned my DVD player. I thought I owned my DVDs. But here is a little conspiracy between the manufacturers of hardware and the distributors of content to assert power over my stuff. Thanks to the notorious Digital Millennium Copyright Act,[3] it is probably illegal for me to tamper with my machine to regain control over the fast-forward button. Once this feature is there, the manufacturers of DVDs can use it for anything; Disney puts commercials on some of their DVDs and you cannot skip them.

[3] 17 U.S.C. § 1201 et. seq. (1998).

Example 2: digital video recorders. Mine is a ReplayTV; other people have Tivo. It is really nothing more than a VCR that uses a computer hard disk in the place of tape, but people who say it totally transforms the way you watch TV are not overstating the case. The basic idea is that I almost never watch live television anymore. I watch everything on my schedule.

Before my new ReplayTV even arrived, the broadcast networks and the Motion Picture Association of America had filed suit against the manufacturer trying to prevent them from shipping it.[4] They have charged "contributory copyright infringement" and "vicarious copyright infringement." They claim that the device "illegally copies" their "copyrighted works."[5] Now that's clearly false: the Supreme Court settled this in 1984, after the Motion Picture Association of America (MPAA) sued Sony over Betamax.[6] Copying copyrighted programs for the purpose of time-shifting is fair use. But of course the copying is not the nub. The real problem is plaintiffs' next assertion: that the ReplayTV strips their copyrighted work of "commercial advertisements during playback."

Well, it does this. Or perhaps it would be more accurate to say, the machine lets the *user* skip the commercials. Am I quibbling, or is this distinction important? I think it might be important. The machines do in fact record everything, commercials and all, and there is no way to *remove* the commercials, but when you play a show, you can choose to *skip* the commercials. When you browse websites, there is a lot of software to help you block the display of advertisements, with varying degrees of success. You may feel this is not fair to the poor broadcaster – that there is no free lunch, and the viewer has an implicit commitment to endure the advertising that pays for the programs he enjoys so well. But is there some kind of *copyright* violation here? It is madness. We have always been allowed to skip the commercials by getting off our duffs and going to the refrigerator. At least I have never felt guilty about it.

This is ugly – in my opinion – an abuse of the legal process to strong-arm a relatively small company that produces an innovative technology. Again, the fundamental question for me is: Who Owns My Stuff? And on these terms, ReplayTV is not just a victim. They are also a perpetrator. They are using their technology to push their *own* commercials at me.

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[4] Newmark v. Turner Broad. Network, 226 F. Supp. 2d 1215 (C.D. Cal. 2002).

[5] *Id.* at 1218.

[6] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

I want to urge you to think in terms of the Who Owns My Stuff paradigm. You may have heard about a particularly noisome piece of legislation that bounced around Congress last summer before finally getting put off until this year, a bill introduced by Howard Berman of California on behalf of the entertainment industry.[7] The idea is that copyright holders, if they have reason to suspect there is piracy going on, would have the right to use technology against anyone on a public network, with viruses, worms, and denial-of-service attacks. The first draft of this bill said that if a user's computer was damaged by such an attack, even if the user was completely innocent of any copyright violation, he would have to get the specific written permission of the US Attorney General before he could sue for compensation.[8] This is nutty – it is vigilante justice. It is known in geek circles as Hack My Box and Steal My Files bill. It is the kind of thing that gives copyright holders a bad name.

And even this is not the worst. The worst is a thing called TCPA: Trusted Computing Platform Alliance.[9] I am sorry to use the initials, but the long name is not any better, because it is a euphemism – the word "trusted" is a piece of brilliant deception.

TCPA is a collaboration of, at last count, two hundred corporations in the computing, chip-making, and financial businesses, beginning with Intel, Microsoft, IBM, American Express, Philips, and pretty much any other company you can name.[10] Its purpose is to create a new official architecture for the personal computer, and not just the personal computer but basically any electronic device capable of storing and processing information – which these days includes your coffee pot.[11] In this architecture, a new kind of security will be built in – cryptographic protocols built into every chip, exerting control from the instant the device boots up.

Microsoft, meanwhile, is creating a new version of its operating system, code-named Palladium, based on this architecture.[12] Microsoft says it is a way to protect your bits on everyone else's computer. Before any program can run, it must authenticate itself through the operating system, which in turn authenticates itself

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[7] H.R. 5211, 107th Cong. (2002).

[8] *Id.*

[9] *See*, Trusted Computing Platform Alliance, *at* http://www.trustedcomputing.org/tcpaasp4/index.asp (last visited March 15, 2003).

[10] *Id.*

[11] *Id.*

[12] Amy Carroll et al., *Microsoft "Palladium": A Business Overview*, *available at* http://www.Microsoft.com/PressPass/features/2002/jul02/0724palladiumwp.asp (Aug. 2002). As of January 2003 Microsoft discontinued the code name Palladium. The new components are now referred to as the next-generation secure computing base for Windows. *Id.*

with the hardware, checking that everything is licensed and all the licenses are up to date, and the keys for all this authentication must be continually downloaded from servers somewhere across the Internet. If you do not connect to these servers, various programs will stop functioning. From the point of view of a record company, the idea is to make possible all kinds of digital rights management: you can sell music to a particular person, or to a particular computer, or for a particular period of time or number of plays. You could send secure e-mail, including e-mail that will automatically delete itself after being read. You could ensure that the Pentagon Papers, written in Microsoft Word, could not be leaked to journalists.

And in case this consortium is not sufficiently all-encompassing, Congress is considering legislation to make it mandatory. Fritz Hollings has proposed a so-called Security Systems Standards and Certification Act, which would make it "unlawful to manufacture, import, offer to the public, provide or otherwise traffic in any interactive digital device that does not include and utilize" these "certified security technologies."[13] Opponents of the TCPA sometimes honor the Senator by calling the hardware a Fritz chip. This is easier to say than Secure Bootstrap Architecture.

The whole thing, controlling after-purchase behavior, is the unskippable FBI warning writ large. So far, this proposal has not made much headway through Congress, but the technology exists and is already making inroads, in products like Microsoft's Media Player. I think it is scary as hell. I like being the boss of my computer – not to mention my music player and my video recorder and my coffee maker. This plan makes someone else the boss – whatever corporation or government operates the authenticating servers for any particular combination of hardware and software. It makes external monitoring routine; outside authorities can track and delete naughty files. I do not think it is paranoid to point out that the most enthusiastic deployers of this system would be foreign governments that are anxious about the free use their citizens make of the online world. It is the perfect technology for censorship.

So what is the poor copyright owner to do? The record industry is in serious pain, and it is possible that the conventional wisdom is true – that the labels are suffering because of widespread peer-to-peer sharing of music, Napster-style. I am not totally convinced that is true, by the way, but it is possible. I really do want to protect my ability to make money from intellectual property,

[13] Security Systems Standards and Certification Act (sponsors, Sen. Fritz Hollings and Sen. Ted Stevens), draft 6 August 2001, Sec. 101: Prohibition of Certain Devices.

and there's no question that that ability is in jeopardy now. At least it will be in jeopardy as soon as people figure out how to make a pleasant and readable electronic book.

Ultimately I believe it is a mistake to frame this debate in terms of property rights versus theft. If that were the whole story, I think everyone would be opposed to theft. But we all know it is not the whole story. Copyright law is a delicate balance; it always has been. Part of the balance is a degree of toleration for petty infringement. No matter how creative and original we are, we consume information far more hungrily than we generate it. I am certainly not the first person to point out that Disney did not invent Snow White but stole it from the Grimm Brothers, at a time when copyright terms were, luckily, short. I know for a fact that there are professors who have photocopied book chapters for classroom use. This is what fair use is – petty infringement that is legalized under a notoriously fuzzy and ill-defined blanket.

This is why powerful technologies are so scary – the VCR was scary, and the photocopier was scary, and these devices really do enable copyright infringement. And now people think of the Internet as a gigantic global copying machine. It is understandable that people are worried that the background noise of petty infringement is suddenly going to turn into the main event: that, in the limit, I will sell one copy of my next book, and Hollywood will release one copy of each movie, and then the Internet will reproduce it billions of times for all to share.

This is scary but I am pretty sure it is wrong. It is better to think of the Internet as a gigantic global communicator. It lets us send information around with unimaginable speed and efficiency – and that *includes* copying, but it is not fundamentally *about* copying. This is the microscopic hair-splitting distinction I want to leave you with. We are information processors, as a species. When information bounces freely from place to place, from person to person, it makes us happy, and it makes us rich. I believe that another element of that delicate balance is moral, or psychological. Consumers of intellectual property have at least some inclination to respect the creators of intellectual property. They do not just pirate Britney Spears' songs, they love Britney Spears and want her to do well. They understand the no-free-lunch concept. They are more open to moral persuasion than the average shoplifter, anyway. Maybe this is silly to say at a conference of lawyers, because it has got nothing to do with legality, but this good will is there, and it should not be thrown away lightly. I believe – I guess because it's what I *want* to believe – that the best strategy for

copyright owners is to glory in the chaos, and relax, and try not to exert too much control.