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Copyright Ownership in the Digital Age

Chris Jordan

*The cases of *Huntsman v. Soderbergh* and *Universal City Studios, Inc. v. Reimerdes* illustrate how corporations use copyright law to control the accessibility of digitally encoded movies rather than recognizing that consumers should have fair access to information goods and services. In preventing aftermarket digital videodisc (DVD) editors from customizing movies for customers, the former case threatens to stilt technological innovation, even though history has shown that embracing new technologies has enabled Hollywood to increase its profits and tap new markets. The latter case exemplifies how the Digital Millennium Copyright Act (DMCA) construes a software program designed to widen access to legitimately purchased DVDs as a piracy tool. The tightening grip of the Hollywood studios over how legally acquired movies can be used must be balanced against the right of consumers to utilize them as they see fit.*

Scholars have in recent years debated whether intellectual property should be defined as a private asset to gain competitive advantage in a communications marketplace, where knowledge and information are prized commodities, or as a collective resource in a democracy where knowledge and information are essential tools of enlightenment. On the basis of the former definition, copyright law has proven effective in providing Hollywood's major studios with control over new movie distribution technologies such as the videocassette recorder, cable television and, most recently, digital videodisc (DVD) and the Internet.

The cases of *Huntsman v. Soderbergh* and *Universal City Studios, Inc. v. Reimerdes* illustrate the ever-escalating efforts of corporations to control their every representation in culture, even after being legally acquired, as if copyright ownership is the natural right of the creator and not granted by the United States Constitution. In *Huntsman v. Soderbergh*, filed in August 2003 and decided in favor of the Directors Guild of America (DGA) on July 7, 2006, a Denver federal court ordered four companies to stop selling, renting, merchandising, and promoting unauthorized edited or altered copies of movies, while allowing another company to continue marketing its DVD players and software filters because it does not make derivative

copies of movies.¹

CleanFlicks, a Utah-based video retailer, sought in the case to obtain a declaratory judgment against a group of film directors that its service of editing offensive movie content from DVDs did not violate the rights of the studios which own the copyrights and trademarks for the original movies. Anticipating a copyright infringement suit by the DGA, CleanFlicks asked a federal judge to determine that its actions were legal under the first sale and fair use doctrines and the First Amendment.

In September 2003, the DGA fired back with a counterclaim against CleanFlicks and widened the scope of the litigation to include ClearPlay and several other firms that delete sexual content and profanity from movies. In its counter suit, the directors guild argued that CleanFlicks, ClearPlay, and the other firms violated three separate exclusive rights of copyright law: the copyright owner's exclusive right to make reproductions of its films; its exclusive right to prepare derivative works of its movies; and its exclusive right to distribute its movies.²

The suit filed by the DGA also contended that Clean Flicks and ClearPlay violated the Lanham Act and created confusion in the minds of consumers by misrepresenting films that had been altered as original works by noted directors and major Hollywood studios. Section 43(a) of the Lanham Act contains an "author attribution" statute which prohibits use in commerce of a "false designation of origin" that is likely to cause confusion about the origin of a copyrighted work.³ Anchoring the DGA's accusation in *Huntsman v. Soderbergh* was the argument that films sanitized by CleanFlicks and ClearPlay made it incorrectly appear as if directors of the works had condoned the cleaned-up versions of their movies. While the Denver court upheld the DGA's claim in *Huntsman v. Soderbergh*, the colorization of classic Hollywood movies by Turner Entertainment owner Ted Turner in 1986 despite protests by the DGA provides an example of how the Lanham Act ultimately protects the interests of capital in the age of digital technology rather than the interests of paid labor such as the DGA.

Huntsman v. Soderbergh and the Directors Guild of America's counter suit thus illustrate how major Hollywood studios seek to control digital media such as DVD and the Internet by eroding long-held balances designed to offset the monopoly conferred by copyright ownership, such as the fair use and first sale doctrines and freedom of speech. In preventing aftermarket DVD editors from customizing movies for customers, the rulings in both cases threaten to stilt technological innovation, even though history has shown that embracing new technologies has enabled Hollywood to increase its profits and tap new markets.

A corollary case illustrates the threat to free speech and technological innovation posed by the Digital Millennium Copyright Act (DMCA), which makes it illegal to traffic in any service or device designed to circumvent digital encryption systems.⁴ In June 2000, the Motion Picture Association of America (MPAA) sued Eric Corley, operator of the 2600.com website, for violating the DMCA by posting online links to DeCSS, a program that "hacks" the anti-copying CSS code incorporated onto many DVDs. The MPAA claimed in *Universal City Studios, Inc. v. Reimerdes* that maintaining or even linking to a site where the program was posted violated the DMCA.

Under the unfairly wide latitude provided by the Digital Millennium Copyright Act, showing that the defendant actually contributed to the infringement of any copyright or the distribution of any video was not necessary. Instead, it was only necessary for the MPAA to prove that the DeCSS program decrypted CSS and was thus intended to circumvent an access control system. Invented to enable users of the Linux operating system to play DVDs encoded with CSS, DeCSS was construed by the court as a piracy tool rather than a means of legally widening access to legitimately purchased DVD movies.

In November 2001, a United States Court of Appeals in Manhattan ruled in favor of the MPAA that it was illegal to publish DeCSS or even online links to the software.⁵ The court determined that the ease of disseminating the code itself threatened to produce virtually unstoppable infringement of copyright, even though CSS does not prevent piracy, DeCSS does not enable it, and no piracy was alleged (Lessig 2001, 190). The district court nonetheless acknowledged that the published material, the text of DeCSS, has substantial non-infringing uses, including scholarly study of cryptography, enabling fair use of copyrighted movies, and development of competing DVD players.

The issues of whether or not consumers should be able to use a computer program to circumvent copyright protections for the purpose of watching a legitimately purchased DVD or edit motion pictures for objectionable content may seem trivial. Nonetheless, these questions illustrate a larger battle between a few huge corporations and the American public over free and open access to culture. Indeed, a contradiction arises from expecting a marketplace that treats ideas as economic goods to be bought and sold to also act in the public interest. The fair use and first sale doctrines are thus very important counterbalances that offset the monopoly of copyright ownership by enabling consumers to access and modify legally purchased copyrighted materials.

Huntsman v. Soderbergh and *Universal City Studios, Inc. v. Reimerdes* must be situated within the broader context of Marxist political economic theory in order to show how the cases threaten to undermine the democratic safeguards of fair use, the first sale doctrine, and freedom of speech. The following section discusses how the logic of capital results in the inevitable concentration of media ownership, and how the dependence of the government on private sector investment for tax revenue promotes the hegemonic role of the owners of capital in determining the availability of copyrighted digital content.

The Capitalist Class and the Power of the “Investment Strike”

The questions “who owns the media” and “who rules the state” provide a starting point for analyzing the means through which the communications industry shapes copyright law. A tight cluster of oligopolies has controlled the major sectors of the mass media since the 1930s and 1940s. However, the rise of new communications technologies such as satellite, cable television, and the videocassette recorder

(VCR) during recent decades has provided new opportunities for the construction of a global communications infrastructure. Ronald V. Bettig (1997a) argues that a global capitalist class arose during the 1990s as international investors bought Hollywood-based filmed entertainment companies to secure programming for new broadcast and cable operations.

The financing of political campaigns and war chests by this global capitalist class cements the relationship between communications conglomerates and government by providing media giants with influence over the formulation of intellectual property laws. Senate Majority Leader Trent Lott and House Speaker Newt Gingrich, for example, agreed in 1998 to co-sponsor copyright term legislation that extended Disney's soon-to-expire copyright ownership of Mickey Mouse, Pluto, and Goofy an additional 20 years a week after meeting with Disney Chairman Michael Eisner. That same day, Disney's political action committee made a \$1,000 contribution to Lott's campaign committee, and shortly thereafter Disney donated \$20,000 to the National Republican Senatorial Committee (McAllister 1998, A21).

Critics of the capital logic theory of the state argue that it is too essentialist in its tautological assertion that the interests of capital always prevail in class struggle simply because business uses the state as an instrument to advance its interests (Jessop 1990, 10). In response, critical political economists argue that class forces struggling in and through the state determine policies and action. Various sectors of industry and the public insert themselves into relevant policy-making arenas and exert pressure on the various departments of the state system in order to advance their interests. The state takes on the role of "ideal collective capitalist" by promoting the long-term interests of capital as a whole through discriminatory management of monopolistic competition (Therborn 1980, 89).

The interaction of these forces, through the individuals, groups, and organizations that constitute them, helps to shape the general political economic framework within which media production, distribution, exhibition, and consumption take place. However, while mediating the process of compromise, the state is also beholden to the global capitalist class because of the state's dependence on the capital accumulation process for tax revenue. This makes the state particularly sensitive to the threat of an "investment strike" (Bettig 1997a, 45).

It is through its power to withhold capital investment that the forces of capital contain the relative autonomy of the state and bend the field of struggle in favor of capital. A key aspect of the definition of "property" is the owner's right to legally refuse others' use of it. While "owners" of other aspects of social authority (e.g., the army, the church, the state) derive their behavior-shaping power from the use or threat of physical or spiritual punishment, the owner of capital is not legally sanctioned to use direct force against those who defy his or her authority.

Instead, the power of capital rests on the ability to choose not to sell goods or not to invest capital rather than on force or coercion (Heilbroner 1985, 39). When Congress and the Federal Communications Commission reregulated cable television rates in 1994, for example, capitalist controllers of the communications industry voiced their disapproval by calling off a \$33 billion deal between TCI and Bell Atlantic, and a \$4.9 billion deal between BellSouth and Cox Enterprises (Bettig 1997b, 145).

The power of capital to withhold investment thus provides it with tremendous influence over the policymaking process and typically leads to government intervention in the marketplace only in cases of market failure. The state's dependence on capital investment has led in recent years to deregulatory measures that have promoted the transformation of broadly-based transnational companies into tightly diversified communications conglomerates strategically structured to take advantage of an emerging global media marketplace. Deregulation in this way takes economic control out of the hands of the government and places it in the hands of private enterprise. The following section considers how the power of capital investment enables the capitalist class to control the communications marketplace.

Control of Copyright and the Communications Marketplace

Critical political economic theory provides a basis for framing a discussion of how a class that owns and controls most of America's productive capital exercises a disproportionate influence on the planning and implementation of copyright law. According to the logic of capital, the transformation of creative thought and expression into property facilitates the expansion of capitalism into areas previously regarded as outside the scope of exchange relations. The commodification of creative expression as intellectual property renders it artificially scarce so that it can command a price and market share for its availability.

The definition of filmed entertainment as property facilitates the generation of surplus value from it through commodity production and exchange. The generation of surplus value through the treatment of filmed entertainment as property in turn reveals how the logic of copyright has historically favored the economic rights of copyright owners over a logic based on cheap and widespread access to copyrighted works. The rhetoric within such provisions defends the author's natural right to profit from the labor of intellectual endeavor. However, the predication of copyright registration on publication of a work establishes copyright as an economic right of the publisher. An author does retain a common law copyright, but only as long as the work remains unpublished. Upon publication, the author relinquishes the right to authorize its usage and reproduction.

The predication of copyright protection on publication of a work reveals the key role of capital in bringing a work to the marketplace, a process through which the publisher takes control of and benefits the most from the author's copyright privileges and the consumer's rights. Efforts by Hollywood studios to control the terms under which digitally encoded movie content can be accessed and modified represent an attempt to gain monopolistic control over how legally acquired copyrighted material can be used. Increasingly, studios also seek to control the development of software formats and technologies. The Motion Picture Association of America has thus implored the federal government to force DVD manufacturers to include software that would prevent unlicensed reproduction and modification of movies. Companies including Macrovision, Technicolor, Verance, and Digimarc

are testing new tools that employ multiple layers of protection, utilizing encryption, digital watermarks, and other proprietary methods (Graser and Brodesser 2003, 12).

The decision in *Universal City Studios, Inc. v. Reimerdes* that programs designed to circumvent these technologies are illegal promotes the efforts of the MPAA to restrict the range of DVD players usable for playing even legitimately purchased DVDs. The tightening grip of the Hollywood studios over how legally acquired movies can be played must be balanced against the right of consumers to have meaningful access to information goods and services at a fair price. *Huntsman v. Soderbergh* illustrates how media conglomerates use copyright law to erode the rights of consumers.

Huntsman v. Soderbergh: Innovation or Infringement?

The business of editing movies for home viewing in order to eliminate violent, profane, or sexually explicit content achieved visibility with director James Cameron's 1997 blockbuster movie, *Titanic*. Reportedly the most expensive movie ever made up to that time, *Titanic* became the highest-grossing film in Hollywood history. The calculated and relentless promotion of *Titanic* soon led to customer requests for a sanitized version of the film, to which a video retailer in American Fork, Utah responded in 1998 by developing a side business in do-it-yourself airline versions of the *Titanic* video. For a small fee, Sunrise Family Video edited out a handful of scenes from a movie that contained nudity or references to sex. The store did not sell or rent the edited versions; consumers had to have already purchased the tape. Sunrise merely performed the surgery, literally chopping up the tape and splicing it back together. According to *Video Business* magazine, the store received over 2,000 requests for the service within the first two weeks of *Titanic*'s release on video (Eddington 2002, 1).

While Sunrise Family Video is now defunct, other companies have sprung up to replace it. CleanFlicks, another Utah-based video chain, had from 1998 until 2003 bought DVDs, sanitized them by deleting offending profanity and sexually explicit scenes, and rented or sold them to customers. Anticipating a lawsuit by the Directors Guild of America and the MPAA, CleanFlicks filed a suit in a Denver, Colorado U.S. District Court in August 2003 contending that it has the right under the Copyright Act of 1976 to sell edited DVD versions of Hollywood movies stripped of potentially offensive scenes. The counter suit filed by the Directors Guild of America accused CleanFlicks and ClearPlay of creating derivative works, an action that copyright law preserves exclusively for the rights holder. The guild also argued that ClearPlay's editing software violated the studios' exclusive rights as movie copyright owners to make modifications to or derivations of the original movies. Responding in its role as mediator of consumer and private sector interests, the state passed the Family Entertainment and Copyright Act in April 2005.⁶ The act legalizes the activities of companies like ClearPlay, while not legalizing CleanFlicks-style editing (Law allows cleanup of DVDs 2005, 1).

The basis for violation of both the "distribution" and "derivative" provisions was the creation and distribution of the final edited film products at issue in the

case. The basis of the main “reproduction” claim was that duplicating movies by copying them onto a computer hard drive as part of the process of making the final edited movie was also infringing (Evangelista 2003, E1).⁷ *Huntsman v. Soderbergh* thus raised several questions: Did CleanFlicks violate the fair use provision contained in section 108 of the Copyright Act of 1976 by using illegal means to create its clean DVDs and by selling a product that compromises the potential market for the copyrighted work? Did ClearPlay violate copyright law by selling software that omitted offensive content without actually altering DVD content? Did CleanFlicks have the right to modify copies of works it had paid for under the first sale doctrine and sell them for profit or did this action violate the copyright owner’s sole right of reproduction of the work?

The “fair use” law allows the reproduction and use of a copyrighted work in order to balance the author’s right to compensation for his or her work against the public’s interest in the widest possible dissemination of ideas and information. The fair use doctrine encompasses four factors: the purpose and character of the use; nature of the copyrighted work; amount and substantiality of work taken in relation to the whole; effect on the potential market of the copyrighted work.⁸ In these ways, fair use acts as a defense against the copyright owner’s monopolistic control over who can access copyrighted material and how they can use it.

ClearPlay and CleanFlicks contended that two provisions in the fair use doctrine uphold the legality of their enterprises: purpose and character of the use, and the effect on the potential market of the copyrighted work. Copyright experts note that ClearPlay sells software that deletes scenes from videos and DVDs without altering the fixed works themselves. In contrast to CleanFlicks, ClearPlay markets a DVD player equipped with filtering technology that allows consumers to edit potentially offensive material without actually accessing the DVD. Computers with DVD drives can also download the filtering software. ClearPlay charges customers a monthly subscription rate to download regular updates with new movies.

Thus, ClearPlay is not deriving commercial gain from the finished product – the derivative work – itself (Sweeting 1998, 18). Supporters of this interpretation contended that it was not clear that if the viewer simply skipped over or edited out sections of a movie that he or she was creating a derivative work, arguing that according to this rationale one violates copyright law by hitting the fast forward button on a remote control (Horiuchi 2002, 1A). Marybeth Peters, the Register of Copyrights, argued on this basis that ClearPlay does not violate the copyright owner’s exclusive right to prepare derivative copies because it is not feasible to have a derivative work when no copy (or “fixation”) of the derivative work exists (U.S. House Committee 2004). CleanFlicks similarly argued that its modification of Hollywood movies conformed to fair use qualifications because the legality of the intermediate copying involved (e.g., reproducing works onto a hard drive) depended on the legality of the final product, and that such copying was a non-infringing fair use when it was done as a necessary step towards producing a transformative, non-infringing final product. Rather than compete with the market for the original product, CleanFlicks argued that it also served an entirely new market that the original product did not address. In fact, the company argued, serving the new market bolstered the original one, since the company purchased one copy for

every copy it sold in edited form.

CleanFlicks also defended its business on the grounds of the first sale doctrine, through which the first buyer of a copyrighted work can use it in any way he or she sees fit as long as no violation of copyright occurs, such as the duplication of a copyrighted work.⁹ The ruling against this argument in *Huntsman v. Soderbergh* thus threatens the role of the fair use and first sale doctrines in offsetting the monopoly of copyright ownership conferred by Article 1, Section 8 of the U.S. Constitution.¹⁰

An additional key aspect of the CleanFlicks case was whether or not the company violated section 43(a) of the Lanham Act.¹¹ At issue was whether the company's alteration of copyrighted movies created confusion in the mind of the consumer by inaccurately representing its product as the work of, say, Steven Spielberg or Paramount Pictures. The counter suit filed by the Directors Guild of America alleged that ClearPlay used the trademarked names of well-known directors in a way that was likely to cause confusion as to the affiliation, connection, or association of ClearPlay with the director, or as to the origin, sponsorship, or approval of ClearPlay by the director. The allegation was based on the fact that a ClearPlay-sanitized film still indicated the name of the director, making it incorrectly appear as if the director had approved the sanitized version.

Because U.S. copyright law has never acknowledged an artist's moral right to prevent the mutilation or distortion of his or her work, the DGA and the MPAA protect the artistic interests of directors by using the privilege of exclusive ownership conferred by copyright law to define the alteration of film content as a form of trademark infringement. The DGA and the MPAA argue that the aftermarket editing or alteration of a Steven Spielberg movie or a film by Paramount damages the market value of these names. However, the use of copyright law in this fashion primarily protects the interests of the major studios in the digital age by allowing them to argue that the unauthorized downloading or manipulation of a specific movie distributed by them damages their ability to profitably exhibit it in theaters and market it to multiple consumer demographics, as they currently do by releasing the R-rated version of a film in theaters and an NC-17 version as a Director's Cut on DVD.

The DGA counterclaim that CleanFlicks violated the Lanham Act cited specifically the court's use of the act to find for the plaintiff in *Gilliam v. American Broadcasting Cos* (1976). The case is often recognized as one of the first instances in which the court recognized an artist's moral right, even though the court denied using the Lanham Act. In *Gilliam*, the court established that the law could be used to "provide a remedy for artists against third parties that have substantially altered their work without permission."¹² It was this notion of presenting an artist's work as his or her own when it is not that made the Gilliam case relevant to CleanFlicks. Under the Lanham Act, ClearPlay was implicated equally with the movie editing companies that made physical copies of movies. The products of both companies altered the presentation of the movie intended by the creator.

The central issue involved whether or not the offending party created confusion in the mind of the consumer. The DGA argued that ClearPlay and CleanFlicks engaged in editing that is inconsistent. In *Pirates of the Caribbean* (2003), for ex-

ample, 'God-forsaken island' is muted, but 'heathen gods' slips through. Similarly, in *Terminator 3*, (2003), the software skips over the Terminator, a cyborg, bloodlessly opening his abdomen to make a repair, but leaves in a hook carving bloody gouges into the palms of a *Matrix Reloaded* (2003) character (U.S. House Committee 2004). According to the DGA, ClearPlay editing also resulted in the insertion of social, political, and professional prejudices. In *The Hurricane* (1999), for example, racial conflict between law enforcement and people of color is deleted, even though it establishes a context for how people of color later react to the police.

The argument that CleanFlicks and ClearPlay's editing created confusion in the mind of the consumer is erroneous. Consumers seek out edited videos or editing software/hardware systems exactly because of the difference between the altered products and the originals. Under such a circumstance, it was specious for the DGA to argue that CleanFlicks and ClearPlay created confusion in the mind of the consumer.

The DGA's allegation that CleanFlicks and ClearPlay violated directors' trademark rights is also questionable because directors hardly ever hold the copyright to their films, much less the underlying rights to the script. Their artistic efforts are "work made for hire" by the studios; thus the studios hold copyright.¹³ If anyone has a claim to false designation under the Lanham Act, then it is the studios, not the directors. Irrespective of who controls the copyrights is the difficulty of assigning sole authorship to a work that involves the creative input of so many individuals: director, producers, actors, editors, composers, production designers, cinematographers.

The designation of the studios rather than film directors as copyright owners of Hollywood movies nonetheless throws into relief the extent to which the Lanham Act actually serves the interests of the owners of capital rather than the DGA. Article 6bis of the Berne Convention requires members of the convention, which the United States joined in 1988, to protect the right of an author to be identified as the creator of a copyrighted work. Under the Berne Convention, this right endures even after the author of a "work for hire" has relinquished economic aspects of copyright ownership.¹⁴

The United States carefully avoided agreeing to this provision in joining the Berne Convention. Upon accession to the Berne Convention under the terms of the Lanham Act, the U.S. Congress did not enact the broadly applicable "author attribution" statute of Article 6bis that would have protected the moral rights of creators of Hollywood movies. Instead, it stated that the Lanham Act already provided sufficient protection of an author's right to prevent distortion or mutilation of his or her work under the act's incorporation of trademark law. As the controversial colorization of classic Hollywood movies by Turner Entertainment Corporation owner Ted Turner in 1986 proves, the Lanham Act's careful exclusion of the moral rights of authors marginalizes the creative interests of the DGA while providing owners of capital such as Turner sweeping protection of their rights as owners of studio film libraries.

Universal Studios, Inc. v. Reimerdes complements the issues raised in *Huntsman v. Soderbergh*. Incumbent in the latter case is the erosion of important legislative balances that offset the monopoly conferred by copyright ownership. Similarly

at issue in *Universal Studios, Inc. v. Reimerdes* is whether or not the circumvention of copyright protection technology by the owner of a legitimately purchased DVD constitutes piracy.

Universal Studios, Inc. v. Reimerdes: Free Speech or Piracy?

The passage of the Digital Millennium Copyright Act represents the media conglomerates' greatest victory in their quest to control content in the digital age and, therefore, offers convincing evidence of their bid for cultural hegemony. The greatest consequence of the DMCA is that it makes the mere circumvention of any copy protection technology a crime in itself. While the fair use doctrine makes it legal to make a backup copy of a movie, it is illegal to defeat copy protection technology in order to make that copy.

Jessica Litman's astute analysis of the political gamesmanship involved in the formulation of the Digital Millennium Copyright Act provides a cogent example of how government policy favors the interests of copyright owners over those of authors and media consumers. United States Patent Commissioner Bruce Lehman spearheaded the task of transforming a White Paper of recommendations that favored the interests of capital into what would become the DMCA. Lehman's staff included former copyright lobbyists for the computer and music recording industries (Litman 2001, 90).

Supporters of the DMCA included the motion picture industry, the music recording industry, book and software publishers, online and Internet service providers, telephone companies, television and radio broadcasters, and computer manufacturers. Opponents of the bill included the Home Recording Rights Coalition (a lobby composed of consumer electronics manufacturers, wholesalers, and retailers), libraries, consumer groups, public interest organizations, and Internet civil liberties groups.

The opposition towards the DMCA expressed by these groups made little difference because they were never invited to participate in the private negotiations over the legislation (Litman 2001, 127). Commissioner Lehman, who represented the software industry on copyright issues before his appointment to the Patent Office, instead maintained extensive informal communication with private sector lobbyists as he and his staff drew up a series of recommendations that ultimately shaped the Digital Millennium Copyright Act.

Lehman defended his belief that the communications industry should play a key role in shaping the DMCA with the rationale that strong control of the domestic market would enhance the capacity of U.S. firms to compete in the global marketplace. The vast power of the state to mobilize economic and military forces in order to maintain its hegemony in trade relations with other countries neatly complements transnational capitalism's goal of controlling domestic and international markets for Hollywood movies.

Lehman pushed the DMCA forward by attempting to get a series of recom-

recommendations formulated by his Working Group on Intellectual Property woven into a copyright agreement under consideration by the World Intellectual Property Organization (WIPO), which administers the major international copyright treaties. He reasoned that when the United States signed the treaty Congress would be forced to adopt implementing legislation in accord with the recommendations forwarded by his task force (Litman 2001, 129). While the treaty approved by the WIPO watered down the working group's recommendation prohibiting the manufacture, sale, or distribution of any devices or services designed to circumvent copyright protections, copyright owners hoped to use the treaty as a platform to encourage Congress to achieve more expansive objectives through the DMCA.

A key objective of the communications industry lobby was the erosion of the first sale law and fair use doctrine. Copyright owners argued that the obligation in the WIPO treaty to provide them with "effective legal remedies" required the U.S. government to provide them with the legal means to prevent circumvention of technological protection measures from occurring at all, by first rendering illegal any circumvention of technological protection, without regard to the reason for it, and second, by making any devices that facilitate circumvention illegal – regardless of whether the devices or services were used for legitimate purposes (Litman 2001, 131).

Copyright owners contended that breaking into technological protection was like breaking into a house or stealing a book, and was therefore not permitted by the fair use doctrine. The housebreaking metaphor proved effective, but was misleading because the protections afforded by property rights do not apply to technological protection measures designed to prevent uses that don't invade anyone's property rights (Litman 2001, 133). The United States Department of Commerce, which supervised the task of drafting a treaty-implementing bill, attempted to strike a compromise by making it illegal to impose criminal liability for circumvention on individuals who use a device or service to circumvent technological protection on a copy of a work to which the circumventer was entitled to gain access. To impose criminal liability for circumvention on individual infringers would be excessive because they would already be subject to stiff liability for copyright infringement.

However, the department also argued it was still necessary to prohibit the making or selling of devices or services designed to facilitate this kind of circumvention, in order to prevent the widespread marketing of piracy devices under the pretext that they had non-infringing purposes. Incumbent in this "compromise" was a contradiction: how could consumers circumvent copyright controls for non-infringing purposes, if all devices and services to facilitate that circumvention were illegal? (Litman 2001, 134)

The DMCA upends more than 200 years of copyright law on the basis of this double standard by putting the power to regulate copying in the hands of software engineers and the companies that employ them. It takes the decision-making power away from Congress, courts, librarians, writers, artists, and researchers (Vaidhyathan 2001, 174). The DMCA acknowledges fair use by allowing law enforcement, computer software publishers, and librarians to circumvent copyright protection programs for the respective purposes of investigating criminal activity, creating a competing product, and deciding whether to purchase a work for a li-

brary.

Ironically, the section of the bill imposing civil and criminal penalties for trafficking in technology designed to aid in circumvention includes no provisions for supplying librarians and law enforcement officers with that technology in order to enable them to take advantage of their statutory privileges. As Litman cogently observes, the software designers working for the firms whose purposes the DMCA served were the only group of these three likely to have the expertise to develop circumvention technology without outside help (2001, 136).

Lawrence Lessig summarizes the double standard thus inherent in the DMCA: “if copyright law must protect fair use – meaning the law cannot protect copyrighted material without leaving space for fair use – then laws protecting code protecting copyrighted material should also leave room for fair use. You can’t do indirectly (protect fair-use-denying-code protecting copyright) what you can’t do directly (protect copyright without protecting fair use)” (2001, 188).

The case of the movie industry’s Content Scramble System (CSS) offers an instructive example of how the DMCA serves as a useful tool for the studios’ attempt to control the digital reproduction and alteration of their copyrighted movies. The system was designed to limit the types of machines that could be used to play a DVD. It limited DVDs to being played on machines that could descramble the CSS code – such as Macintosh and Windows computers. CSS did not allow for other types of machines, namely Linux-based computers, to play DVDs encoded with it. Users of Linux machines who wanted to play DVDs they had legally acquired could not do so in their machines.

A group of hackers wrote DeCSS, a code that disables CSS and enables the DVD to be used in any machine. Through the MPAA, the industry immediately sued, even though the distributors of DeCSS were not in the business of selling pirated movies, and at no time in the case did the plaintiffs prove that any movies had been pirated because of DeCSS. Nonetheless, the MPAA prevailed in federal district court without ever showing that DeCSS or any of the defendants had actually contributed to the infringement of any copyright or the distribution of any video. [Under the DMCA], the plaintiffs merely had to show that the code decrypted CSS and was thus a device intended to circumvent an access control system (Lessig 2001, 188).

Variety noted that Jack Valenti, the normally loquacious chairman of the Motion Picture Association of America, was unusually vague in a deposition for the case taken on June 6, 2000. In response to questions regarding the piracy of DVDs using DeCSS, Valenti answered, “I don’t know” 62 times (Sweeting 2000a, 14). Though legally useless, the deposition made Valenti’s ignorance regarding the issues involved in the case a matter of public record.

Media scholars also weighed in on the issue. Lawrence Lessig, a Stanford University law professor, testifying against the DMCA before the U.S. Supreme Court. Lawyers for Eric Corley, the defendant in *Universal City Studios, Inc. v. Reimerdes*, argued that the DMCA must be balanced against fair use, noting that DeCSS is legitimately used to allow people who already own DVDs to view the discs on computers running the Linux operating system, which they are unable to do without descrambling the encryption. They further contended that the complex-

ity and time involved in decoding a DVD makes DeCSS an impractical movie piracy tool. Martin Garbus, Corley's lead lawyer, observed that it takes 20 hours to create a compressed, unscrambled version of *Sleepless in Seattle* (Harmon 2000, C6).

More troubling about the case is its erosion of the first sale doctrine. Because the DMCA allows content providers to regulate DVD use and access, they can set all the terms of use. The duration of protection under the DMCA is also potentially infinite. Copyright law currently protects any work created today for the life of the author plus 70 years or 90 years in the case of works for hire. However, electronic copyright devices protected by the DMCA do not expire (Vaidhyanathan 2001, 175).

Just as troubling is the endangerment of free speech under the DMCA. Corley's website ran articles about DeCSS and the code involved and almost immediately received an injunction from a federal judge at the request of the MPAA. The MPAA filed three separate suits in three different federal district courts in New York, Connecticut, and Pennsylvania. A request by the MPAA for a similar injunction in California against 72 websites was denied by a judge, leading to an explosion of new postings of the DVD hack program (Sweeting 2000b, 17). The website then removed the article and code and instead posted hyperlinks to where readers could find the information. This won the site an injunction, too.

This leap of logic drew the attention of the American Civil Liberties Union and other free speech advocates. News organizations, including the *New York Times*, began testing how far the MPAA would go in its pursuit of bans by posing DeCSS links on their own websites. The MPAA's next move was to try to bar the press from attending depositions in the case or public hearings, claiming the need to protect confidential sources and the methods involved in its anti-piracy efforts (Sweeting 2000a, 14). In November 2001, a Manhattan federal court of appeals ruled in favor of the studios, arguing that Congress had a compelling interest in preventing piracy (Schwartz 2001, 4). In July 2002, 2600 Magazine announced that it would not seek U.S. Supreme Court review of the court order.¹⁵

Conclusion

Huntsman v. Soderbergh and *Universal City Studios, Inc. v. Reimerdes* illustrate how the legal system constructs copyright ownership as a natural right rather than a constitutional privilege. Even though the Directors Guild of America prevailed in *Huntsman v. Soderbergh*, the case nonetheless demonstrates that copyright law ultimately protects the interests of capital rather than Hollywood directors. Crucial to the victory of the MPAA over aftermarket editors of Hollywood movies was the Lanham Act's recognition of trademark law rather than artists' moral rights as a defense against the unlicensed alteration of Hollywood movies.

Similarly, the outcome of *Universal City Studios, Inc. v. Reimerdes* exemplifies how the interests of capital increasingly erode the right of consumers and citizens to access information under first sale and fair use laws. To prevent consumers from accessing legally acquired digital movie content by inaccurately defining the

circumvention of CSS as a form of theft ignores the fact that the use of DeCSS does not violate property rights. Making it legal for consumers to circumvent copyright controls for non-infringing purposes does no good if the technological means of doing so are illegal.

Although Hollywood has successfully tapped new markets and banked record profits by welcoming new technologies rather than suppressing them, both cases illustrate how the filmed entertainment industry's ceaseless quest to control digital technology engenders myopia. Nonetheless, content providers who wish to extend copyright protection well beyond its intended objective of ensuring remuneration for creators and promoting the progress of the arts and sciences will continue on the basis of these cases to exert absolute control over how and when legally acquired, copyrighted material can be used.

Notes

1. See *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo, filed Aug. 29, 2002).
2. See The Player Control Parties' Opening Brief in Support of Their Motion for Summary Judgment, *Huntsman v. Soderbergh* (D. Colo. Sept. 20, 2002) (No. 02-M-1662)
3. Lanham Act, 15 U.S.C. 1125.
4. The Digital Millennium Copyright Act (Pub. L. No. 105-304) was signed into law by President Bill Clinton on October 28, 1998. It says that "no person shall circumvent a technological measure that effectively controls access to a work protected." (17 U.S.C. 1201).
5. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 346 (S.D.N.Y., 2000).
6. A related instance of how state intervention is necessary to redress consumer concerns is the Children's Internet Protection Act, which predicates school and library access to the Internet on the installation of third-party filtering technology designed to filter or block material deemed harmful to minors. See the Communications Act of 1934, 47 U.S. C. 254.
7. *Sony v. Universal* (1984) anticipated Hollywood's perception of technological innovation as a threat to loss of control over copyright. The complexities of whether or not the reproduction of Hollywood movies on hard disk constitutes copyright infringement is evidenced by the decision in the case that consumers could only tape movies from broadcast television. It remains unsettled whether or not consumers should be able to record movies using Tivo.
8. The Fair Use doctrine, 17 U.S.C. 107, says that "the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."
9. The first sale doctrine, 17 U.S.C. 109, says that "the owner of a particular copy...or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that

copy....” Section 17 of USC 102 of the Copyright Act of 1976 (Public Law 94-553), defines software as a protected copying medium under the First Sale Doctrine, and 17 USC 117 protects modification of software.

10. United States copyright law has its basis in Article 1, Section 8 of the U.S. Constitution: “The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
11. See 15 U.S.C. 1125. Section 43(a) of the Lanham Act specifies that “any person who...misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”
12. See *Gilliam v. American Broadcasting Cos*, 538 F.2d 14, (2d Cir. 1976).
13. See 17 U.S.C. 302. The “works for hire” provision of the Copyright Act reads “in the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.”
14. Berne Convention for the Protection of Artistic and Literary Works, art. 6bis.
15. The Electronic Frontier Foundation made the announcement that online and print publisher 2600 Magazine would not seek Supreme Court review of the case in a July 3, 2002 press release. Available online at http://www.eff.org/IP/Video/MPAA_DVD_cases/?f=20020703_eff_2600_pr.html. Accessed 8/14/2006.

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