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COMMENT: HOW TANGLED IS THE WEB?

David O. Carson[†]

I could not agree more with the theme that appears at both the beginning and the end of Professor Loren's paper, and I would like to take a few minutes to address some side issues related to that theme, with the hope that I will get back on target before I finish.

Professor Loren starts by saying that the music industry is in crisis. Infringement is rampant with little sign of abating despite lawsuits against peer-to-peer file sharing systems. New systems arise faster than old systems shut down. Consumers are ripping and burning CDs with little regard for music copyright. She begins her conclusions by saying copyright risks irrelevancy in the digital world. And I could not agree more. I am not sure I agree, however, that it is primarily because of the way in which rights are divided up or because of difficulties in obtaining rights from the people that own or control the various exclusive rights of copyright.

I think the first question we have to ask is: What is the real problem? – i.e., What is going on today? And I would suggest that the problem is not so much with the law or with the current distribution of rights among various persons, but with the technology and the consumer expectations that have been built up and satisfied by that technology, along with the inability of content providers to catch up with those expectations.

We would not be having this discussion if it were not for technological advances with computers, the Internet, and consumer electronic devices. These advances have in the past decade or so, for the first time, made copyright a topic of national interest and, indeed, of controversy. For those of us who have been practicing law in this area for quite some time – in my case, more than two decades – this is a very surprising development. Certainly I could not have imagined such a development when I started out in this business.

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Not so long ago copyright was a subject that was fascinating only to those who specialized in that area, and was either fascinating or puzzling to authors and those who were involved in the industries or involved in the exploitation of the works of authorship. But it was not exactly scintillating cocktail party conversation.

What has changed? Well, what has changed is that for the first time anyone can be a copyright infringer. Of course, anyone can also be a copyright owner. And that has been true since 1978 when the law was amended to provide that copyright attaches upon fixation. But most people were not, and are not, aware that they are creating copyrighted works everyday. Computer technology and the Internet actually do hold out the promise that everyone can become an author as a practical matter and not just in theory. They provide the possibility that anyone who creates a work of authorship of any kind, a song, a film, an essay, a short story, a photograph – the list goes on – can eliminate the middle man such as the record company, the publisher, and the movie studio, and make his or her work available for distribution to the world at large. That is the promise of the new digital network environment; a promise that is probably largely unfulfilled thus far. How many creators actually have been able to reach a wide audience by making their work available on the Internet? How many have actually been able to make a living doing that? Not many, I suspect. But the promise is there and maybe it will be met one day.

However, there is also what I hesitate to call the dark side of the Internet from the copyright point of view. If the Internet makes it possible for anyone to be an author and to be his or her own publisher, it also enables everyone to be an infringer. I think that is the crisis to which Professor Loren refers in the first sentence of her article. And it is what threatens to make copyright irrelevant, as she notes in her conclusion.

As we sit here, millions of copies of copyrighted works, mostly music but also computer games, movies, computer software, and other works, are being transmitted from one person to another on the Internet without the permission of the author or the copyright owner. The issue first hit national consciousness with the Napster phenomenon. The ink was not even dry on the Digital Millennium Copyright Act, the law that supposedly resolved all the sticky copyright issues presented by the Internet and made it safe to distribute works in digital form and on digital networks, when the peer-to-peer revolution burst onto the scene and apparently caught us unaware. To those of us used to thinking in conventional copyright terms, Napster was a no-brainer. Its purpose

was to facilitate infringement, plain and simple, and it was a highly effective means of mass infringement – of, dare I say, piracy.

One would have thought – or at least one used to thinking about copyright in conventional terms would have thought – that Napster would have been shut down immediately. But it seemed to take forever before the court issued an injunction. Then the Ninth Circuit inexplicably stayed the injunction, and for months and months it was business as usual for Napster and its millions of so-called file-sharing users. When Napster was finally shut down, other services sprang up in its place, such as Gnutella, KaZaA, and Morpheus. They were designed and located in ways that made it more difficult to prove and enforce a copyright infringement claim, and they continue to this day with millions of persons using them to infringe copyrights without any fear of adverse consequences, unless you consider the occasional virus or the surreptitious planting of software on your computer to be a danger. Again, the wheels of justice turned slow, and although these post-Napster services are being sued and are designed, to be frank about it and admit what we all know to be true, to facilitate copyright infringement – that’s their business plan – they continue to operate with impunity. Well, perhaps not exactly with impunity, for the day of judgment – literally – may eventually come.

My real point however, is not to engage in a polemic against the current crop of file-sharing services, although I guess I am doing a pretty good job. The point I am trying to make is that by allowing what is clearly unlawful conduct to continue for so long a period of time, and permitting large segments of society to enjoy the benefits of such benign neglect, we have allowed a monster to be created. We are now living in a world, unimaginable a decade ago, in which large segments of our population believe that it is perfectly okay to engage in what we, or at least what most copyright lawyers, know is copyright infringement. More than that, many people emboldened by years of experience of engaging in such conduct now perceive it as a vested right to “exchange” or “share” the copyrighted works of others with a few million of their closest friends.

Copyright has indeed reached the public consciousness, and not in a way that should make anyone who believes in copyright comfortable. I think that when Professor Loren says that the music industry is in crisis and that copyright risks irrelevancy in the digital world, that is really the problem she is referring to, at least in part. And I would add that, while she is right to focus on music –

that is where the problem is apparent today – music is just a canary in the coal mine. All sorts of works are at risk, and that is why Hollywood is so concerned. But if that is the problem Professor Loren is concerned about, I am not persuaded that she has come up with the right solutions. However, I hasten to add that I do not know whether I have the right solutions either. To the extent that I have thought about it, I am not going to use this occasion to share those thoughts other than to suggest, in a very cursory fashion, that the components of the solution probably include a combination of: public education – raising the consciousness of people about copyright and why they should respect copyright – combined with stronger and quicker enforcement – not a popular notion among some, perhaps – as well as (and most importantly) efforts by legitimate content providers to make works available to the public in ways that the public wants to receive and enjoy them. Well, certainly not in every way in which the public wants it, because what we have learned, if we have learned anything recently, is that the public really wants it for free.

But having gotten that off my chest, let me turn now to Professor Loren's paper.¹ When I read on page 674 that "the copyright system is broken. Merely retooling it will not work. What is needed is a redesign,"² I thought I had an idea of what to expect. This is, after all, a paper by a law professor and with all due respect to our hosts and to the many law professors in the room, the stereotype that many of us have about copyright law professors in this day and age is that they are all hostile to the very idea of copyright. Certainly the stereotype is that copyright law professors all think that the balance has shifted too far in favor of copyright owners. So, it was refreshing to see Professor Loren proposed changes in copyright law that, in many respects, would strengthen the rights of copyright owners. I don't mean to suggest that I favor strengthening copyright owners' rights, although my remarks a few minutes ago might suggest that, in some respects, copyright owners do need some help. But Professor Loren's paper demonstrates something that is not always apparent to those of us outside of academia but which all of you in academia, I am sure, do recognize as a fundamental characteristic of the academic world: that there is a rich diversity of views in the scholarly community, perhaps even in the area of copyright.

¹ Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

² *Id.* at 674.

As Professor Loren observes, copyright law has become very complex, and I could not agree more. Here is the original copyright law of 1976. Here it is today. And any day now President Bush is going to sign into law the TEACH Act, which will add a few more pages to it. And it is not just a matter of length; it is truly a matter of increasing complexity as well. There was a time when most of us practicing copyright lawyers had a pretty good sense of everything that is in Title 17. And there was a time when you could read just about everything in Title 17 and understand it. Not so with this. I do not pretend to have mastered everything in this book, and I find myself constantly having to refer to it just to figure out what the law is with respect to things that I deal with everyday. If it is difficult for a copyright expert, I can only imagine how difficult it is for others.

But is prolixity and complexity necessarily a bad thing? Perhaps it is, but sometimes complex issues and complex problems require complex solutions. The new and complex provisions in the law were added to address specific problems. The Digital Millennium Copyright Act (DMCA) is one of the major reasons that the copyright law has begun to resemble the Internal Revenue Code. Whether or not you like a particular solution Congress came up with, these complex provisions are there to address complex legal issues created by all the wonderful things that new technology has allowed us to do with digital media. Were there simpler alternatives than the DMCA? Certainly. Were there better alternatives? Quite possibly. But in any event I am not sure whether the complexities that Professor Loren identifies are necessarily problems that cry out for solutions.

One premise that I think is implicit, and perhaps even explicit in Professor Loren's paper, is that it should be a societal goal to make it easy for as many people as possible to obtain rights to exploit the works of others. If you are in the business or want to be in the business of exploiting other people's works, that is certainly a desirable goal. But if that is what copyright is all about, then the Supreme Court got it wrong in *Tasini*. Those of you who know the Copyright Office's role in the *Tasini* case know that we happen to think that the Court got it right. But *Tasini* clearly made it more difficult for people other than the author, such as publishers and others, to disseminate the author's work. The publishers argued that they have the right to put the freelance authors' works into their electronic databases, and that this was a good thing. It was a good thing because it made those works more available to the public. And it is hard to argue with that. It is also hard to deny that

the publishers' pre-*Tasini* practices, and for that matter their post-*Tasini* practices, have resulted in greater availability of freelance authors' articles.

But broader dissemination does not nor should not trump authors' rights. The Constitution says that Congress may grant authors exclusive rights to their works, not that authors must give up those rights in order to ensure broad dissemination. Complexity is not unusual in copyright law, and the existence of complexity has not always necessarily caused problems. Take for example the panoply of rights that must be exercised in making and distributing a motion picture. The motion picture may be based on an underlying story, e.g., a novel or short story. There will be a screenplay, which may or may not be a work for hire, although by the time the contracts are signed, it certainly appears to be one. There will be music in most motion pictures, which means you have to get all sorts of rights. You have to get rights in the musical composition, as well as the sound recording. You need to get synchronization rights. The rights of reproduction, distribution, and public performance must all be addressed and obtained from various persons. It sounds like a nightmare and yet, by and large, the system works, and it has worked for decades. Motion picture studios have lawyers and business affairs departments that understand the various rights. They have to obtain those rights in order to make and distribute motion pictures. So complexity is not necessarily a vice.

The problem is that in the music industry and the Internet environment, we suddenly have a large number of new players or want-to-be new players who wish to obtain the right to reproduce, distribute and or perform the works of others, and who do not understand how those rights work. As a copyright lawyer, my gut reaction might be, "get a lawyer, just as your predecessors in exploiting works have had to do." But of course, that is not always a satisfactory answer to someone who just wants to get the rights and wants to get it right.

Very recently, we in the Copyright Office have had to address claims by webcasters that they have a First Amendment right to play music – music created by people other than themselves – over the Internet. Well, the First Amendment really has nothing to do with that. And, subject to limitations on authors' rights such as fair use, nobody has the right to exploit the works of others if the authors are not willing to give them that right. Well, that is a lie. If you are a broadcaster, you have a right to broadcast sound recordings to your heart's content. Professor Loren would change that, giving sound recording copyright owners a full exclusive per-

formance right. The Copyright Office has long advocated that, and I applaud her for that suggestion. And other provisions of law also give people other than the author the right to exploit the works of others so long as they comply with specific terms, including payment of royalties pursuant to, for example, the increasing number of compulsory licenses that we have the fortune (I will not say whether it is good or bad) to administer. But the basic premise in our copyright law is that the author or the person or persons to whom the author assigns exclusive rights has the right to decide who will exploit the author's works and under what circumstances. I would suggest that as a general proposition, there is nothing wrong with that. And therefore, philosophically, I think that we at the Copyright Office are sympathetic to Professor Loren's suggestion that the provisions of section 115 establishing the mechanical license for musical compositions be repealed. Philosophically, we think that statutory licenses are a bad thing as a general proposition, and that they should be enacted sparingly, if at all.

Having said that, the mechanical license seems to have served the record industry and the music publishers and composers well for almost a century. Indeed, it is hard to imagine the record industry in its present form without the mechanical license. And music publishers seem to have been so enamored with the section 115 license that in 1995 they successfully urged Congress to include a provision in the Digital Performance Right in Sound Recordings Act that expanded this section 115 license to include digital phonorecord deliveries. We now have a statutory license that facilitates the downloading of musical compositions on the Internet, and I am not so sure that that is a bad thing. If one of our goals is to facilitate dissemination by third parties of an author's works, it strikes me that a good argument can be made that section 115 is in fact a good thing.

I'm not here to tell you that existing copyright law is perfect or even that it is good enough. A year ago at the Copyright Office, we made some suggestions in the Section 104 Report,³ not only on first sale, but in the music context. We suggested to Congress that the permissions process should be streamlined in some respects. For example, Congress should tell music publishers that they cannot assert the reproduction or distribution right in connection with a streaming of music. And Congress should tell the performance rights organizations that they cannot assert the performance right in connection with downloading. Indeed, the music publishers

³ U.S. Copyright Office, *DMCA Section 104 Report* (August 2001).

were not pleased; the performing rights societies were not pleased. And perhaps in part because of that, thus far one has not seen any great interest on the part of Congress to fix what we think is a clear problem, which does in fact stand in the way of getting the transactions made.

We also think that section 115 could and should be streamlined to make it more workable and more user-friendly for those who want to use the statutory license. We certainly should take a look at whether the current requirements regarding notification to copyright owners that one is going to use the work should be simplified or overhauled.

But apart from the problems that I just referred to, it is not my impression that in practice section 115 creates major problems for persons wishing to make digital phonorecord deliveries or make sound recordings. In fact, it makes it easier for them. In other words, rather than repeal the section 115 license, perhaps we simply need to update and simplify it.

In conclusion, there is nothing wrong with a system that requires third parties, people who did not create a work of authorship, to acquire rights from the author or the rightsholder, and to obtain those rights before they begin to exploit a work of authorship. And while we can all agree that removing obstacles to obtaining rights is a good thing in principle, that does not mean that we should cut the author or the pertinent rightsholders out of the process simply in order to make it easier to get the rights.

If I sound critical of Professor Loren's suggestions, let me try to correct that impression. As a not-completely reformed litigator, I always find it easier to pull apart another lawyer's arguments than simply to say, "Well done." But I will say, "Well done." I think she has offered us an accurate and thoughtful analysis of the current state of affairs with respect to rights to music in the digital environment. And I find myself sympathetic to many of the suggestions she has made, and certainly all of the suggestions she made are worthy of consideration. It is certainly a very thought-provoking piece and I hope that, if nothing else, the remarks I have given you today have proved that.