

### 3 Origins of the Digital Rights Movement: The White Paper and the Digital Millennium Copyright Act

A comparison of the initial recommendations in the WGIP's Green Paper to the final recommendations in what came to be called the "White Paper" and ultimately the DMCA suggests some important outcomes from the policymaking processes for the DMCA. First, it shows the emergence of a number of visions of what the NII would become. During the comment period prior to the release of the White Paper, a number of citizens voiced concern over the possible excess of the proposed policy and suggested that the NII might be a place where copyright and intellectual property can be reimagined rather than reenforced. Second, such a review, specifically of the White Paper's final policy recommendations and the DMCA's most resisted provisions (the anticircumvention provisions), finds that, by and large, citizen concerns and imaginings were ignored. This lack of notice prompted initial resistance to the law and served as a sort of spark to the digital rights movement, giving early leaders a foil against which they might rally supporters. Last and perhaps not surprisingly, the comparison suggests that the policymaking process's approach to evaluating copyright policy favored the status quo argued for in the rhetoric of preserving the "balance of copyright." I ultimately ask whether technological changes alongside changes in consumer/user practices should not be the impetus to reevaluate the status quo, changing it to facilitate participation rather than to preserve or buttress restrictive copyrights.

#### Testimony and Hearings for the White Paper

Following the release of the Green Paper in 1994 (see WGIP 1994), the WGIP requested comments from stakeholders regarding its proposals. It received more than 140 written comments from copyright owners, trade associations, libraries, and individuals (see *Comments* 1994 and appendix B). About 47 were from individuals or organizations representing copyright

interests, 27 were from libraries and universities, 27 from private citizens, one from a consumer advocacy group, and the remainder from Internet service providers (ISPs) and foreign associations.

The major difference between the comments before and after the release of the Green Paper was the representation of average citizens, mostly members of computer professions, online communities, and law professors. Their contributions to the policy process put forth alternative conceptions of the NII, the consumer, and what ought to be the limits of digital copyright. Not surprisingly, copyright owners overwhelmingly agreed with the Green Paper's conclusions and suggestions: that only "minor" changes were needed in the copyright statute to ensure continued strong copyright protection in the NII. They also noted that technological measures in conjunction with the law would help ensure this protection and that technology that circumvented technological enforcement ought to be outlawed (see *Comments* 1994 and *Testimony* 1994).

A number of business and public-interest groups raised strong objections to the Green Paper's recommendations, however. ISPs, for example, argued that holding them strictly liable for their users' potentially infringing activities would stifle their nascent businesses. They claimed that the anticircumvention provisions and the strict liability for ISPs proposed by the Green Paper would hamper innovation, market expansion, and free speech. They noted that forcing ISPs to monitor users would impose a crippling economic burden, making it difficult for the industry to grow. It would also create an element of surveillance in the users' experience of the NII and negatively impact free speech.<sup>1</sup>

The strongest critiques of the Green Paper's recommendations came from individuals and law professors in support of a more user-centered view of copyright. Of the more than 140 written comments submitted to the WGIP after the release of the Green Paper, 20 were from private individuals concerned with the impact of policy on personal use. These individuals noted that technological enforcement and notions of fair use governed by licensing were counter to user experience with digital media, would have potentially negative impacts on innovation, would defeat the purpose of the NII's "network" effects (which gives value to information because it is distributed), and would be unenforceable in the NII's distributed networks.<sup>2</sup>

Many of the individuals who commented after the release of the Green Paper were computer professionals, such as computer science professors and programmers, and they deployed arguments common among hackers, who view proprietary claims on software as ultimately detrimental to the

common good. Also, many respondents framed their anti-Green Paper comments in notions of a “proper balance,” noting that the Green Paper had missed the intent of the intellectual-property clause in the Constitution. One such witness noted that

the draft report appears to have concerned itself mostly with the issue of protecting the property rights traditionally granted to copyright holders, and how to stem the tide of change that is rendering them unenforceable and archaic. Not really addressed is how best to promote the “progress of science and the useful arts,” the real reason for copyright and patent protection in the first place. For example, the software that runs NII as it exists now (i.e. the internet [*sic*]) was constructed without substantial protections for the ideas that underlie it. I think that if the original authors of the ftp program had patented the ideas that went into it, it is more than likely that I would have been able to use it to get the NII-ip document from your computer. Thus, the interest of society was best served by their not protecting their property and their not interfering in other people’s use of it. (Mitchell Golden in *Comments* 1994)

Even stronger critique came from law professors who could speak to the interpretive biases in the Green Paper’s recommendations. Among them, none was as scathing as Jessica Litman of Wayne State University Law School. Noting that the Green Paper disturbed the balance between the public good and incentives to authors, she took particular aim at copyright owners’ claims that fair use was simply a defense against liability of infringement and implied that fair use has in fact been viewed as a right. She added: “The public does not give out copyrights to encourage authors to appropriate all of the rents that a given creation might yield. The copyright system is designed instead to assist authors in earning enough profits to enhance the creative environment enough to make their works available to us” (in *Comments* 1994).

In her view, the primary purpose of copyright is the good of the public, not the good of the author. This view strikes at the heart of the differences between notions of fair use and copyright held by copyright owners and proponents of expanded fair use. Furthermore, Litman conceptualized a different sort of consumer than had been envisioned by either copyright holders or the supposed representatives of the public—educational institutions and libraries: “The library associations are here purporting to speak for the public. And they surely speak for the public’s ability to use the NII in libraries,” she wrote. “But nobody involved in drafting this report appears to have seriously estimated the interests of the public in general” (in *Comments* 1994).

What are the interests of the general public? Fostering creativity, Litman argued. She, along with other proponents of expanded fair use, believed

that allowing users access to copyrighted works will “benefit all of us in a variety of creativity enhancing ways” (in *Comments* 1994).<sup>3</sup> She disagreed with recommendations that would limit first sale in digital media or that would regulate every use of digital products. To Litman and others, the consumer was much more than simply a consumer; he or she was a potentially creative appropriator who would need expanded access to copyrighted works to use them in ways that would allow for creating new works. This definition of the user is a central vision for what other legal scholars have termed the “situated user,” one that is not simply limited to consumption but has creative rights as well (J. Cohen 2005).

The notion of the “situated user” has been one of the rallying cries for the digital rights movement, and it was a failure on the part of the WGIP not to recognize users as more than consumers. One user explicitly noted, Much of the value on the internet [*sic*] has come from the blurring of lines between providers and consumers. The content which has built the Internet so far has come almost entirely from peer-to-peer interactions. . . . A substantial amount of high quality content has emerged . . . including libraries and archives, award winning periodicals and top-quality soft-ware. . . . The tendency among some industry analysts has been to dismiss such benefits as “minor league action” in comparison with traditional commercial systems. But to some extent the relatively youthful Internet is already challenging that presumption. Why is it growing at such an explosive pace if, as the WGIP suggests, the content to drive its success is not yet in place? (Mahatma Kane-Jeeves in *Comments* 1994)

Based on such testimony, the WGIP should have been aware that at least some of the public had a different perspective on the origins and value of content on the NII—namely, that it was user created. Yet in the WGIP’s final recommendation, it disregarded the notion of active and creative users whose practices were already entrenched. This choice resulted in an adversarial relationship between the law and many users of digital content because the WGIP recommended not extending first sale to the NII, defined fair use narrowly, and advocated for criminalizing circumvention technologies.

### **Alternate Visions of the NII**

The critiques of the Green Paper’s recommendations by consumer rights groups, law professors, and private individuals articulate an alternative vision of the NII. The rationale for strong copyright protection on the NII, articulated by the WGIP and content owners, assumed that the NII would be barren without big commercial contributors and saw the challenges

inherent within the NII as threats. Others, however, believed that there would be value nonetheless or that for value to be truly exploited the NII should not be a place with strong copyright protection, but instead a place where there may be weaker protection that would allow users maximum access to the potential of digital media and networks.

The latter visions went beyond legal arguments, and for users of the NII they were rooted in technological practices that content owners and the WGIP did not understand. Many people who commented on the Green Paper could not see the rationale espoused by content owners for why there should be strong copyright protection on digital content. As one software developer put it, “When duplication is not difficult, many people rightly ignore the shady government granted monopoly that we call intellectual property. After all, only fools think [intellectual property] is tangible and no amount of prattle from lawyers will really convince anyone that copying a computer file is the same as taking someone’s diamond necklace. Who am I to say this? Just a private citizen who happens to write software for a living” (Richard Johnson in *Comments* 1994).

Another witness wrote: “The moral implications of copyright violation on the nets are far from clear. Simplistic analogies to stealing and inflated claims of software companies notwithstanding, the true dimensions of harm and losses from common small scale piracy have never been well established. It is not unreasonable to speculate that many instances of illicit copying do not in fact result in any actual harm to the copyright owner” (Mahatma Kane-Jeeves, in *Comments* 1994).

These comments suggest that copying of intellectual property was seen as a common practice, and although I do not suggest that authors’ rights ought to be ignored, the issue should have been addressed with more finesse than an all-encompassing focus on enforcement through technological protection mechanisms and criminalization.

Both camps continued to view technological enforcement of copyright differently after the release of the Green Paper. Most notably, individuals experienced with computers warned the WGIP that technological enforcement would be difficult. They argued that encryption schemes would only create a speed bump against unwanted access and copying and that enforcement mechanisms would continuously be defeated. Richard Johnson’s comments suggest that even potential copyright owners were in the habit of copying and had the skill to write software to help them do so. David Rothman, quoted in chapter 2, foresaw the kinds of digital civil disobedience and resistance to law and technology that one day might come about if the WGIP’s recommendations were accepted: “If the

Lehman abomination becomes law, we just might see National Copy-wrong Day—during which Netizens could mail each other copyrighted articles and publicly announce their sins to mock Washington” (in *Comments* 1994).<sup>4</sup>

Without exception, private individuals commenting on the NII wanted to see a network where information was easily accessible and not encumbered by law or access-control technologies. And whereas libraries and many lawyers saw the WGIP’s recommendations as legally problematic, users saw them as counter to the common practices of life in the new medium, the NII.

The WGIP made no concessions to these views in the White Paper, the final draft of its proposed recommendations, noting:

While, at first blush, it may appear to be in the public interest to reduce the protection granted works and to allow unfettered use by the public, such an analysis is incomplete. Protection of works of authorship provides the stimulus for creativity, thus leading to the availability of works of literature, culture, art and entertainment that the public desires and that form the backbone of our economy and political discourse. If these works are not protected, then the marketplace will not support their creation and dissemination, and the public will not receive the benefit of their existence or be able to have unrestricted use of the ideas and information they convey. (WGIP 1995, 14)

The paper also stated, “Since computer networks now make unauthorized reproduction, adaptation, distribution and other uses of protected works so incredibly easy, it is argued, the law should legitimize those uses or face widespread flouting. . . . Computer networks can be and have been used to embezzle large sums of money and to commit other crimes. Yet, these acts are prohibited by law. Simply because a thing is possible does not mean that it should be condoned” (WGIP 1995, 15).

There are a number of difficulties with these responses. The first response is rooted in the rhetoric of incentives, which assumes that all incentives to produce creatively are monetary. It also assumes that a marketplace of goods based on strict copyright privileges is the only marketplace capable of generating value and profit. However, this is not always the case. The realization of the open-source/free-software movement as a profitable enterprise has shown itself to be an exception to this assumption, and other examples abound. Building primarily on freely available products, open-source ventures have generated revenues that come from services provided in support of the product’s use. Production of open-source software was originally not motivated by monetary compensation, but rather by norms of gift giving and reputation on the Internet.

Also, alternative licensing systems such as the Creative Commons license (discussed more fully in chapter 8) have shown that authors are willing to give users more rights to access and use and that giving such rights does not preclude their incentive to produce. In short, the WGIP turned a blind eye toward the potential for “participatory culture” among users (see Jenkins 1992; Lasica 2005), incentives to authors, and the nature of alternative sources of revenue on the NII. It was influenced by the alarmist arguments espoused by content industry representatives describing the death of the industry on the NII and indeed overly anxious to craft policy on their terms. As the proceedings show, industry representatives used well-worn tropes to craft their arguments about the appropriateness of strong copyright protection. Painting a picture of sublime creators toiling to realize the genius of their ideas, the industry argued for their protection against those who would steal their intellectual property and for incentives to spur their creativity forward (see Boyle 1996; Patterson 1968). Even a cursory look at today’s culture industry reveals that the majority of owners of copyrighted works are media businesses; that the lonely genius is but one player in an interconnected system of production and consumption that includes the cultural commons, business, creators, and consumers; and that the latter two are increasingly converging.

The second response quoted earlier is problematic because it oversimplifies the nature of copyright by ignoring the categorical difference between the nature of copyright’s social contract and tangible property as protected by law. They are not the same. Copyright is a limited property right: it has limitations with regard to the fair-use doctrine; it has limitations with regard to the exemptions for libraries and the interoperability of technological systems; and it has limitations on control of distribution, such as the first-sale doctrine. Thus, property rights in intellectual property are supposed to be in a state of negotiation where the interests of the public are the ends of the doctrine and monopoly for authors is the means. If a technology encroaches on copyright owners’ rights, the questions regarding policy *should not* be limited to concerns over maintaining or reestablishing the balance of copyright but should also ask *whether the new copyright relationships made possible by the emerging technologies will actually be more beneficial to the public*. In other words, given changing technological regimes, we should not shy away from considering whether copyrights should be changed in favor of user access. The trend has always been for preservation of copyright, but who is to say that a decrease in the rights granted to authors would necessarily be detrimental to society? Rights of ownership in intellectual property are, more than any other right, clearly

granted by the state through the beneficence of the public and as such can be subject to constant revision and reevaluation (see Boyle 1997).

In sum, comments and testimony after the release of the Green Paper were largely critical if originating from technology users and technology firms invested in the free flow of information on the NII but were supportive if coming from content owners. As will become apparent, the vision of the NII that earned a place in the final draft of the WGIP's report on intellectual-property issues on the NII was that espoused by content owners.

### **The White Paper: A Second Attempt at Formulating Policy for the NII**

The White Paper was released in September 1995 and has been widely criticized as revisionist in its interpretations of copyright law. Law professor Jessica Litman (2001) has noted that Commissioner Bruce Lehman responded to negative comments primarily by ignoring them or by noting that “naysayers” simply did not know what they were talking about. Furthermore, critics suggest that the White Paper, in response to negative comments on the Green Paper, focused on reinterpreting case law and legislative intent to suit its purposes. As Litman has noted, the majority of the White Paper was geared toward grounding its recommendations in legal doctrine to make them appear less revolutionary in their impact on the scope of copyright. Overall, the White Paper's recommendations and its rationale for them were the same as those in the Green Paper (Litman 2001).

The White Paper differed with the Green Paper in two important respects concerning its recommendations for technological protection measures and law, however. First, it supported changes in the standards used for criminal liability and legislation that would become the No Electronic Theft (NET) Act of 1997.<sup>5</sup> Second, it changed its recommendations for amendments to sections 501, 503, and 512 of the US Copyright Act, as noted earlier, recommending instead the addition of a new chapter 12 to US Title 17. Chapter 12 would serve more or less the same function as the previously proposed amendments.

### **Technological Protection Measures and the Law**

The White Paper considered the types of technological protection measures that could be available to content owners who chose to distribute digitally. The measures included: (1) access controls at the level of servers and files, essentially password protection for access to a file or a server holding



content; (2) encryption of data with distribution of decryption keys to paying consumers; (3) digital signatures or embedded code, usually in a specific location in the digital media that validates the authenticity of the work and ensures that if the work is copied without authorization, subsequent copies can be identified; and (4) steganography or watermarking technology embedded code in digital media that will prevent them from being rendered if the watermark is removed or tampered with and that can also serve as an authentication measure similar to a digital signature. In its discussion of these measures, the White Paper noted that any combination can be used to ensure that copyright is maintained in digital works.

When the White Paper considered unlawful distribution of proprietary content online, it stated that legal remedies should be strengthened to criminally sanction those who willfully infringe on copyright even *if those infringing or contributing to infringement do not gain financially from it*. The WGIP cited the 1994 court case *United States v. LaMacchia* (871 F.Supp. 535 [1994]), where a lawsuit was brought against David LaMacchia, an MIT student and hacker, for posting copyrighted material on an electronic bulletin board. In that case, the court was forced to dismiss the government's attempt to bring criminal penalties against LaMacchia because the law did not provide for criminal liability for individuals distributing copyrighted works for no financial gain. The White Paper recognized that “[s]ince there is virtually no cost to the infringer, certain individuals are willing to make such copies (or assist others in making them) for reasons other than monetary reward. For example, someone who believes that all works should be free in Cyberspace can easily make and distribute thousands of copies of a protected work and may have no desire for commercial advantage or private financial gain” (WGIP 1995, 229). Without noting it and perhaps without knowing it, the White Paper was describing the more radical elements of the open-source/free-software movement as well as intimating that some other form of reward mechanism may exist among Internet users—a form of reward that encourages distribution of copyrighted works.

The solution, from the White Paper's perspective, was a natural knee-jerk response to a complex behavior rooted in norms and user practices: to increase criminal liability. Perhaps the better response would have been to ask why otherwise perfectly law-abiding citizens might come to believe it is acceptable to violate copyright on the Web. This approach would have required a conceptual shift in the way content owners and the WGIP thought of copyright (admittedly a shift against industries' interests, but perhaps toward the interests of society as a whole). Let me not be

misunderstood. To ask the question “Why might otherwise perfectly law-abiding citizens come to believe it is acceptable to violate copyright on the Web?” is not to entertain the notion that just because users can do such a thing, it should now be considered a legitimate option for policy and law. Rather, to pose the question suggests an understanding that the notion of intellectual property is a bargain between society writ large and individuals, a bargain whose terms are dependent on technological, historical, and cultural circumstances. If the circumstances begin to shift, it is understandable to be conservative and preserve the terms (in this case the law), but it is perhaps more important to be open to changing those terms to include new groups of people and their practices. It is a tricky balancing act to include in the discourse those who might easily be labeled criminals for their behavior, but if policy is to grow with society’s needs, the policy process must include them. The significance of the White Paper’s response to LaMacchia is that it demonstrates a particularly conservative (and perhaps overly simplistic) way of addressing a complex issue of law and social behavior.<sup>6</sup> From a technology perspective, the White Paper sought to curb behavior such as LaMacchia’s by buttressing protection measures with the power of law.

The White Paper noted that legislation should ban the manufacture and use of circumvention technologies. Such an action was not unprecedented in technology policy; as noted earlier, both the Telecommunications Act and the AHRA outlawed the circumvention of technological measures controlling copying of transmitted signals and audio recordings.

Much like the Green Paper, the White Paper continued to ignore concerns that technological protection measures would limit fair use, and anticircumvention provisions in law would give them legitimacy online. The White Paper reiterated its position that fair use is not a right that content owners are required to allow for. As such, in this view, technological protection measures and anticircumvention law are well within the scope of the copyright statute. As noted earlier, consumer practices and notions of fair use were not considered in the WGIP analysis of fair use, nor was the power of users and hackers effectively to undermine the White Paper’s technological regime with hacks or work-arounds.

### The DMCA

Following the comments on the Green Paper, the WGIP released the White Paper (WGIP 1995), the final draft of its recommendations for copyright on the NII. Then, based on the recommendations and continued

consultation with stakeholders, Congress formulated and passed the DMCA in 1998.

The DMCA is an amendment to US Title 17, the US copyright law, bringing it in line with the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) of 1996 and the WIPO Performance and Phonograms Treaty (WPPT) of 1996. Both of these treaties were expansions of the Berne Convention for the Protection of Literary and Artistic Works of 1886 undertaken in recognition of the new threat to copyright that emerging digital technology posed.<sup>7</sup>

Specific sections of the DMCA have come to be known as its “anticircumvention provisions.” They were informed by the White Paper, implemented with the support of US copyright owners and under requirements from the treaties mentioned in the previous paragraph. As the US Copyright Office noted,

Each of the WIPO treaties contains virtually identical language obligating member states to prevent circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information. These obligations serve as technological adjuncts to the exclusive rights granted by copyright law. They provide legal protection that the international copyright community deemed critical to the safe and efficient exploitation of works on digital networks. (1998, 3)<sup>8</sup>

The anticircumvention provisions comprise DMCA Title I, section 1201(a) and (b), and they are the legal embodiment of conceptions of how access to digital content should be structured. They place the consumer under the tight control of technological measures and criminalize the design and use of technology that might give consumers extended or unauthorized use. Many of the court battles that have been fought over violations of copyright since the late 1990s have revolved around circumvention of the technologies protected by section 1201. The digital rights movement has focused in part on challenging the technological regimes that these sections create. For these reasons, I spend a bit of time reviewing section 1201.

This section of the DMCA was based on the premise that copyright owners should be encouraged to help themselves by creating technological measures that would ensure their copyright is preserved. This notion was fostered by a generalized rhetoric of “fear and consequences” for copyright on the NII. Thus, the WGIP and subsequently Congress intended to give copyright owners the broadest protection against consumers, who were envisioned as passive receivers of information from the NII or, worse, as potential thieves. To achieve this end, section 1201(a)(1)(A), first, prohibits

the conduct of circumventing technologies that control access to copyrighted content, thus making “cracking” or breaking a technological lock illegal. Second, the statute prohibits the manufacture and distribution of technologies that might help in carrying out circumvention. Section 1201(a)(2)(A), (B), and (C) state:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

Thus, section 1201 outlaws hacking into protected media as well as developing the tools associated with hacking. Furthermore, it has a great stake in the deployment of anticircumvention technologies because it implicitly accepts the impracticality of enforcing copyright law in the digital domain with traditional law enforcement methods.

Section 1201 separates its understanding of technological copyright-protection methods into two categories: (1) measures that control access to a work and (2) measures that control the exercise of exclusive rights with respect to a work. The first type of protection is called “access control,” and the second type is often referred to as “copy control.” The reason why legislators sought to create this distinction between protection methods is that fair use gives consumers certain privileges over the works that they have purchased (see the section on fair use in chapter 2). Technologies that control the exercise of exclusive rights (copy-control technologies), legislators reasoned, also bear on consumers’ fair-use privileges, and it would be inconsistent to hold consumers liable for circumventing technologies that preclude them from exercising those privileges. Thus, section 1201(b) purposefully does not state that the conduct of circumventing copy control technologies is illegal. However, section 1201(b)(1) (A), (B), and (C) state that the manufacture and distribution of these technologies is *illegal*. Thus, whereas one part of 1201(b) implies that the conduct of circumventing copy-control technologies is allowed because these technologies control privileges that the consumer may have over purchased works, another part says that any technology that may help the consumers exercise those privileges cannot be distributed.<sup>9</sup> The consumer,

if she is savvy enough, can certainly design a piece of software to circumvent copy-control technologies. However, if she is not, then she cannot exercise fair use by circumventing copy control because the prohibition on distribution prevents her from being able to buy the technology, get it from a friend, or download it from the Internet. Section 1201(b) makes allowances for the conduct of circumvention hollow because the majority of consumers do not have the technical know-how to design copy-control circumvention technologies on their own.<sup>10</sup> This provision is thus a weak technological solution for the implications of digital protection technologies with regard to fair use. By feigning an allowance for circumvention technology of copy control, the WGIP satisfied itself that it had kept fair-use interests in mind.

The distinction between access-control technology and copy-control technology is important for copyright owners. Access to a work is the sole privilege of the owner of the work and is not protected by fair use or any other exceptions to the author's exclusive rights. Therefore, any copyright-protection technology that controls access to a work is essentially like a locked door at a private residence: one may not enter unless invited. The provisions in section 1201 regulating access and the technologies that ensure it illustrate how technology and the copyright statute have come together to redefine the relationship between copyright owners and consumers. Access to a work is a negotiable condition of purchase. When consumers buy works protected by access technologies, they are not really buying the works in a sense that would grant them fair-use privileges. Rather, they are buying access, and the terms of sale may include not only a rent, but the surrender of fair-use privileges and first sale. Such surrender is difficult to enforce and implement with nondigital materials; in other words, the possibility of it being a term of sale/rent is afforded in relation to digital technologies and materials.

Take the following example. A consumer can buy a book at a bookstore. Implicit in that exchange is the purchase of both access to the work and the assumption by the consumer of certain fair uses. Publishers would much rather lease the consumer the book and charge a rent every time the book is used, but market and technological conditions make such a condition of sale impossible. Publishers must sell the book, accepting the technological and market limitations that prevent them from leasing it out to the customer. The copyright owner must make the good-faith assumption that the consumer will not overstep her fair-use privileges primarily because the publisher has no practical way of controlling the personal uses a

consumer makes of a printed book. It is imaginable that the copyright owner of the book, in fear of his exclusive rights being abused, can try to negotiate the sale of the work in exchange for the consumer's surrender of fair use, but how can the surrender of rights be enforced? It would be impractical and absurd, for example, for booksellers to follow consumers everywhere they go, making sure that they have not violated the contract. There is nothing one can do to the printed book to ensure that it regulates the contract for itself. Thus, given the limitations, access to a work in print is unencumbered with regulatory mechanisms. The law delineates the rights of authors and the consumer privileges, but technological limitations and market realities (Who would purchase a book with an armed guard attached?) keep the boundaries of the agreement between buyer and seller from sliding into the realm of the absurd. The conditions of the bargain are more or less a practical matter.

Digital technologies have made overcoming the impractical trivial, however. When one purchases an eBook, downloads a song from one of the many online music stores, or purchases a DVD, it is possible for access technologies to come with the package. It is also possible for access to be negotiated in a EULA and for the license to limit consumer uses, effectively requesting that the consumer rent a work or surrender fair use. It is in copyright owners' interests to distribute only works protected by access-control technologies because these technologies give owners the broadest possible control over their media.

Some would argue that this vision cannot be realized because consumers can go elsewhere for their content if they find access-control technologies and the associated agreements too restrictive. However, the claims ignore the market power held by copyright owners. Because owners have exclusive rights to license distribution of their content, all vendors can be required to have access-control technologies in place. In that case, the consumer may truly have no place to go for a better deal.

In recent years, the major sellers of online digital content have made some changes—selling, for example, music that has no DRM system associated with it (Apple being the most notable, but also Amazon.com). Such a change is in no small part due to consumer demand and the discursive inconsistencies of marketing campaigns that sell not only music, but also the idea of a personalized media experience and then turn around and limit or disallow personal noninfringing uses. Despite this turn to more unencumbered digital media, the vast majority of digital content (books, movies, videogames, software, and streamed content) still remains under tight technological control.

## Initial Resistance

By the time the DMCA was passed into law in 1998, a host of prominent legal scholars and Internet “gurus” had started to point out its biases and inconsistencies. As noted earlier, some critiques came during the formulation process from users of the Internet; other critiques came from libraries addressing their need for continuance of privileges held in the analog world into the digital world. Still others were formulated by ISPs and consumer electronics groups who wanted to ensure their business models, arguing that overprotection would stifle innovation. Many of these critiques were ignored.

An important development in the movement against expanded copyright protection on the NII was the involvement of a small circle of elite legal scholars and technologists who early on forcefully politicized the implications of digital copyright. They include John Perry Barlow, founder of the Electronic Frontier Foundation (EFF), and law professors James Boyle, Jessica Litman, and Pamela Samuelson. I discuss the importance of Lawrence Lessig in the digital rights movement in chapters 4 and 8, but the first four were the earliest critics of the White Paper and the DMCA.

John Perry Barlow’s contribution can be said to be primarily ideological. In a widely distributed article, Barlow noted: “We are sailing into the future on a sinking ship. This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. . . . Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression” (1994).

Barlow’s connections to the EFF positioned the organization to become a leader in the movement against expanded copyright. He also achieved notoriety among the cyberlibertarian communities of cyberspace, authoring the infamous “A Declaration of the Independence of Cyberspace” (Barlow 1996). He espoused minimal government intervention within cyberspace, imagining a cyberutopia of free information flow and total equality. Critics, of course, have of course pointed out the shortfalls and realities that hinder this vision, but it captured the imagination of many early Internet users. It questioned the “unquestionable” claims of ownership of cultural products espoused by publishers and copyright holders and challenged governments’ authority to regulate the communities taking shape in cyberspace. In many ways, his work and the work of others (such as Richard Stallman [2002]) politicized the Internet and made it a contested space where users and content owners (often one in the

same) as well as governments were forced to reconsider how and who was actually being regulated by policies such as the DMCA and the expansion of copyright to the digital world.

Barlow's critique of intellectual property in digital works was expansive; he questioned the authority of an international intellectual-property rights regime fashioned by Western nations, the feasibility of regulating copyright on international data networks, the effects on free speech and innovation that such regulation might have, and the divergence between common practices in the digital domain and what the law (along with technological enforcement) was now capable of doing. Barlow also wondered about the nature of ownership in digital products that can be reproduced and distributed at nearly null cost and leave the original owner no less the richer from the distribution. Although he did not advocate that copies of original works ought to be given away for free, he wondered whether current prices were fair and presciently predicted the ongoing legal war over digital copyright. Barlow's contribution was visionary and at least in part predictive of alternative methods of extracting value from intellectual property.

Perhaps those who are part of the problem will simply quarantine themselves in court, while those who are part of the solution will create a new society based, at first, on piracy and freebooting. It may well be that when the current system of intellectual property law has collapsed, as seems inevitable, no new legal structure will arise in its place.

But something will happen. After all, people do business. When a currency becomes meaningless, business is done in barter. When societies develop outside the law, they develop their own unwritten codes, practices, and ethical systems. While technology may undo law, technology offers methods for restoring creative rights. (Barlow 1994)

The open-source movement and the success of open-source software as a business model bear out his predictions. Beyond that, his thoughts on the nature of the Internet, specifically in terms of its situated norms and its possibility to maximize the value of information by making it widely available, informed critics of digital copyright who saw legal strictures as impediments to accessing information and cultural products that are at least in part components of a cultural commons.

James Boyle was one of the first legal scholars to call for a movement to reappropriate cultural products that were quickly being put out of reach by the machinations of copyright owners. His generative 1997 article called for a social movement and a discourse to save the quickly diminishing commons: "Right now, we have no politics of intellectual property—in the



way that we have a politics of the environment or of tax reform. We lack a conceptual map of issues, a rough working model of costs and benefits and a functioning coalition-politics of groups unified by common interest perceived in apparently diverse situations.”

His argument was rooted in the economy of information, which necessarily is defined by a balance between costs of information hoarding and the cost of information sharing. From Boyle’s point of view, the cost of hoarding information and of intellectual-property protection outweighs the cost of information sharing. The prevalent rhetoric that equates benefits to authors with benefits for society informs the framework that has led policymakers to overprotect content rather than consider the benefits of underprotection. Boyle also was concerned with the privatization of speech by copyright, which circumvents free-speech protections and leads to corporate censorship.

When the White Paper was released, Boyle targeted it specifically as the embodiment of a policy position that would greatly help copyright owners circumscribe the commonwealth of culture and faulted it for not considering the implications of digitization for ease of use and efficiency, which might warrant “underprotection” to maximize the NII’s network effects. His arguments attacked the prevalent perception of intellectual-property rights as “natural rights,” noting that these rights above all others are not natural but granted temporarily by the state and as such ought not to reside within the protection of dominant rhetoric that holds other property rights as sacred and inviolate. In his early writings, Boyle touched upon the major issues now considered to be germane in the digital rights movement: fair use, creativity, innovation, privacy, and free speech.

In March 2006, Copyright and Stanford’s Center for Internet and Society acknowledged Boyle’s influence on informing movement advocacy, holding a conference to gauge the progress of what they termed the “cultural environmentalism” movement. Ten years after Boyle’s famous article, his views were adopted by Lawrence Lessig (until recently one of the digital rights movement’s most visible intellectual leaders), whose Creative Commons license acknowledges the value of the cultural commons for continued cultural production and expansion while at the same time explicitly recognizing policymakers’ failure to come to terms with the benefits of underprotection of intellectual property.

Pamela Samuelson was also an early critic of the DMCA, targeting its anticircumvention provisions as overly protective and criticizing the WGIP for its lack of interest in the unintended consequences of technological

enforcement. Her key insight, one that I have expanded on here, is that the DMCA implicitly gives users the ability to circumvent copy controls but not the ability to get the software that would do the job. She asks “[w]hether it is lawful for people to develop or distribute technologies that will enable implementation of the exceptions and limitations on the circumvention ban built into the statute. Did Congress intend to allow people to exercise these privileges, or did it intend to render these privileges meaningless because the technologies to enable the excepted activities have been made illegal?” (1999, 46).

Samuelson’s early work in writing about the inconsistencies of the anti-circumvention provisions and her participation in conferences and symposia drew attention to the broad protections afforded copyrighted material in digital media and helped to propel this debate into the legal consciousness. Her early work has earned a place of prominence in the digital rights movement. The Boalt School of Law’s Law, Technology, and Public Policy Clinic bears her name, and she sits on the boards of multiple key organizations and digital rights groups.

Perhaps no one has done as much as Jessica Litman to bring attention to the DCMA’s excess and the historical trajectory of copyright in the twentieth century and into the twenty-first. Both by her testimony at the proceedings for the White Paper and with her writings, Litman was early to point out alternative visions of the NII and consumers therein. In her testimony before the WGIP, she criticized the committee for failing to represent the public interests and for catering to copyright owners. In her book based on her experiences with the formulation of the DMCA (Litman 2001), she notes that licensing schemes have been given dominion over fair use and personal noncommercial uses, creating a situation where consumers will potentially have to pay every time they want to access a work. She notes that the law and technology have allowed copyright owners to charge a rent for every potential use, a situation that is counter to the intent of the intellectual-property clause in the Constitution. Litman’s work within the legal community, her participation on the boards of various key advocacy groups, and her publications helped galvanize others in the early days of the digital rights movement.

The White Paper and the DMCA created a technological regime that users of the NII and digital technologies immediately found restrictive. Policymakers marginalized many users by ignoring warnings concerning the loss of fair use, the common practices of digital technology users, and the problems with technological enforcement. By creating inconsistencies and

biases in the law, policymakers created fertile ground for a mobilization against the law that seeks to regain control of media consumption, use, and access and to allow consumers to be more creative.

Part II discusses specific examples of the mobilization inspired by key prosecutions, lawsuits, and other types of repression that resulted from the DMCA. It uses case studies to illustrate how the movement shaped its important discursive frames, how some organizations rose to prominence, the movement's tactics, and the movement's organizational structure.



This is a section of [doi:10.7551/mitpress/8698.001.0001](https://doi.org/10.7551/mitpress/8698.001.0001)

# The Digital Rights Movement

## The Role of Technology in Subverting Digital Copyright

By: Hector Postigo

### Citation:

*The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright*

By: Hector Postigo

DOI: 10.7551/mitpress/8698.001.0001

ISBN (electronic): 9780262305334

Publisher: The MIT Press

Published: 2012



The MIT Press

© 2012 Massachusetts Institute of Technology



All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher.

MIT Press books may be purchased at special quantity discounts for business or sales promotional use. For information, please email [special\\_sales@mitpress.mit.edu](mailto:special_sales@mitpress.mit.edu) or write to Special Sales Department, The MIT Press, 55 Hayward Street, Cambridge, MA 02142.

This book was set in Stone Sans and Stone Serif by Toppan Best-set Premedia Limited. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Postigo, Hector

The digital rights movement: the role of technology in subverting digital copyright / Hector Postigo.

p. cm. — (The information society series)

Includes bibliographical references and index.

ISBN 978-0-262-01795-4 (hardcover: alk. paper)

1. Copyright and electronic data processing. 2. Digital rights management.

3. Hactivism. 4. Internet—Law and legislation. 5. Piracy (Copyright)—

Prevention. 6. Fair use (Copyright). I. Title.

K1447.95.P67 2012

345'.02662—dc23

2012004559

10 9 8 7 6 5 4 3 2 1