

Cites & Insights

Crawford at Large

Libraries • Policy • Technology • Media

Sponsored by YBP Library Services

Volume 6, Number 8: June 2006

ISSN 1534-0937

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Perspective

Thinking About Libraries and Access

Libraries—public *and* academic—need to provide both strong physical collections and access to resources beyond those physical collections. Academic libraries should do their best to assure long-term access to resources in *all* disciplines, including those disciplines where the primary publication method is the monograph. I believe libraries should pay more attention to gray material in an era where the lines between traditional and untraditional distribution and publication are growing ever fuzzier. Libraries should acquire, organize, and secure long-term access to the things that make us a civilization, the thinking, knowledge and wisdom set down in articles, books and other media.

Effective long-term access involves several inter-related issues, including:

- The money to acquire physical resources and provide access to other resources, and to pay the professional staff to determine *what* to acquire.
- The means—money and procedures—to assure *effective* access, through cataloging and other organization and discovery techniques.
- The wherewithal—determination, money, and procedures—to *preserve* physical works and digital resources and assure that future generations can use those resources.

The standing head for *Cites & Insights* discussions of events and commentaries related to issues of access to scholarship is LIBRARY ACCESS TO SCHOLARSHIP, not OPEN ACCESS AND LIBRARIES. That standing head reflects my primary interests when it comes to talking

about access, open or otherwise: How trends in access affect libraries' ability to maintain long collections, provide long-term access, and provide access to resources in *all* disciplines (not all disciplines at equal collection levels in all libraries, of course).

Think of it this essay as an extended answer to the question, "Why do I write about library access at all—and why don't I stick to open access?"

I'm tempted to bring in related issues—for example, the role of the Open Content Alliance and Google Book Search in improving *discovery* for books (and, for OCA, access to public domain books). But I'd like to keep this fairly short, so I'll note that a lot of the other things discussed in *C&I* also relate to library access to scholarship.

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Fundamental Assertions

I would not dissuade anyone from focusing on open access to scholarly articles (with or without capital "O" and "A") and improving both "green" and "gold" aspects of such access. That's important work. Peter Suber sustains a high level of clarity and completeness in discussing and advocating both forms of open access; Charles W. Bailey, Jr. and (more recently) the bloggers at *OA librarian* add to that effort, as do others. Many other librarians and scholars are engaged in creating and building OA journals ("gold" OA) and encouraging scholars to deposit their articles in OAI digital repositories ("green" OA). More power to them. *Library* access involves more and, in some ways, less than open access. My interest is in libraries'

long-term ability to serve the full range of human creative activity.

Scholarship and the stuff of libraries are more than just refereed articles

Science, technology and medicine (STM) consume most of the serial budgets of most academic libraries—indeed, STM journals consume most of the *acquisitions and access* budgets of most academic libraries. But refereed STM journal articles aren't all there is to science, technology and medicine, and certainly not all there is to scholarly and human creativity.

Even in STM, monographs play a role, as do working papers, datasets, and other “gray” materials that don't fit into the refereed-journal-article mold. Outside—in the humanities and social sciences—monographs and other books may be the primary means of communicating progress. For that matter, serial publications other than refereed scholarly journals play significant roles in the record of human creativity that should be the stuff of libraries.

The current journal model is broken

Too many STM journals cost too much money, and increase in price at too rapid a rate, for libraries to sustain the level of access they need. The cost of STM journal access distorts library budgets, driving out both the less expensive journals and the monographs and other resources. The current model, with several large commercial publishers dominating the field of STM publishing and charging what they believe the market will bear, is unsustainable: It is already breaking down, with even the wealthiest libraries canceling large numbers of journals.

It is apparent that some major commercial publishers fully intend to charge what the market will bear. They have succeeded in acquiring most of the highest-profile journals, including many that were originally modestly priced society-published journals, and in raising prices so as to assure profit margins far in excess of those enjoyed by most book publishers and companies in competitive industries.

I am not arguing that these publishers don't add value. Clearly, they do. I am arguing that the subscription model simply will not stand: That it is already breaking down and will continue to break down, probably at an accelerating rate.

The current model is *also* broken from a philosophical perspective: It makes it more difficult for scholars, especially independents and those at smaller institutions, to keep up with work in their field.

Open access strives to correct the philosophical breakage. Green OA, however, does nothing to address the financial breakage—which means it fails to address *library* issues, vital to long-term effective access. Worse, some green OA evangelists regard library issues as irrelevant and even treat with disdain library efforts to improve green OA—if those efforts *also* meet other needs of the libraries and their academic communities. More about that in a moment.

The breaking model damages secondary players first

Unfortunately, there's some reason to believe that it isn't the big commercial publishers and their overpriced journals that will be hit first as the subscription model continues to crumble. The first to go tend to be journals with smaller audiences and lesser reputations, including many of the more reasonably priced journals and those in the humanities.

The breaking model can cause one specific economic dislocation—and clarifies another economic distortion. The economic dislocation: Journal subscriptions shove out monograph and other acquisitions. Some libraries have protected monographic budgets, and that may be a partial solution. The economic distortion is more sensitive: Libraries have been underwriting professional societies indirectly, and can no longer afford to do so.

That's clear from the surprising alignment of professional society publishers, most of which are by nature nonprofit and intended to promote scholarship, with the commercial publishers in opposing effective steps toward open access. The professional societies admit that profits from non-member journal subscription prices, frequently but not always moderate in comparison with the worst for-profit prices, are used to subsidize other society activities. They argue that loss of those profits will undermine those activities and is, thus, a blow against scholarship. The only plausible response, from a library perspective, is that it is *wrong* to expect libraries to subsidize professional societies outside the field of librarianship. If other professional societies deserve subsidies from universities, those subsidies should be requested and provided *as subsidies*, and should be provided out of appropriate departmental budgets—not out of the library acquisitions budget. “That's the way we've always done it” isn't good enough.

Open access publishing is progressing, but slowly

We didn't call it “gold OA” in 1990, but that's when I was first involved with a refereed scholarly ejournal

free to all readers, *The Public-Access Computer Systems Review* (it wasn't the first such journal). Since then, thousands of open access journals have been started and more than two thousand survive.

That's a lot—but it's a small portion of the total scholarly journal landscape and a smaller portion of the total article output.

Open access journals can relieve cost pressures on libraries. Open access journals can reduce the cost structure of the entire scholarly publishing enterprise. Libraries may even be sensible candidates to carry out the modest organizational tasks involved in publishing an electronic-only open access journal.

But open access journals aren't growing rapidly—and aren't displacing commercial journals to a noticeable extent. They may be slowing the rate of increase of overall journal costs, but they are not apparently reducing overall costs. Some argue that a complete shift to open access journals could even *increase* costs to some libraries or universities, but that analysis assumes two questionable points:

- It assumes a very high cost per published article, at least \$1,500, even though some open access journals that charge author-side fees have considerably lower fees. Sharp analysis and real examples are required to determine just how much an electronic-only journal, paying only for copy editing, markup, and disk space (since most editors and referees work for free, open source journal publishing software is freely available, and there's no need for contract offices) should actually cost.
- It assumes that all open access journals will be paid for by direct author-side charges, even though *most* open access journals don't currently charge author-side fees (and many subscription journals *do* charge author-side fees), and even though author-side fees could reasonably be built into research grants.

There are several possible reasons for the slow growth of open access publishing. One factor may be the astonishing level of “untruthiness” set forth, on an ongoing basis, by many within the scholarly publishing community: For example, arguments that open access journals will undermine peer review, reduce editorial quality, or in some other manner damage scholarship.

Open access archiving is neither inevitable nor trivial “Green” open access—either preprint or postprint versions of published articles, deposited in digital re-

positories that follow OAI models to allow metadata harvesting—has done well in some disciplines, but isn't taking over the world.

Green OA does little or nothing to solve library budget problems, to be sure. To the extent that single-minded green OA advocates dismiss journal publishing and library budget problems as irrelevant, they may encourage a catastrophic failure of the existing publishing system and the portion of peer review carried out by that system, rather than a slow slide and conversion from subscription to open access. Such a failure would be unfortunate for green OA, as it would eliminate the chief sources of “branding” for the papers in the repositories.

That dismal scenario aside, the fact is that academic libraries can, and in a growing number of cases will, play a role in making green OA work: To wit, providing professional-quality institutional repositories that have the institutional and staff support to be maintained for the long run. Good institutional repositories aren't cheap (although the software itself may be free), but they are sustainable for the long term, unlike “server in a closet” departmental repositories with no firm base of funding or firm long-term programmatic support.

Library-based repositories should go beyond articles—and doing so doesn't damage the articles

One of the oddest arguments in the sometimes-fractious OA community is that institutional repositories should *only* hold refereed scholarly articles. Library-based digital repositories are likely to go much farther, and probably should: They can and should include supporting datasets, work in progress, and other digital materials created within the repository's scope that don't fit neatly into the refereed-article slot.

As long as it's possible to identify refereed articles, as it always is in any good OAI repository, I can think of no plausible argument for restricting the repository to refereed articles. The arguments for broader inclusion are clear: Such inclusion helps justify the costs of the repository, makes it stronger for long-term use, and improves the library and its parent institution by providing access to important scholarly resources.

If *Time Magazine* sits next to *Tetrahedron* on a periodical shelf, that adjacency certainly does not make the articles in *Tetrahedron* less scholarly, nor is it likely to confuse readers of either periodical. How, then, can the presence in a digital repository of digital objects that aren't refereed articles—and *don't have the meta-*

data of refereed articles—possibly damage the refereed articles in that repository? It can't, and any argument that such sharing of repository space is somehow inappropriate should be viewed skeptically.

Conclusions?

I don't have any—or at least I don't have any that haven't been stated here, in previous LIBRARY ACCESS TO SCHOLARSHIP pieces, or elsewhere. Some will disagree with the assertions here, and they may be right.

I'm an optimist by nature. I believe scholarly publishing and academic libraries will survive for the long term, but with significant changes in both. For that matter, I believe many commercial journals will survive—although, with luck, some will be supplanted by open access journals, either as true journals or as wrappers for sets of repository articles. *Science* and *Nature* probably aren't going away, in print or electronic form. *Tetrahedron* and the *Journal of Economic Studies*? Don't ask me.

Bibs & Blather

A Funny Thing Happened

The final section of last issue's BIBS & BLATHER was "Here's the Plan..." I recognized that I need a break—and that most of you take a break in summer. I planned a June issue with copyright balance as a major theme, a July issue (just before ALA) with library balance as a major theme, and then a "non-issue" for August, focusing on the typography and design of C&I, which most of you would probably skip. Meanwhile, I'd relax, read, contemplate, and do some long-range planning.

As some of you know, events over the past few weeks made contemplation and long-range planning a trifle difficult.

I won't say everything's resolved for the long term. I will say that I'm not obsessing over the situation and am inclined to believe things will work out.

The major theme of this issue is indeed copyright and balance. The two essays here aren't all that I had in mind; that would have required far too much space. More related essays may follow.

As things stand now, the plan continues—although that plan may not leave as much room for "reading, relaxing, going on short trips, organizing music, and all that." We shall see.

Short term, expect continuity. Longer term—that's harder to predict, but isn't it always?

©3 Perspective

Copyright: Finding a Balance

Balanced copyright: A nice phrase and a worthy goal, but lacking in precision and rhetorical support. The loud voices on copyright issues tend to be at the extremes, even though it's probable that most citizens are somewhere in the middle. Extremes are exciting; balance tends to be boring. But balance is what we need, in copyright as in other areas—and the current state of copyright law and enforcement in the U.S. is, I believe, wildly out of balance. This essay considers some of what's going on and being said from the perspective of finding a balance.

First it wouldn't hurt to repeat that golden oldie, the constitutional basis for copyright and patents in the United States:

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 rights to their respective writing and discoveries.

Consider three aspects of that brief, potent wording:

- **Purpose:** "to promote the progress of science and useful arts." Not "to make the grandchildren of authors and inventors wealthy"—remuneration is not mentioned. Not "to prevent the creation of new creations based in part on existing creations"—you don't promote progress by preventing it. Not "to set a series of traps for unwary citizens through extraordinary penalties." I read "promote the progress of science and useful arts" as meaning "encourage creativity."
- **Length:** "for limited times." Not "forever on the installment plan." I find it hard to believe that the founders would have thought of "lifetime plus seventy years" as "limited," although technically it is. (Patents are better in this respect: The direct term is still 14 to 20 years, depending on the kind of patent.)
- **Parties:** "authors and inventors." Not "publishers and patent holding companies." Since

these essays are about copyright, I won't get into the set of issues surrounding patent holding companies, but a balanced view of intellectual property in general might suggest that such companies represent a perversion of constitutional intent. That's another topic for someone else to take up.

What do I mean by balance? I discussed that question two years ago in a PERSPECTIVE at the end of a special copyright issue (*CE&I* 4:8, Mid-June 2004). What follows is a slightly modified version of that essay (with a few additions) before catching up on some copyright resources.

Balanced Copyright: What It Means to Me

I read the news today, oh boy, about three cases where people were either arrested or chased out of a theater after diligent ushers spotted them using a camcorder to record a current motion picture.

I've been critical of Big Media and what I regard as extreme copyright legislation (at their behest) and practice, unbalancing U.S. copyright toward rightsholders at the expense of citizen rights. I've also been critical of the term "piracy" as used for most peer-to-peer file sharing and casual CD-R burning. I will continue to be critical in both areas.

So how do I feel about those devil studios urging ushers to spot camcorders in movie theaters and prevent them from being used, even charging people with crimes for using them?

More power to the studios. I hope they succeed.

Just as I cheer when those devils at RIAA manage to locate and shut down factories that demonstrably produce nothing but bootleg CDs and DVDs. Good for them.

There is such a thing as media piracy—the illicit mass redistribution of copyrighted materials for commercial profit, at the expense of creators and rightsholders. It does constitute a worldwide market running to billions of dollars. For software producers, motion picture companies, music publishers and, to some degree, book publishers, it's a problem.

I can see no legitimate reason to have a camcorder when going to the movies, and *certainly* no legitimate reason to use one. When you buy a movie ticket, you're buying the right to see one performance of one movie (unless it's a double feature). You are not buying permanent rights to that movie. The same goes for live performances, most of which *legitimately* forbid the use of camcorders or other recording equipment.

(Yes, there are exceptions, mostly pop and rock bands, and that's great as well. For example, the Grateful Dead had an alternative business model that served them very well.)

Balanced, not weak

I believe in balanced copyright as a way to encourage creators and distributors—and, with balance, to encourage *new* partially derivative creations and assure a healthy flow of material to the public domain. Balanced copyright is not really weak copyright, certainly not where it comes to commercial exploitation without permission.

I was an annoying purist in my youth. I had one of the larger record collections in the co-op I lived in and kept the records in pristine condition. I would not, under any circumstances, loan those records to others (both because of probable damage and because I knew they were going to make cassettes from them) or dub cassette copies for others.

I'm also a science fiction reader with some sense of history. When someone says copyright should only last five or ten years, I remember Isaac Asimov's Foundation trilogy. While Asimov was paid by *As-tounding* for the serial publication of the stories that made up the books (at the absurdly low rates that the S.F. magazines have always paid), he made *nothing* from the first book publication because Gnome Press had persistent money problems and dealt with them partly by failing to pay royalties.

See Chapter 53 of *I, Asimov* for some details. "He [Martin Greenberg, head of Gnome] had an unalterable aversion to paying royalties and, in point of fact, never did. At least he never paid me." Oddly, the Foundation trilogy was turned down by Doubleday (because it was old material), which published most of Asimov's other book-length fiction and which—11 years later—bought the rights back from Gnome, then published new editions that were enormously profitable for Asimov and Doubleday. With a ten-year copyright, one of the landmark works in science fiction would have earned almost nothing for its creator. With a 28-year or 56-year copyright term, of course, Asimov did pretty well.

"Live with it" is not an answer

I am appalled by people who scan contemporary books and release the scanned versions to the internet. That's copyright infringement of a sort that's unfair to the creator and damages everyone involved. I'm no friend of most informal music downloading, either,

even as I believe the RIAA has gone overboard in trying to shut it down.

Copyright infringement is not theft, but it is a crime. Blatant copyright infringement of currently available works is unethical as far as I'm concerned. The ethical issues get cloudier for works that are not available for purchase or where "purchase" has morphed into highly restrictive licensing.

I've heard the argument that, since digital transmission makes it easy to pass around perfect copies of anything that can be digitized, copyright is outmoded and people need to find other ways to earn a living. That's excusing unethical behavior on the basis of technological imperatives. Telling me to "live with it" because that's the way things are is a sneering, me-first response. It makes me want to scream. It does not, however, make me want to "put 'em all in jail" or lock up creations with digital restrictions management so tight that everything becomes pay-per-use.

I believe most people understand that balanced copyright involves ethics as well as enforceability. Most people who find a book they consider worthwhile (and want to read more than once) *will* buy it even if photocopying it or downloading a scanned copy would be cheaper. There's increasingly strong evidence that, at least for most adults, casual downloading to experiment with new music—ethically questionable though it may be—does not actually eliminate CD purchasing. I believe most U.S. adults, given the choice of a \$20 DVD that clearly comes from the motion picture company or a \$10 DVD with photocopied cover art sold by a street peddler will pay for the legitimate copy. In short, I believe that most people will behave ethically if ethical behavior is feasible.

Rights for creators and citizens

I also believe in the first sale doctrine and fair use. Once you've purchased a legitimate reproduction of a creation, you should be able to do pretty much anything you want with it—with a few exceptions such as making multiple copies for sale to others and, for some creations, carrying out public performances. (The latter is tricky, to be sure.) You should be able to lend it (as long as you can't use it simultaneously), sell it (as long as you don't also keep it), give it away (as long as you don't also keep it), and copy portions of it for use in an assemblage. You should be able to use limited portions of it as inspiration or as the basis for a new creative work. You should be able to use it in

the manner you see fit with those minimal restrictions noted. And, as long as it's a mass-produced copy, you should be able to mock it, alter it, or destroy it as you choose: Moral rights should be limited to originals and limited-run artistic works.

Oh, and if you're a creator, you should be able to give away as many of your rights as you choose. The concept that it's unconstitutional to give away your work—and also require that someone who uses your work in other work must also give away the new work—is simply ludicrous. Right now, I retain some rights in *Cites & Insights*, but I reduce the full range of copyright by permitting both derivation (not stated in the current license) and reproduction as long as it's not for sale. Those are my rights as the creator and copyright holder. If I changed the license to the "No rights reserved" dedication to the public domain (which I don't plan to do), that would be my right as copyright holder.

I believe in balanced copyright. If that sometimes results in coverage that seems to say "a curse on both your houses," that's because sometimes neither extreme makes much sense.

2006 additions

Some additional clarifications and examples of what balanced copyright might mean:

- When I say copyright infringement is not theft, I'm making what I believe to be a significant distinction—just as I believe there's a crucial distinction between casual copying and piracy (that is, infringing distribution for commercial gain). Let's say you walk into a restaurant, grab a chair, and leave with it. That's theft, pure and simple: "the felonious taking and removing of personal property with intent to deprive the rightful owner of it." But what if the chair *continues to be there* in the restaurant—what if it's replicated instantly, at no cost or inconvenience to the restaurant, as soon as you remove the copy? Then the rightful owner isn't deprived of anything. You may be guilty of a crime, but that crime is no longer theft. And that's how most current copyright infringement, particularly noncommercial copying, works: You may be depriving the owner of a *sale*, but you are not depriving the owner of *property*.
- Balanced copyright would not be a set of gotchas and treasure hunts, unlike the present

copyright system. So, for example, orphan works would be available for reuse and re-publication—without the danger of a copyright holder turning up and claiming outrageously high penalties for each copy sold. Yes, a copyright holder should receive compensation for some portion of royalties they might have received if they had been available—but only at reasonable rates, and taking into account the costs of those who tried to find the copyright holder. Similarly, the penalty for noncommercial infringement should have some relationship to the plausible lost income for the copyright-holder, not hundreds of thousands of dollars and lengthy jail terms for noncommercial copying the equivalent of a \$12 CD or \$20 DVD.

- Balanced copyright would assure that fair use is feasible, and that copyright holders using technological measures to prevent fair use should *themselves* be subject to penalties—not, as now, providing additional laws (DMCA) to prevent others from restoring fair use where it has been prevented.
- Balanced copyright would encourage creation with the recognition that nearly all creativity is partially derivative, making it possible to create partially derivative works without fear of massive retribution.
- Balanced copyright would provide adequate time for creators to gain from their creations, while maintaining a healthy and growing public domain by protecting creations *for a limited time*—and it's hard to see how that limit should be more than 56 years.
- I was delighted to read about a series of raids across the U.S. to deal with *real* piracy—the commercial sale of illegally copied discs. RIAA *should* be encouraging such raids and seizures. Seeking balanced copyright doesn't mean abandoning copyright and doesn't mean excusing all infringement. I applaud the conviction of a St. Louis theater worker for camcording and uploading a current-release movie in a theater; the Family Entertainment Copyright Act was a legitimate addition to copyright, and there's no plausible excuse for theater camcording. Neither is there an excuse for the *Star Wars III* case, where illegal copies apparently came from the usual source:

An insider, in this case an employee in a postproduction house.

I could go on. I'm sure I will, in comments here and in later issues. You should have an idea what I mean by now: Balanced copyright would provide plenty of financial incentives for creators to create—but within a framework that encourages *other* creators to create and that allows users, libraries and society to make effective use of those creations.

A confession here: I haven't done my book reading on this topic, and I'm doubtless saying what some of the great thinkers have said more eloquently and with more precision. For now, this is my naïve view of what balanced copyright might be about. Let's see what's being said by others, and what's happening (and not happening) in the real world.

Balancing Acts and Extremes: Notes Along the Way

Consider just a little of what's been said and done over the past year or so and *not* previously discussed in *Cites & Insights*:

- According to a January 20, 2005 *Wired News* story, technology and consumer groups were “ready to get more aggressive” after fighting off the Inducing Infringement of Copyrights Act. Gigi B. Sohn: “Technology companies are starting to get religion in terms of courting Washington policy makers. If you just sit back on your heels and defend, [the entertainment companies] are just going to keep coming at you.” The piece mentions “talk of codifying the Betamax principle”—that is, *assuring* that technologies with both legal and illegal uses (like crowbars and computers) aren't subject to litigation. Sohn was confident: “I think we are winning the public debate. The way will get legislators on our side is when their constituents tell them, ‘We want balance in copyright law.’” Sohn and Public Knowledge *clearly* don't want to eliminate copyright; the goal sought here was balance. Unfortunately, about the best the groups managed in 2005 was a holding pattern: No improvement in citizen rights—but also very little stiffening of copyright law.
- When Rik Lambers of *Indicare* reviewed a hearing on the DMCA, a proposal that would move toward balanced digital copy-

right, Ambers saw the likelihood of restoring balance. As Lambers saw it, fair use (and European copyright exemptions) represent the users' part of the copyright balance...and it's clear that "technological measures do prevent fair uses." Lambers' sense at the end of the hearing: "Fair use, the ground on which the greater part of the DMCRA is founded, seems all but rock solid." But the DMCRA made no headway—and Big Media continues to diminish or dismiss fair use and call for stronger technological measures. As of January 1, 2005, Lambers wrote "it seems uncontested that the anti-circumvention provisions of the DMCA have prevented consumers from actively making a fair use of content protected by technological measures" and "it is all but certain that the DMCRA or a comparable proposal will make it into law." If that was the sense at the start of 2005, then 2005 was a dismal year: Few observers would now consider DMCA "all but certain" to be adopted.

- Donna Wentworth posted "What does 'copyfight' mean?" on July 30, 2005 at *Copyfight*. She noted Erik J. Heels' definition: "[I]f 'copyfighter' means 'one who fights against bad copyright laws...', then I am a copyfighter." Add Cory Doctorow's definition: "Copyfight is the broad banner to describe people who are fighting for reforms to intellectual property—trademarks, patents, copyrights and what are called 'related rights' (broadcast rights and so on)." Wentworth's own attempt: "[T]he copyfight is the battle to keep intellectual property tethered to its purpose, understanding that when IP rights are pushed too far, they can end up doing exactly the opposite of what they're intended to do." She goes on to lament the "baiting strategy" seen from the "other side"—"attempts to get a rise by either suggesting or outright arguing that people who fight for balanced copyright are automatically opposed to any and all copyright." Indeed, citing a post from an intellectual property blog, she sees a challenge to "a critic to try to live an IP-free life for some brief period of time" and talked of "sitting in close proximity to the commies with the Free Software Foundation." There's more, but that may be enough: As I've seen myself, any argument for

balancing copyright—for making copyright law do what the Constitution says—is met with claims that you're *wholly* against copyright ("commies" is another version of extreme refusal to debate). "Is it really so difficult to agree that intellectual property can sometimes be pushed too far, in ways that harm society?"

A pause here to consider just how "extreme" Wentworth's definition is: "the battle to keep intellectual property tethered to its purpose." When copyright and other IP laws are too extreme, they *prevent and discourage* progress in science and the useful arts. When a filmmaker can't release a documentary because a TV set was on in the background for a few seconds and the documentarian can't afford to clear the rights to the TV footage; when modern composers can't do what the great composers (certainly including Bach and Stravinsky) have always done, that is, build their own inventions making liberal use of the inventions of others; then, and in other cases, intellectual property laws are "doing exactly the opposite of what they're intended to do."

- Is there a common platform for balance? Derek Slater hoped there was, in a May 5, 2005 *A copyfighter's musings* post, "The commoners' common platform." He expressed discomfort with a particular "free culture" group "excusing and encouraging widespread, infringing P2P file-sharing" and doing so "as a means to destroy the major record labels." In short, Slater argues against copyright extremism on the other side. "We can argue that lawsuits against file-sharers will not reduce infringing file-sharing... We can recognize that not all file-sharing is harmful and that there is not firm evidence that it has already done significant harm. But we can say all that without supporting widespread infringement...and, indeed, by actually saying, don't infringe." He quotes Lawrence Lessig: "I have no patience for people who download music contrary to the wish of the original copyright owner." He dismisses the idea that widespread infringement is a legitimate way to change the music industry: "Deeming it an illegitimate business model by itself doesn't provide a sufficient rationale for infringement." Like me, Slater was worried that EFF's Let the Music Play campaign would be misin-

terpreted. (Actually, I was unable to come up with *any* interpretation of EFF's publicity, particularly the "60 million file sharers can't be wrong" campaign—and I may have that wrong—that didn't smack of excusing and possibly condoning infringing file-sharing, one reason I'm wary of EFF in some areas.)

- Commenting on Slater's post, Seth Finkelstein concluded that, "to a good approximation, we can't" synthesize the interests of the more extreme and more moderate parties into one common cause. "Welcome to *The Movement*, try not to get shot by all the in-fighting." Finkelstein notes that liberals and radicals on almost any topic have very different attitudes and methods—and that, "As a rule, liberals and radicals hate each other." Finkelstein says "no radical will ever change their mind from being criticized by a liberal"—and notes that, unfortunately, radicals provide cover for the other side to denounce liberals *as being radicals*. "When *lying works* in attacks to smear one's view, no matter how hard one works at distancing, the mud just doesn't come off." Finkelstein believes that if "anti-copyright" extremists didn't exist, they'd be invented, since they're so useful to extreme protectionists as straw men. Slater responded, in a brief response that basically calls for one fairly radical group to say that it does not support widespread infringing P2P file-sharing. In a separate response to Slater's post, Fred von Lohmann of EFF asserted that "wide-open, unhindered file sharing is a great thing" and rejected any suggestion that the people who built "the greatest music library in the history of the world" (the Napster universe at its peak) should "hang their heads in shame" or, indeed, that they'd done anything wrong. He agrees that "file-sharing without compensation is not realistically sustainable, nor good in the long run for those who care about music or the Internet," but it's a semi-admission of trouble within his extolling of the "right instincts" behind infringing file-sharing.
- Steps toward balance might be as simple as clarifying unclear law. Section 108 of the Copyright Act allows libraries, archives and nonprofit educational institutions to make copies of protected works in the last 20 years

of the copyright term as long as the works are not subject to "normal commercial exploitation" nor obtainable at a reasonable price. As Mary Minow noted in an August 5, 2005 *LibraryLaw blog* post, "What does [normal commercial exploitation] mean?" In this case, the Library of Congress convened a Section 108 Study Group "to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act..." The group includes lawyers, librarians, academicians, and representatives from Big Media. It is holding a series of private meetings and public roundtables.

- *Stereophile* doesn't usually spend time on copyright, but ran a substantial article by Laurence A. Borden in September 2005, "Copying and sharing recorded music." It says the ability to make perfect digital copies of music and share them on the internet "has created a copyright-infringement nightmare of epic proportions for the recording industry." We learn that "fair use is not *granted* automatically" [emphasis added] and that fair use "is not a right in the sense of the right to vote." Reading the article, you'd never guess fair use is actually part of the Copyright Act—and Borden refers to "finite periods of time," not the "limited term" in the Constitution. Borden says the Audio Home Recording Act "permits the manufacture and use of digital and audio recording devices," which is pure nonsense (there were a lot of perfectly legal recorders around before 1992). He refers to "copy-protected CDs" (which don't exist, as copy protection violates the CD standard), a sloppiness that seems odd for a magazine as devoted to excruciatingly narrow distinctions as *Stereophile* is. He says the INDUCE Act "would hold technology companies responsible if their devices are used to commit copyright infringement," which considerably overstates the awfulness of a bad bill. He repeats "copyright nightmare" in regard to digital technology, and seems to conclude that it's only reasonable to lose our "privileges" (not rights, apparently) if anyone infringes. It's a sad article that basically hews the maximalist-copyright Big Media line; it's also fairly typical of mainstream media.

- Edward W. Felten notes the ease of overstating positions in a May 9, 2005 *Freedom to tinker* post, “Nobody disputes this post.” There was a debate between an MPAA lawyer and an EFF lawyer; the MPAA lawyer said “nobody disputes” the effectiveness of filtering—that is, technology to detect and block copyright material as it crosses a network. As Felten notes, the statement is “obviously false”—and a questionable debating tactic, “since it practically invites somebody in the room to falsify your statement by disputing X.” Which he did. And, of course, if you’re going to say “nobody disputes X,” you should be able to provide evidence in support of X—which the MPAA lawyer failed to do. Thus we get extreme arguments: The side favoring maximalist protection makes false assertions without evidence, and assumes (correctly) that many will believe the assertions.
- The public domain offers one shrinking form of balance—but some publishers try to claim copyright in public domain works. Raizel wrote a long, fascinating discussion on March 15, 2006 at *LibraryLaw*: “The tale of one bunny, copyright statements, & public domain: A cautionary tale.” It starts with Jason Mazzone’s fine term for the claim of copyright in public domain materials: Copyfraud. Raizel cites part of the copyright notice in a mystery novel based on the life of Beatrix Potter, including references to some of Potter’s characters such as Peter Rabbit. This notice claims that Frederick Warne & Co Ltd is the sole and exclusive owner of the “entire rights titles and interest in and to the copyrights and trademarks of the works of Beatrix Potter...” From that, you might assume that the Peter Rabbit books are under copyright. But they’re not, at least not in general: *The tale of Peter Rabbit* was officially published in the U.S. in 1904, clearly placing it in the public domain. One Potter story is definitely under copyright; many definitely are not—and several cover illustrations are also in the public domain in the U.S. There’s a lot more here regarding trademark and its uses, but the key here is that the copyright statement, while legitimate, may be misleading. Warne does own the copyrights—but only where there *are* copy-

rights. One wishing to republish Peter Rabbit stories might be scared off by the copyright notice and not choose to investigate enough to realize that it’s not applicable to some of the stories.

Coping with orphan works: following up

As discussed in March (*C&I* 6:4), the Copyright Office issued a *Report on orphan works* that recommends legislative steps to make orphan works more manageable—that is, to allow people to republish or otherwise use orphan works after reasonable attempts to contact the copyright holders, without the new users facing extreme penalties and without totally disenfranchising the copyright holders if they do turn up.

Lawrence Lessig wasn’t thrilled. He introduces a nine-page letter to Zoë Lofgren with the comment “No one will like me for this letter.” (Lofgren asked for Lessig’s views; she’s one of the two most significant Congressional forces for balance, and earlier introduced the Public Domain Enhancement Act.) Lessig notes the significance of Copyright Office recognition that copyright owners bear some burdens as a condition of getting the full benefit of copyright. “Every property system places some burden on the property owner to help assure that the property system functions efficiently”—but since the requirements for registration and even assertion of copyright were eliminated, copyright seemed to be an exception.

But Lessig believes the Copyright Office’s proposed reforms “both go too far, and not far enough.” **Too far:** Even recent works could be considered orphans, and Lessig worries about that. He also believes that unpublished works shouldn’t be subject to “orphan work” analysis. Lessig believes that the real problem of orphan works “is tied to old works”—and specifically to old published works. He suggests 14 years as a cutoff—that is, that no work could be considered an orphan if it’s 14 years old or less.

Not far enough: The Berne Convention prohibition of required “formalities” (that is, asserting copyright or registration) apply to *foreign* works; the U.S. can require formalities of its own citizens. Lessig doesn’t favor a government-maintained registry, but does favor a set of minimum protocols for private copyright registries. (He uses internet domain registries as analogous competing registries.) As before, Lessig’s preferred “limitation on remedies” for cases where copyright owners *don’t* register after 14 years is that the works go into the public domain—or to spec-

ify “a very minimal royalty rate for any commercial use of a work that has not been properly registered.” He suggests changes in PDEA as a proposal based on those comments.

Jerry Brito and Bridget Dooling published “An orphan works affirmative defense to copyright infringement actions” in *Michigan Telecommunications and Technology Law Review* 12 (2005) (www.mttl.org/voltwelve/brito&dooling.pdf). The article offers a good discussion of the orphan works problem in the real world, but criticizes all proposed solutions based on the assertion that the Berne Convention “prohibits formalities that are conditional to the enjoyment and exercise of the minimum rights it adopts,” ignoring nationality. The article also asserts that PDEA’s \$1-per-work fee represents “a large up-front cost for many existing copyright holders,” even as it only applies to works more than 50 years old. Similar objections—based on the assertion that Berne is absolute in all cases, and claims of burden, are used to fault every solution put forward. As far as Brito and Dooling are concerned, Berne assures that copyright is an exclusive property right, and that’s the end of the discussion. (Later on in the article, there’s a brief admission that the Berne ban on formalities need not apply to U.S. authors.)

What solution do Brito and Dooling offer? One that would cheer the hearts of underemployed lawyers: an affirmative defense similar to fair use:

The proposal is that if, after a reasonable search in good faith, no copyright holder for a work is found, the work may be used without the user being subject to liability. A user who is subsequently sued for infringement will be able to defend by claiming a codified orphan works defense.

First you spend the money for a good-faith search. Then you’re left in a fair use situation: Subject to lawsuit, but if you can afford the lawyers, you have a line of defense. The authors say this would “encourage the use of orphan works by *significantly reducing* the fear of automatic and harsh penalties for infringement” (emphasis added)—not by eliminating that fear or reducing the possible penalties, but by giving the user a better shot in court. I suppose that’s better than nothing—but surely not ideal.

Balance and Imbalance: A Few Longer Pieces

The Center for Democracy & Technology issued “Protecting copyright and internet values: A balanced path

forward” in spring 2005. CDT defines “balance” oddly, as in the blurb before the white paper itself: “In CDT’s view, a combination of robust enforcement of copyright law to make infringement unattractive and technical protections for online content offers the best possibility of fostering vibrant new markets for content delivery, consistent with innovation and the open architecture of the Internet.”

Balance? Perhaps CDT means “robust” legal enforcement is balanced by DRM—but that’s a bizarre form of balance for anyone but copyright maximalists. CDT calls itself “a civil liberties and public policy organization dedicated to defending and enhancing the free flow of information on the open, decentralized Internet”—but as with its white paper *favoring* the Broadcast Flag, CDT might best be known by the stances it takes, not its asserted dedication.

The white paper refers to “creators, consumers, and technology innovators.” As we know, “consumers” have two rights: to buy and to not buy. *Citizens* might expect a broader range of rights—but the white paper conspicuously omits “citizens” as players in this game. It’s about “creators” (by which CDT presumably means rightsholders) and “consumers”—sellers and buyers. And, indeed, the supposed tension behind debates over intellectual property is between “the system for rewarding creators” and “the growing capabilities of computers and the Internet.” Citizens? Fair use? Not in the equation.

Some of us see that new creation is hampered by DRM and excessively tight copyright—but not CDT. It sees “possible massive infringement of copyright” as the evil that “hurts artists and chills investment in new content.” The solution: Strict enforcement and “secure digital delivery”—which has the side effect in most cases of eliminating fair use and restricting or eliminating first sale rights.

CDT repeats this message with three bullets for essential components: “Punishing bad actors” (which *explicitly* includes “individual infringers”), “Encouraging a marketplace of content-protective and consumer-friendly DRM” (although no DRM proposed to date has been in the slightest “consumer-friendly,” much less citizen-friendly), and “better public education by trusted voices.” What sort of education? Speaking out against “bad actors,” teaching consumers that illegal file sharing is “dangerous, unethical, and harmful to artists and creators,” and providing “information about DRM, so they can make informed

choices.” Not choices to *avoid* DRM; CDT clearly thinks DRM is both necessary and a good thing.

CDT is explicit in calling *all* infringing file-sharing “piracy,” raising the objection that the term is applied too broadly, then slapping it down “given the prevalence, volume, and potential impact of clearly unlawful infringement.”

While there are some useful comments in this white paper, it’s about as far from a “balanced path” as would be an argument to abandon copyright altogether. CDT explicitly calls for “pursuing people” and applauds the mass RIAA suits. CDT calls for *secondary* liability (that is, those who develop technologies that can be used for infringement). CDT seems sad that the PIRATE Act didn’t pass. CDT regards “DRM [as] an essential component of a vibrant digital media marketplace,” making the claim that “Consumers benefit from DRM”—because it gives them *more choices to buy things* (and can require that they “buy” the same content over, and over, and over...) No mention of DMCA. No mention of fair use. No mention of first sale rights. No mention of citizens.

And CDT still wants a “balanced” broadcast flag.

Ernest Miller posted “CDT’s ‘balanced framework’ for copyright completely unbalanced” at *The importance of...* on June 7, 2005. As he notes, “any policy based on treating citizens solely as consumers is doomed to failure from the start.” “There really isn’t anything like a ‘citizen creator-friendly DRM’”—so CDT’s consistent use of “consumer” makes sense. He notes that the “public education” called for conspicuously omits “educating people about their rights with regard to content.”

Miller explicitly calls a claim in the CDT paper into question. CDT says “For example, many so-called ‘100% legal’ file-sharing services are in fact unlicensed services that defraud consumers by promising lawful access to works.” But, as Miller notes, the FTC staff has reviewed representations made by file-sharing distributors and concluded: “None of these representations appear on their face to be false or misleading.” Apparently CDT knows better than the FTC.

Miller concludes CDT’s “balance is nearly entirely one-sided in favor of the content industries.” It’s hard to disagree with that take.

Ed Felten commented on the CDT paper *and* Miller’s comments, but focuses on CDT’s pro-DRM stance. “Here CDT’s strategy is essentially to wish that we lived on a planet where DRM could be consumer-friendly while preventing infringement. They’re smart

enough not to claim that we live on such a planet now, only that people hope that we will soon.” Indeed, the examples cited by CDT (such as FairPlay) all restrict reasonable use. Felten studies DRM a lot—and doesn’t see any real-world DRM as being “consumer-friendly” much less citizen-friendly. He also points out that CDT’s assertion that “producers must be free to experiment” with various forms of DRM and distribution doesn’t really mean what it says in an era where tens of millions of citizens are *also* producers at some level. “What they really mean, of course, is that some producers are more equal than others”—that is, those producers “who are expected to sell a few works to many people.” Or, to put it bluntly, Big Media.

Adelphi Charter on creativity, innovation and intellectual property

The Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA) published this one-pager on October 13, 2005; you can find it and related FAQs at www.adelphicharter.org. The left column states reasons for balance; the right offers nine principles for law regarding intellectual property.

It’s a good starting point for a balanced perspective. It recognizes that “creative imagination requires access to the ideas, learning and culture of others, past and present.” It says the purpose of intellectual property law should be “now as it was in the past, to ensure both the sharing of knowledge and the rewarding of innovation”—and it recognizes that today’s IP regime is “radically out of line with modern technological, economic and social trends.”

I won’t cite all nine principles, but portions of the first four, the sixth, and the ninth are worth quoting:

1. Laws regarding intellectual property must serve as means of achieving creative, social and economic ends and not as ends in themselves.
2. These laws and regulations must serve, and never overturn, the basic human rights to health, education, employment and cultural life.
3. The public interest requires a balance between the public domain and private rights...
4. Intellectual property protection must not be extended to abstract ideas, facts or data.
6. Copyright and patents must be limited in time and their terms must not extend beyond what is proportionate and necessary.
9. ...There must be an automatic presumption against creating new areas of intellectual property protection, extending existing privileges or extending the duration of rights...

The seven-page FAQ provides useful background both on the charter and on RSA. That FAQ *does* distinguish between commercial large-scale copying (piracy) and “incidental and even accidental on-line copying at home for private non-commercial use.”

I find little or nothing in the Charter or FAQ to disagree with. It’s an excellent starting point for a balanced discussion of balance.

Unintended consequences:

Seven years under the DMCA

This 15-page paper (v.4, April 2006, available at www.eff.org) is the latest in a series studying the real-world effects of DMCA in chilling free expression and scientific research, jeopardizing fair use, impeding competition and innovation and, surprisingly, interfering with computer intrusion laws. EFF may be unnerving on some issues, but their fact-finding is excellent and this paper spells out real examples.

I reviewed version 2.1 in March 2003 (*C&I* 4:1); that version (subtitled “four years under the DMCA”) was ten pages long. I believe most of the actual cases cited there are still in the newer version, joined by some others that are equally astonishing. It’s worth noting that then-White House Cyber Security chief Richard Clarke has expressed concern that the DMCA has chilled legitimate computer security research.

You’ve heard about some of the abuses of DMCA over the past three years. Streambox being enjoined from offering a product to time-shift streaming media. Apple threatening DMCA action after RealNetworks announced technology that would *enhance* Apple iPods by enabling them to play Real downloads. Apple (again) preventing a small retailer from making it possible to use iDVD software on older Macs using external DVD burners, threatening DMCA suit. And so it goes.

What’s the Story?

The good people at *It’s all good* reminded me (and others) of the importance of *story*—something that I’m afraid is frequently missing from *C&I* essays.

The story here begins with what I believe copyright balance is all about—and a series of examples that may help show why balance is so difficult to achieve and even difficult to advocate. Balance is boring. It’s bland, the work of liberals, detested by radicals and conservatives alike. It’s also (in my opinion) where the world works best. It’s easy to take a position just one step shy of the most extreme and call it

“balanced,” as CDT seems to do. It’s all too easy for extremists to accuse balance proponents of being at the other extreme.

Do I believe we’ll achieve a copyright balance that I’d find wholly satisfactory? Probably not. I believe the best that’s achievable, given the forces at work, is a *tendency* toward balance—and, with any luck, a tendency against further overprotection.

Libraries need balanced copyright. Creators need balanced copyright, although copyright holders may be served better by extreme copyright. Citizens, creators, and (if you must) consumers are all part of the same pool, and most of us are all three at some point. We need to work toward a balance we can live with.

Interesting & Peculiar Products

MusicGiants and SoundVault

If you care about sound quality, legal downloaded music has always been problematic (to say nothing of illegal downloaded music!). Most services offer something a little better than 128K MP3, but in most cases it’s still a compression rate that assures careful listeners will hear some degradation.

That’s changing, according to a story in the January 2006 *Absolute Sound* (confirmed elsewhere). The four big record publishers have formed MusicGiants Network, which offers tracks in Windows Media Audio Lossless format. “Lossless” is the key term. As with Apple’s lossless format and one or two other variants, WMA Lossless doesn’t compress all that much but *assures* that the original bitstream emerges from decompression. So if the CD sounds good enough, the WMA Lossless version should sound at least as good (there are plausible reasons it could sound better).

It’s an expensive service. Tracks cost \$1.29; albums cost \$15.29—or more than a CD (with cover art, insert, and jewel box) *should* cost. You pay a \$50 annual fee up front but get a \$50 credit toward music—and if you buy \$250 worth of music each year, the renewal fee goes away.

Apparently the Big 4 see relatively wealthy clients as the target audience; thus the hardware companion, the SoundVault. This is a home-audio server “meant to take the place of a CD player in an audio rack” with a 380GB hard disk, “enough to hold about 10,000 songs” in WMA Lossless format (figure 2:1 compress-

sion at most, so that sounds right). The SoundVault includes an embedded version of Windows XP, a whole range of inputs and outputs, and expansion capabilities—and it costs \$9,500! For that price, you think they'd throw in a terabyte of storage (after all, that would only be some \$500 worth of hard disks).

By the way, paying the price of a CD doesn't buy you the flexibility of a CD: WMA Lossless files still carry DRM.

Realistic Tablet PCs?

Fujitsu's LifeBook T4020D (\$2,150) as reviewed in the February 7, 2006 *PC Magazine* may be a realistic option for those who want tablet PCs—some of the time. It's a 4.6lb. convertible: A notebook computer with full-size keyboard and touchpad, but with a 12.1" screen that can swivel to cover the keyboard and become a proper tablet PC. While this isn't the thinnest or lightest tablet, it does include a DVD-ROM/CD-RW combo drive and is well equipped in other respects.

Sony Reader and Philips RADIUS

"If these two products don't herald the age of e-books, nothing will." It's a shame Sebastian Rupley concluded his *PC Magazine* "Pipeline" writeup of these two ebook readers with such a conclusive statement. Particularly when taken with the tease "Can innovative new designs convince people to chuck their paperbacks?" it's a nice way of projecting failure.

I'm not saying the Sony Reader (Sony's American version of its E Ink-based reader, "to be priced between \$300 and \$400") or the roll-up Philips RADIUS (prototype only, predicted shipment this summer, no price) will fail as devices. (The illustration of the RADIUS shows contrast so low that "eye-popping" might be read in a negative manner, but the scrolling idea is charming in theory. The Sony looks about the same as pictures of the Japanese version: Good, if certainly not paperback quality.) You can bet Sony will have DRM attached to the ebooks it's selling at Sony Connect, but the reader's also supposed to display PDF, which helps. Oddly, they've also made it a music player, and "7,500-page" battery life won't mean much if you're decoding and amplifying MP3 while reading ebooks.

What I will predict is that neither device will "convince people" in general to "chuck their paperbacks"—that's just not going to happen. There's a sound potential multibillion-dollar market for ebooks

under the right conditions, but it's not massive replacement of trade books. On the other hand, even if the Sony Reader and Philips RADIUS both fail miserably, those failures in no way preclude the eventual success of ebooks, in some markets, on some devices.

Really Cheap PCs

The story title: "Your Next PC Will Cost \$159." *PC Magazine* (March 21, 2006 again) seems to be serious. Fry's Electronics has (or had) a "GQ 3131" computer selling for \$159. Black minitower, decent generic keyboard, generic mouse, "terrible" speakers. 128MB RAM, 40GB disk, CD-ROM drive. Add 512MB RAM for another \$40 (\$199 total), and it would run decently—it has a 1.67GHz AMD Sempron chip. Linux, of course, in the form of Linspire (formerly "Lindows"); four USB ports and Ethernet. Linspire includes OpenOffice 1.1.3.

The verdict? If you already have a display sitting around, this is a workable system, but don't try to run it with the supplied RAM.

Really, Really Cheap Home Theater

Home Theater ran an unusual three-page review in its April 2006 issue, certainly suitable for the month but a full-scale review of an apparently real product, also from Fry's Electronics: the GPX HTD2204 HTIB. (GPX is real enough, making a range of cheap electronics products. I can't verify the reality of this particular model on Outpost.com, Fry's web presence, but the photo looks genuine.)

What you get: A *progressive* DVD player (that is, one that will turn out 480p signals for HDTV as well as the usual 480i for regular TV), "subwoofer" with amplifiers for all the speakers, and five little speakers for the five channels. Add a TV and you have a complete 5.1-channel home theater system. Systems that combine five speakers, a subwoofer, DVD player, and amplification aren't unusual; they're usually referred to as "HTIB," home theater in a box, and they're usually several hundred dollars—typically nothing great, but a way to get surround sound from your DVDs without much hassle.

But the price here isn't a few hundred dollars: It's \$60. Naturally, the salesperson at Fry's wasn't anxious to sell the only unit on hand (and, to be sure, suggested an extended warranty when reviewer Geoffrey Morrison insisted on buying the unit).

The benefits of this system are easy to recount. It's absurdly cheap and Morrison says the manual is

actually fairly well written—although it's also incomplete (not mentioning, for example, how to turn on progressive scan). That's about it.

Otherwise? The DVD player isn't awful. The "subwoofer" has some response down to 50Hz, but its peak output, and the output of the other speakers with their 3" "woofers" below about 1000Hz, is a good 10-15dB lower than those speakers' output in the treble. You don't get much bass, much midrange, or really much of anything: "Put a pair of headphones on a desk, and you can approximate this system's volume level and sound quality." In other words, "cheap" in this case is true in both meanings.

Morrison's conclusion: "If this is all you can afford, go for it. Otherwise, don't."

Nine Megapixels for \$500

If you've switched (or are switching) to digital cameras and want to make big prints or manipulate your images a lot, that headline should be intriguing. *PC Magazine* awards an Editors' Choice to the Fuji FinePix E900 in a full-page April 11, 2006 review, not only because of the impressively high-resolution image sensor but also for the other features that matter.

The FinePix runs on two AA batteries; it has a 4x optical zoom lens starting out at a fairly wide angle; although it's a point-and-shoot camera, it will save RAW (uncompressed) files; and it captures images with a wide dynamic range. Tested resolution hit the limit of *PC*'s test target. The camera's quick to boot up but slow (4.7 seconds) to recycle.

Zen MicroPhoto

Ten colors, eight gigabytes, four ounces (well, 3.8), \$250. That's the new Creative Zen MicroPhoto, and it's a strong competitor as an MP3 player and occasional photo viewer. It's compact (2x3.3x0.7"), the 1.5" color screen uses OLED technology, offering vivid colors and wide viewing angles. The device meets MS PlaysForSure DRM standards for protected WMA files—but it doesn't support lossless compression formats or Audible.com content (yet). Sound quality was very good; the rechargeable battery lasted about 15 hours. An FM tuner is included, and you can record from FM. The control pad glows in the dark. *PC Magazine* gives it an Editors' Choice.

Teraboxes

PC Magazine looks at two one-terabyte external hard drives in a full-page April 11, 2006 review, giving the

Editors' Choice to Maxtor's \$900 OneTouch III Turbo (over Iomega's \$800 XL Desktop Hard Drive), partly because it's smaller, partly because you can configure its two internal 500GB drives as a 500GB RAID 1 subsystem, offering good backup security. Unfortunately, the disks aren't removable.

There's a true peculiarity in the first paragraph of the review, given *PC Magazine*'s reputation as the premiere PC journal:

So how much is a terabyte, really? Well, besides the abstract notion of its being 1 million kilobytes...

I'm *certain* that *PC Magazine* employs copy editors. Those editors should be knowledgeable enough to know that one million kilobytes is a gigabyte. A terabyte is one million *megabytes* or a thousand gigabytes or one *billion* (U.S. billion) kilobytes.

Disc Stakka

Both interesting and a little peculiar, this product looks like a plausible solution to some public library problems—and the first time I heard about it, at least, was from a blogger in Queensland, Australia: Deb, the Real Public Librarian.

She calls them the "towers of terror," and the five-high stacks in the photo are a bit terrifying. They store optical discs, CDs or DVDs, 100 to a unit, under computer control. In a way, they're like Sony's megajukeboxes (but only 100 discs, not the 400 that a Sony unit can hold)—but designed to retrieve and eject discs, not play them. For libraries that find theft too much of a problem to have actual CDs and DVDs on the shelves, Disc Stakka systems may be more compact, retrievable and secure than having binders full of sleeved discs behind the counter.

They're not ideal, and her post notes reasons why. They may have started in Australia, but Imation offers them in the U.S. as well. (Imation's not a fly-by-night; it began as the data media arm of 3M.) I see online store prices around \$110 U.S. as of this writing.

Perspective

High-Definition Optical Discs: What You Need to Know Now

HD DVD. Blu-ray. They're both 12cm. discs, the same size and thickness as CDs and DVDs. They're both primarily designed for high-definition movies and

other video, with three to five times the storage capacity and playback data rate of DVDs. They're both either just on the U.S. market or just about to reach the U.S. market, after typical delays. Here's what I believe you need to know now—as people and as librarians.

The Short Version

Unless your academic library supports a film studies department or your public library is extremely well funded and supports a high-income population of early adopters, you can *and should* ignore both high-def disc formats for at least a year and probably two years or more.

If your library started acquiring DVDs in the first half of 1997, you may be one of the rare exceptions. If you didn't start until 2000 or later (and that delay served your patrons) then you need read no more: If you *ever* need high-def discs, it won't be for at least a couple of years.

Film studies? You probably had a collection of 12" LaserVision discs until recently. If you already have HDTVs available, you'll probably be acquiring *both* high-def discs fairly soon. The bad news is that there are two incompatible (for now) formats, and the early players are pricey. The good news is that the discs are priced closer to DVDs than to the old first-release videocassettes—and there won't be enough of them this year to burden your budget.

A High-Def FAQ

For those who want more information or are considering early adoption at home, these notes may be useful. I've been tracking HD DVD and Blu-ray since they were first mentioned, but background for these questions and answers comes from four primary sources: James K. Willcox' "The format war goes nuclear" in the April 2006 *Sound & Vision*, Gary Merson's "HD DVD versus Blu-ray" in the May 2006 *Home Theater*, a multiauthor special section on HD DVD & Blu-ray in the May 2006 *Sound & Vision*, and David Pogue's overly-cynical "Why the world doesn't need hi-def DVDs" in the May 11, 2006 *New York Times*.

What do both formats have in common?

- Both HD DVD and Blu-ray use blue-violet lasers (405 nanometer wavelength) to read 12cm (or 120mm) discs that are 1.2mm thick. Those physical dimensions are identical to DVDs and CDs (DualDiscs, which are CDs on one side and DVDs on the other, are slightly more than 1.2mm thick).
- Both are designed for high-definition video, with up to six times the resolution of DVDs.
- Both use heavier-duty DRM than DVDs: Advanced Access Content System in addition to other protections—but, unlike DVDs, both formats are *supposed* to provide a way to copy a movie to a hard disc or a portable player ("Mandatory Managed Copy") while preventing further distribution. AACS can (but need not) include an "Image Constraint Token" that lowers component video output resolution to a maximum of 960x540, one-fourth the possible maximum resolution; that might partially cripple such discs for early adopters of HDTV (those whose sets don't have HDMI or DVI/HDCP inputs). Studios have said they won't use the token on initial releases.
- Both will offer more advanced surround-sound options than DVDs with higher quality, more channels, and potentially many more alternate sound channels (for languages, commentary, etc.).
- Discs should cost a few dollars more than new-release DVDs: Current projections are \$35 to 40 suggested retail for new releases, \$25 to \$30 for older items. (Amazon already lists some discs in both formats, suggesting that discount prices will be \$20 to \$25+.)
- HD DVD and Blu-ray players will also play DVDs and CDs. As with DVD players, there's less assurance that any given player will handle all of the recordable variants.
- Warner Brothers, Paramount, New Line, and HBO plan to release discs in both formats. Netflix plans to rent discs in both formats. HP, LG, and Samsung are backing both formats and plan to develop "universal" players that can handle both formats.
- Discs that began as movies should be mastered as "1080p/24"—that is, 1920x1080 resolution, with a full frame at that resolution generated 24 times a second. (24 frames per second is the standard rate for movies, as opposed to 30 or 60 fps for video.)
- Players for both formats will allow you to make menu selections while the picture is playing (or while pausing the selection). In practice, some DVD players already allow you to change options while a picture is playing but you have to make the changes using the

player's menu system rather than the disc's menu system.

- Recorders and burners (recording drives for PCs) will be available for both formats, probably within a year.

What's different about HD DVD?

HD DVD was primarily developed by Toshiba, and its biggest strength is that it's *very* similar to DVD—similar enough that the same production lines should be able to handle HD DVD with little adjustment. That should mean lower production costs for discs, at least initially. (The lowest information layer is 0.6mm from the surface. The laser spot size is 0.62 micrometers, as compared to 1.1 micrometers for DVD.)

Single-layer HD DVDs store 15GB of data, just over three times as much as single-layer DVDs. Dual-layer HD DVDs will store 30GB. HD DVD can transfer data at up to 36.55 mbps, as compared to 19.39 mbps for broadcast HDTV and 10 mbps for DVD. Note that these are all maxima—in the real world, most DVDs have much lower average data transfer rates, and the same will be true for high-def discs.

Most HD DVDs will use MPEG-4 or VC-1 (otherwise known as Windows Media 9) data compression, more aggressive compression schemes than the MPEG-2 used for DVDs. At least one Microsoft honcho claims that MPEG-2 “will not look as good” as VC-1 at the highest possible resolution (1920x1080 progressive). Notably, although HD DVD discs will supposedly be mastered at 1080p, the first generation of HD DVD players won't output 1080p.

The royalty package for HD DVD players supposedly totals around \$12 per player.

The first HD DVD players from Toshiba sell for \$500 and \$800 and are already on the market. (An RCA model that may be on the market is a Toshiba player with an RCA faceplate.) More will follow from other makers. Microsoft plans to offer an HD DVD drive for the Xbox 360 some time in 2006.

Interactivity on HD DVDs will be based on Microsoft's iHD software, in turn based on XML.

Some studios will release dual discs, with a DVD on one side and an HD DVD on the other. In the future, three-layer HD DVDs might yield 45GB capacity.

Backers of HD DVD include Toshiba, Sanyo, Microsoft, NEC, and Universal.

What's different about Blu-ray?

Sony is the primer mover behind Blu-ray—but it's made every effort to build a strong coalition. The Blu-

ray Disc Association includes more than 170 companies, including most of the consumer electronics companies that were on the “VHS side” in the first recorded video format war. While Blu-ray discs are the same size and thickness as DVDs, the primary information layer is a mere 0.1mm from the surface—and those discs have a new “scratchproof” coating to make such fine tolerances workable. The laser spot size is 0.48 micrometers.

Single-layer Blu-ray discs store 25GB of data, just over five times as much as single-layer DVDs. Dual-layer Blu-ray discs store 50GB of data. Blu-ray can transfer data at up to 48 mbps.

While Blu-ray discs could use MPEG-2, MPEG-4, or VC-1, most initial releases from core Blu-ray backers should use MPEG-2, including all of those from Sony-owned studios, which will aim for an 18mbps data rate. (Warner will use VC-1 for both Blu-ray and HD DVD discs.) Sony claims that MPEG-2 at the high data rates that Blu-ray's capacity makes feasible will yield the best possible pictures. All Blu-ray players will support 1080p output.

The royalty package for Blu-ray supposedly totals around \$30 per player.

The first Blu-ray players will list for \$1,000 and \$1,800. Samsung should have players out at the end of May or early June with Pioneer and Sony close behind. Sony's PlayStation 3 includes a Blu-ray drive.

Interactivity on Blu-ray discs will be based on Blu-ray Disc Java (BD-J), itself based on Java.

While dual discs have been demonstrated using Blu-ray on one side, no studio has said it would release such discs. Multilayer Blu-ray discs holding 100GB have already been demonstrated.

Backers of Blu-ray include most PC and consumer electronics firms (Apple, Dell, Hitachi, Mitsubishi, Panasonic, Philips, Pioneer, Sharp, TDK) and studios (Sony/Columbia/MGM, Fox, Disney/Miramax/etc., Lions Gate). Almost every Hollywood studio belongs to the Blu-Ray Disc Association.

Why are there two formats?

Money, technology and ego. The primary developers on both sides covet the patent royalties. Sony and Blu-ray friends argue that the higher-capacity disc will be needed; Toshiba and HD DVD friends claim that HD DVD's similarity to DVD will make the “transition” faster and easier.

Discussions toward a compromise took place over several months. Similar discussions (and a

healthy shove from studios and computer makers) finally resulted in a single DVD format (two competing formats had been developed, but only one made it to market)—but this time, talks fell apart.

Who benefits from high-def discs?

The cynical answer is “studios and consumer entertainment companies”—but that’s only true if people decide high-def discs and players are worth buying.

The real answer is another question: When do high-def discs make a difference?

There’s a primary answer and a secondary answer. The secondary answer is so arcane at this point that it’s probably not worth worrying about.

Primarily, high-def discs matter if:

- You have an HDTV with a large enough screen for the difference to be visible (At least 40" diagonal, although I’ve seen suggestions that 35" might be large enough). If you’re watching *very* close up, as you might (for example) on the forthcoming Toshiba Qosmio supernotebook with its 17" high-def screen and HD DVD player, you could also find the difference worthwhile.
- You can see the difference between true high-definition TV (at least 720p) and regular DVDs (480i)/standard TV. Apparently, millions of people who *own* HDTVs don’t *watch* HDTV (they have an HDTV monitor and haven’t acquired an appropriate tuner or set-top box, or they have an HDTV but don’t know how to find HDTV stations) and aren’t aware that they’re missing anything.
- You *care* about the difference. Nobody really knows how many people will find high-quality DVD, upscaled to HDTV resolution (although “upscaling” doesn’t add new picture information), “good enough” when compared to high-def discs.

Secondarily, the extra storage on high-def discs *could* matter in several special situations:

- You don’t care much about the extra visual quality, but your golden ears are offended by the shortcomings in current DVD surround sound. High-def discs should have higher-quality sound and more channels.
- You’re looking for language tracks that aren’t on current DVDs; with up to 32 channels, high-def discs *could* include a wide choice of dubbed or subtitled choices—although that

requires that studios go to the expense of providing such choices.

- You’re hot for interactivity. Increased data rates, more data space, and internet connectivity (which will be present in most players) could yield much more interesting interactions—but how many of you think much about DVD interactivity?

What happened in similar format wars?

Similarity can be hard to define, but here’s a quick take on several dual-format situations, offered chronologically:

- **Videocassettes:** Betamax was first and better, but VHS had a longer recording time and more big companies behind it. **Outcome:** It took more than a decade for complete victory (actually 13 years, the period from Betamax’ introduction until Sony introduced a VHS recorder), but VHS won. (Betamax really wasn’t “first”—it was maybe fifth or sixth or tenth, but it was the first videocassette format to have any significant success in the home.)
- **High-definition audio:** DVD-Audio and Super Audio CD (SACD) came out at roughly the same time, both using DVD capacity to store higher-resolution sound and surround sound. **Outcome:** In this case, nobody won: While DVD-A and SACD still exist, neither could be considered a success. Most SACDs were probably sold because they were compatible hybrids (dual-layer discs with one layer playing as a CD, the other as an SACD, e.g., some Rolling Stones and Bob Dylan releases), and it’s notable that Sony—originator of SACD—releases a few DVD-As and has basically scrapped SACD. A few high-end classical labels still release SACD. “DualDiscs” keep DVD-A in the market, but barely, particularly because some players can’t handle the slightly-out-of-spec CD side. The question that really can’t be answered is whether the dual failure is because there was a competition or because most listeners don’t care about surround sound and couldn’t hear the difference between CD and high-res audio. My guess is the latter. I would note that “universal players” became available within a year of the formats’ release, and eventually became affordable—but nobody much cared.

- **Recordable DVD:** DVD-R/RW and DVD+R/RW emerged at roughly the same time (as did another format, DVD-RAM, which is primarily limited to specialized uses). Each format had certain advantages and a range of supporters. The advantages were subtle enough to be mysterious to most of us. **Outcome:** For most computer users, a draw: Virtually all modern DVD burners will handle all recordable and rewritable DVD formats except DVD-RAM.

Takeaways and Possibilities

This is my own conjecture. I'm not planning to invest in either format for some time, so I'm not actually betting on any of this.

People aren't clamoring for high-def discs. When DVDs came out, they offered obvious advantages in picture quality, convenience, and extra features. The difference between high-def discs and DVD will, I suspect, be perceived by almost everyone as much less significant than the difference between DVD and VHS—and for most of us (everyone who doesn't have a big HDTV), there is no useful difference.

That doesn't mean (as David Pogue implies) that the only reason for high-def discs is because everyone has a DVD player and most everyone has most of the discs they want, and business wants to sell us all *new* players and resell the movies once more. There **is** a difference in picture quality almost everyone with good vision can see on good sets. Good high-def discs should yield significantly better pictures than broadcast and cable HDTV, just as DVDs yield much better pictures than standard-definition broadcast and cable TV. Despite his cynical lead Pogue admits, "The average person can see the difference in picture quality."

I do **not** believe studios will try a muscle play, forcing people to buy high-def discs by dropping new DVD releases. The move to CD was in part a forced play by the record companies—but if you remember, studios didn't stop releasing videocassettes until DVDs were already in most U.S. households (some videocassettes are still being released). Record companies would have *loved* to get us to buy all our CDs again in SACD or DVD-A form, but when we didn't cooperate, the CDs just kept on coming.

My best guess is there will be a trickle of discs in both new formats for the next few months; optimistic predictions are that perhaps 200 in each format will be in stores by the end of the year.

A reasonably priced chipset is already available that can handle both high-def formats. I suspect we'll see at least one "universal" player by this Fall, probably at no more than \$600, and that we'll see a steady stream of them next year—if there's any real consumer interest in the high-def formats.

It's quite possible that neither format will catch on with the public. This holiday season will tell part of the story, but the 2007 holiday season is probably critical: If players aren't selling by the hundreds of thousands and there aren't thousands of discs, both formats may be headed for niche status or failure.

If I had to bet on one of the formats, I'd bet on Blu-ray. It has the best technology, the most studios, the broadest range of supporters—and although it's theoretically more expensive, I note that Amazon's prices for early Blu-ray (pre)releases are consistently as low or lower than HD DVD prices. But it's a tough bet: You could make a good case for HD DVD as well.

For now—well, if I was a librarian, I'd wait a year or two to see what develops. Meanwhile, you know I'll be following the story.

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Finding a Balance 2: Signs of Imbalance

When life veers from one extreme to another, some of us look for balance—and recognize that balance means something other than negotiating among various extremes. The same should be true for copyright. You won't gain balance by adding up the extreme protectionist view and the extreme anti-copyright view and dividing by two: The resulting center has no basis and cannot hold.

Nevertheless, it's useful to look at some extremes and their consequences. Most items here fall on the extreme-protectionist side, because that's where most of the action is: Few Americans actually argue against copyright, but many corporations and associations push for extreme protection.

Bridgeport Music v. Dimension Films

No Limit Films released a movie *I Got the Hook Up* in May 1998. The soundtrack included "100 Miles." That song included *three notes* of solo guitar from "Get Off Your Ass and Jam" by George Clinton, Jr. and the Funkadelics. The sampled music was lowered in pitch

and “looped” to run 16 beats, the resulting seven-second loop used five places in the new song.

Omitting a bunch of other stuff, a district court concluded that the sampling was *de minimis* copying—a trifle that couldn’t justify legal action. On appeal, in 2004, this decision was reversed—with the remarkable finding that *any* sampling of a musical recording that’s at least two notes long could be considered an infringement. “Get a license or do not sample. We do not see this as stifling creativity in any significant way.” Notably, copying three notes from sheet music *would* be dismissed as a trifle—but once it’s recorded, that music gets total protection.

If that isn’t bad enough, the court claims that *digital sampling* is “a physical taking rather than an intellectual one,” because it’s copying sounds from the original recording. The court also says creativity isn’t at issue because many artists and record companies seek licenses as a matter of course—and “the record industry...has the ability and know-how to work out guidelines...if they so choose.” Therefore, apparently, sampling without license is entirely off limits. Fair use? Not even mentioned.

The Sixth Circuit Court of Appeals agreed to rehear the case. One interesting amicus brief for that rehearing came from the Brennan Center for Justice at NYU School of Law and the Electronic Frontier Foundation. They note, among other things, that hearings during the 1976 Copyright Revision Act included the express statement that only “substantial” copying from sound recordings would violate copyright. “Courts have long recognized the centrality of quotation from earlier works in the creation of new art, particularly music.” The Ninth Circuit does hold that there’s a minimal level beneath which sampling isn’t infringement: If nothing else, the level at which “the ordinary lay observer [cannot] discern or recognize the sampled material.” Would a typical moviegoer hearing “100 miles” say “hey, that’s copped from the Funkadelics and Get Off Your Ass”? Eliminating any such level appears to be unprecedented.

In June 2005, the Sixth Circuit panel essentially reaffirmed its earlier decision: A “bright line” saying that *even two notes* can be infringement is a good idea, entirely ignoring issues of balance and fair use.

By the way, RIAA was on the “right side” this time around: It argued against the Court of Appeals’ ruling and for continuing to consider *de minimis*. Oh, and RIAA’s brief mentions fair use—a concept that the association favors when it serves RIAA interests.

Well, heck, getting a license is just a little bother, right? And maybe a little cost: Apparently a sub-three-second sample can cost \$1,500 to \$5,000 to license. The song in question wasn’t on the soundtrack CD for the movie.

Put that Frosting Gun Down Slowly...

Ever had a cake custom-frosted? Traditional bakeries can do remarkable things; those with frosting-jet printers (I don’t know what else to call them) can go truly wild, since they can scan a photo or drawing you provide and produce a fairly high-quality rendition. All of it edible.

But here’s the sign at College Bakery, as noted by Clay Shirky in a June 16, 2005 *boing boing* posting: “College Bakery no longer accepts edible images from any outside sources.” Why? Because the bakery had been told it might be sued for copyright infringement if a recognizable image of, say, Dora the Explorer or Thomas the Tank Engine showed up on a cake. Shirky’s interpretation of College Bakery’s statement: “The risk of being sued is so high that we’ll give up on helping paying customers create their own cakes.”

Shirky thinks it’s stupid. “First of all, disappointing children is a lousy tactic for a media company. If a child loves Nemo so much she wants a clownfish birthday cake, it’s hard to see the upside in preventing her from advertising that affection to her friends.” And, to be sure, it’s a chilling effect.

Consider the infringement, if there is one. We’re not talking distribution here—“the image is designed to be eaten...within hours of its creation.” No unlimited copies. No easy transition to other media. “And what happens? The same grab for total control, and the same weak regard for side-effects on non-commercial creativity.”

One law clerk managed to get *very* confused about IP law in a long comment attempting to justify this. “Companies don’t run around trying to enforce their copyright because it brings them joy, they do it because they have to.” That’s *trademark*, not copyright; and even there, one wonders just how heavy-handed you have to be. (Yes, Lsoft has to gripe at people once in a while to retain “Listserv™” as a trademark for its list processing software, because it’s one that’s on the verge of being aspirined—of losing trademark status. Still, I’ll guess that if you said “Congrats on the new listserv” on a celebratory cake, Lsoft lawyers wouldn’t be in your entryway.) The law clerk equated College Bakery’s cake decorations with “steal-

ing from another company,” and seemed to think it reasonable for this little bakery to “negotiate with each of the companies involved to pay for the right to SELL the images those companies created.”

Jason Schultz commented at length suggesting a balance—that those who love copyrighted and trademarked characters should have *some* rights, e.g. fair use rights. You shouldn’t be able to do your own commercial Dora the Explorer cartoons or books without a license—but a cake? Even for trademark, it’s a reach: “[N]o one would ever start calling cartoons ‘Doras’ and birthday cakes aren’t even in the same class of goods.” As Schultz suggests, it’s really about total control: “The idea that someone other than the creator might actually make use of the character without permission is what drives copyright maximalist authors, owners, and advocates crazy, not loss of rights or even, often, compensation.”

I haven’t tried to do a photo cake recently. Do you need to fill out a form asserting that you took the photo and it contains no trademarked images?

Enhancing the Video Signal

This one’s tricky and goes back to a device I saw during ALA in Toronto: the Sima GoDVD! or something very much like it. The GoDVD! is or was a \$130 box that “enhances” analog video so you can convert it to digital form to burn to DVD—and you could connect it to the *analog video* output from a DVD player to back up (copy) a commercial DVD (losing menus and special features in the process).

Sima claimed it wasn’t a DMCA violation because it didn’t operate in the digital domain. It also wasn’t a violation of Macrovision’s enforced licenses because it wasn’t a VCR—but the video enhancement had the effect of undoing Macrovision’s videocassette (and apparently DVD) copy protection, which for video relies on signal distortion of a sort. (On our old TV, we could see the effects on most commercial videocassettes: the top inch or so was wavy.) Seth Finkelstein clarified my original comment: DMCA includes a special clause to protect Macrovision copy protection (“automatic gain control copy control technology”) by outlawing any consumer *recording* device that ignores the protection. But, Sima said, it’s not selling VCRs; it’s just selling video enhancement.

Sure enough, come June 2005, Macrovision sued Sima and another corporation, with the claim that Sima’s Video Enhancers “are principally used to allow consumers to make unauthorized copies of copy-

righted DVDs” and that they infringe Macrovision’s technology and violate DMCA. As Finkelstein notes, even if Sima and the other corporation have a reasonable legal defense, “*funding* that legal defense may bankrupt them.”

In April 2006, a U.S. district court granted Macrovision’s request for an injunction preventing Sima from selling its products. The Consumer Electronics Association issued a statement, with its CEO Gary Shapiro saying:

Consumers should be outraged by today’s decision. The devices Sima Products manufactures simply allow consumers to use digital techniques to make up for viewing artifacts in analog material—some from age or distortion, and some caused as a result of the use of distortive copy protection techniques. Such products have been necessary and available, in the analog and digital domains, for years. The legislative history of the 1998 Digital Millennium Copyright Act (DMCA) is clear that passive analog measures that distort video signals are not “technical protection measures.” Indeed, the “No Mandate” clause of the DMCA (Section 1201(c)(3)) makes this clear. To consider them as such, and for courts to extend the reach of a problematical law is another extreme example of the growing imbalance between consumer rights and intellectual property rights.

The DMCA should not trump consumer rights. When a court sends a message to consumers that they can no longer transfer their home movie archives between software platforms, and cannot correct artifacts caused by passive copy protection techniques, it’s clear the scales are tipping too far in the content industry’s favor. It’s time to stop government intrusion into private, non-commercial home entertainment practices.

Imagine a World without Copyright

That’s the title on an October 8, 2005 story in the *International Herald Tribune*, by Joost Smiers and Marieke van Schijndel. Even understanding that these are Europeans speaking to a different copyright regime, the story starts out badly and serves primarily as an odd example of the other extreme: The concept that we’d be better off if there was no copyright.

“Copyright was once a means to guarantee artists a decent income.” That’s the lead sentence and it’s complete nonsense. *Patrons* were once ways to guarantee artists a decent income, and patronage is about the only way to provide such a guarantee. The most extreme form of copyright won’t “guarantee” a dime to an artist, much less a decent income. It never has and—at least in the U.S.—it was never intended to. The authors say that it now serves an “altogether different purpose”: “It now is the tool that conglomerates

in the music, publishing, imaging and movie industries use to control their markets.” Not as false as the first statement—but copyright isn’t *the* tool (DRM, combinations in restraint of trade, inherent small monopolies in creative works and trademarks are also important tools), and copyright *does* serve creators themselves in addition to protecting Big Media.

The authors claim extended copyright results in “The privatization of an ever-increasing share of our cultural expressions” and that “Our democratic right to freedom of cultural and artistic exchange is slowly but surely being taken away from us.” I don’t get it. Copyright doesn’t “privatize” anything that was already in the public domain (except in a few bizarre cases), and copyright *by itself* does not restrict “cultural and artistic exchange” except to the extent that creators or their agents insist on such restriction. When you buy a book, you’re as able to give it away or trade it for another book as you ever were—and if there are problems doing so with an ebook, those problems come from DRM, not copyright as such.

The authors assert that *every* artistic work “derives the better part of its substance from the work of others, from the public domain.” That’s a tough assertion to prove—and I doubt the claim that “in no other culture around the globe, except for the contemporary Western one, can a person call himself the owner of a melody, an image, a word.” Really? *No other cultures* allow a painter to claim ownership of their painting?

What do the writers propose? Eliminating the “luxurious protection offered by copyrights”—**entirely**. They claim that this will strike “a fatal blow to a few cultural monopolists who...use their stars, blockbusters and bestsellers to monopolize the market and siphon off attention from every other artistic work...” This sudden inability to create blockbusters comes about because “we can freely exploit all existing artistic expressions and adapt them according to our own insights.” Huh?

Somehow, this means “many artists” would “no longer be driven from the public eye and many of them would, for the first time, be able to make a living off their work.” How? Not stated, except that they wouldn’t have to “challenge—and bow down to—the market dominance of cultural giants.” I sense that the authors believe there would be no best-selling books or blockbuster sound recordings were it not for Big Media monopolies—that the so-called “long tail” would take over entirely, yielding adequate sales for everyone. This makes no sense to me.

Even these anti-copyright folk accept that “certain artistic expression...demands sizeable initial investments.” They propose that “the risk bearer... receive for works of this kind a one-year usufruct, or right to profit from the works.” Their examples of such high-investment works? Movies and novels. So movies get one year to earn back their costs and make a profit (although many small movies and independent movies only earn back their costs when released on DVD, and TV series may require years of reruns to earn a profit). Novels? Since when do novels demand “sizeable initial investments”—particularly as compared to, say, sound recordings or TV shows?

Ah, but that’s not enough. What do you do “when a certain artistic creation is not likely to flourish in a competitive market”? You know, like when the “artist” is producing worthless crap but still claims to be an artist? There’s always a solution: “It would be necessary to install a generous range of subsidies and other stimulating measures, because as a community we should be willing to carry the burden of offering all kinds of artistic expressions a fair chance.”

There it is. Without copyright, we would have “more, and more diverse” forms of entertainment. “A world without copyright would offer the *guarantee of a good income* to many artists, and would protect the public domain of knowledge and creativity.”

Interesting. No copyright, but guarantees of “a good income” for artists. I presume that we’d have boards to determine who’s an artist and who’s a hack? Or would you simply fill out your Assertion of Artistry, attach a copy of the novel, or sound recording, or sculpture, and collect your subsidy?

Not all extremists are on the Big Media side.

Library CDs and Digital Ethics

Here’s one that gets tricky: A post by Jason Griffey at *Pattern recognition* on October 19, 2005, “MP3’s, audiobooks, and libraries.” He got an email from an acquaintance asking his thoughts on ripping audio CDs that are borrowed from the library. (Griffey says “audiobooks,” but the CD in question was a music CD.) The friend checked out a CD “and ripped it to listen to [on] my iPod. I then, honestly, felt guilty...”

The friend pointed to a *boing boing* post where a reader asked Neil Gaiman how he felt about copying library audiobooks to an MP3 player. Gaiman doesn’t believe the person’s broken a law, and says “you’d be expected” to copy an MP3 CD borrowed from the li-

brary “onto your iPod, after all.” But here’s where it gets interesting, and where balance becomes difficult:

There’s a weird sort of ethical fogginess, in that I suspect that part of the idea of libraries is that when you’re done with something you return it, and of course once you have your MP3 on your computer and iPod you can keep it forever. But I think this is just one of those places where changes in technology move faster than the rules...

Probably wisest not to pull it off your iPod and give it to other people, though. Let them at least take it out of the library themselves.

Griffey’s take is that copyright is out of control—and that copying library audiobooks “counts as fair use. It’s format shifting.”

Well, yes...and no. It’s format shifting *while you have the CD checked out from the library*. I have no ethical problem with that—listening to the audiobook or Jimmy Buffet music on your preferred device. But, as Gaiman says indirectly, library circulation is *consecutive* multiple use, allowed under the First Sale doctrine: That purchased copy can be used by any number of people, *one at a time*.

When you return the CD and keep the ripped copy, you’re infringing copyright. It’s not piracy by my standards; it’s informal sharing, which should be regarded as a far less serious offense. But it’s also ethically wrong by my standards. If you wish to retain permanent use of a copyright object, *you should buy it*.

Strong Copyright in the Blogosphere

Daniel J. Solove posted a thought-provoking piece at *Concurring opinions* (www.concurringopinions.com) on December 15, 2005: “What if copyright law were strongly enforced in the blogosphere?” What if mainstream media initiated vigorous copyright enforcement against bloggers?

“The blogosphere would be in for some tough times I bet. Bloggers frequently copy large chunks of mainstream media articles and some of us copy pictures we find on the Web.” Solove says bloggers quote liberally “because the mainstream media is notorious for creating dead URLs”—but I find that ingenious. Bloggers (some, certainly not all, and generally *not* libloggers) copy significant portions of articles because it’s easy and they don’t expect to run into trouble. Dead URLs make a great excuse. If you provide a proper citation and cite the *arguments* in the original, a dead URL shouldn’t be a big deal.

“We bloggers have, to put it mildly, a very robust concept of fair use.” That’s closer to the truth. “[T]he

blogosphere has developed a set of copyright norms in an area where there is very little enforcement. These norms about the use of copyrighted material are probably at odds with existing copyright law.” *Probably?* If you quote the entirety of an article, or even half of it, in a blog that runs ads—or, worse yet, if you copy a photo because it makes your blog more visually enticing—you’d have a tough time making a fair use defense. Solove noted a *Wall Street Journal* article that some stock photo houses are cracking down on unauthorized use of photos from those houses (e.g., Corbis and Getty Images).

Solove thinks “the development of looser copyright norms in the blogosphere is a wonderful thing”—*not* because it’s vital to expression or freedom of speech or opinion, but because “blogging is already quite time-consuming” and “copyright holders might charge fees for the use of their materials.” Having to pay attention to copyright “can make posts less complete, less interesting, less snazzy. Having to paraphrase rather than quote directly will take more time, and perhaps make bloggers more reluctant to dash off a post on a particular issue.”

I hate to say it, but “I want my site to be snazzy” and “I’m too lazy to actually *write* as opposed to quoting” are not particularly good fair use defenses. Nor are they ethical reasons to appropriate other people’s work. In the final paragraph wondering whether a crackdown’s likely, Solove finishes: “With blogging getting bigger and more profitable every day, will copyright suits become the wave of the future?”

Sorry, but if you’re getting “more profitable” by grabbing pictures to make your site snazzy and importing articles wholesale, rather than quoting the excerpts needed to make *your commentary* meaningful, I’m not particularly sympathetic. You know, a *People*-type magazine would be significantly more profitable if it simply grabbed other people’s pictures and stories without payment or license fees.

What’s particularly interesting is that Solove’s post spends almost no time—maybe one sentence out of a long post—discussing *legitimate* reasons for extended quotations: That is, because they’re needed for the purposes of commentary. Instead, it seems to be about laziness, snazziness and profitability: Too lazy too write or paraphrase, out to make a buck, and wanting neat celebrity pictures. None of which are legitimate reasons for wholesale copying. As one extended comment notes, there haven’t been many copyright lawsuits against bloggers, and litigation is expensive

on both sides. One blogger believes media that pursued such suits “would be in for a major fight” because “really smart litigators and law professors would chip in to help out”—which I’ll suggest is *probably not true* if the suits are for flagrant infringement with no legitimate education or commentary purpose...like those decorative pictures of the celebrity of the week. One professional photographer states a simple fact I have trouble disagreeing with: If that photographer’s work is adding value to your blog, the photographer may (and probably does) deserve compensation.

Putting this in the context of libloggers, I don’t believe there’s much of a problem. While one high-profile blog within the library field used to quote substantial portions of articles, that’s no longer the case. I don’t know of any library-related blogs that habitually quote large portions of copyright articles except as interleaved with extensive commentary, or that import copyright pictures for decorative purposes. Libloggers understand linking, and it’s my impression that libloggers understand the ethics of fair use, which can be even fuzzier than the always-fuzzy law of fair use.

Short Items for Good and Bad

The Digital Cinema System Specification, the basis for digital projectors in movie theaters, will allow studios to trace bootlegged movies (DVDs, downloads) back to the specific theater the movie was shown in, maybe the time it was shown. That assumes the specification works; it requires that the 35-bit “forensic marker” be “visually transparent to the critical viewer” and “inaudible in critical listening.” If it works, it’s a good thing: Pirated DVDs and downloads sold for commercial gain, typically camcordered in a theater or diverted somewhere along the distribution line, *absolutely* hurt artists and studios and have no defense.

- What can you say about the family of Joan Miro and the Artists Rights Society, who “asked” Google to remove the Miro-esque Google logo that appeared on Miro’s birthday? Google did not reproduce Miro’s art. Google’s artist did some letter-filling sketches *in the style of Miro*. Google took down the special logo. It all seems a shame: A shame that protection against “derivative” works could be so extreme as to rule out casual tributes, and a shame that the family wouldn’t recognize the honor Google was paying. So extreme copyright makes fools of us all. (Shakespeare’s been dead more than 70 years. I’m safe.)

- One bad proposed new law, H.R. 4861, not only authorizes the broadcast flag, it extends it to digital radios as a *mandatory* feature. If the law passes, you’d need an FCC license to build a radio receiver and be forced to incorporate DRM if the receiver has recording function. The bill prohibits *unauthorized* copying and redistribution, not *unlawful* or *infringing* redistribution: Fair use goes out the digital window, as does the Audio Home Recording Act. Basically, the RIAA would determine what you could and couldn’t do with digital broadcasts—and it doesn’t think you should be able to do very much. (See EFF’s *Deep links*, March 2, 2006).
- Another one, in draft form and pushed by the Department of Justice, would broaden *criminal* copyright infringement by eliminating the necessity of proving actual infringement and increasing the penalties; even *attempted* infringement would be a criminal offense, as would “conspiracy” where *no infringement took place*. (*Deep links*, April 25, 2006)
- The PERFORM Act would *require* webcasters to use streaming formats with DRM: The statutory license available for music webcasting would require that the webcaster “uses reasonably available technology to prevent copying” of the transmission, except for “reasonable recording”—and, as in H.R. 4861, “reasonable” would basically assure that you can’t record or identify recordings based on artists, genres, or song titles, and that you can’t separate a stream into individual songs.
- Now RIAAs suing XM satellite radio—because XM is making it easier to record broadcasts and turn them into playlists. Doesn’t the Audio Home Recording Act *assure* that you can legally record broadcasts for later home use? Oddly, the complaint never mentions AHRA: after RIAA assured us that AHRA would “allow consumer electronics manufacturers to introduce new audio technology into the marketplace without fear of infringement lawsuits,” RIAA wants to ignore the law it pushed for. The complaint’s a gem. It says that the highly-compressed MP3s from XM are “perfect digital *copies*” of the original sound recordings (emphasis in the original). It claims that adding track identification and a buffer to

broadcast reception suddenly changes it from broadcast (“performance”) to distribution, thus violating the XM license. Sirius has introduced similar features—but it’s paying off the record labels. This one has everything: Ignoring fair use, asserting that failing to build in sufficiently draconian restrictions constitutes inducement to infringe, *and* ignoring the law RIAA asked for (and has received millions in payments from).

- The U.S. 2d District Court of Appeals upheld a decision *favoring* fair use in *Bill Graham Archives v. Dorling Kindersley*. DK published a 480-page coffee table book, *Grateful Dead: The Illustrated Trip*; it’s DK, so of course it used loads of illustrations as meaningful parts of its content. In this case, there’s a timeline running continuously throughout the book combining more than 2,000 images representing dates in the Dead’s history, with text. Seven of those 2,000 images are small versions of concert posters (or in one case the front and back of a concert ticket). Can you imagine a book about the Grateful Dead that *doesn’t* include some of those posters? The largest reproduction of a poster is 3x4.5"; the originals were 13x19" to 19x27". No reproduction is more than one-twentieth the size of the original, takes up more than one-eighth of a page, or “is given more prominence than any other image on the page.” (All quotes from the court’s decision.) So, naturally, Bill Graham Archives sued to enjoin further publication, to destroy unsold books, and for actual and statutory damages. The lower court decided that DK’s reproductions were fair use and granted summary judgment. The appeals court goes into each fair use factor in some detail (with emphasis on the first factor, purpose and character of the use), and in almost every case finds that the balance favors DK.

What’s the Story?

As with Part 1, no firm conclusions appear reasonable at this point. Copyright becomes unbalanced in many ways. There are forces at work to create even greater imbalance—and there are people who deal with imbalance in what may also be inappropriate ways.

My Back Pages

Who Needs a Database?

John Dickinson offers a half-page look at “Microsoft Office Alternatives” in the March 21, 2006 *PC Magazine*. He looks at WordPerfect Office X3 (13 would be bad luck, I guess) and StarOffice 8. “What I’ve found is that if you can live with a couple of limitations and quirks, you can spend a lot less money on the non-Microsoft products and do all the work you want to do.” I’m sure that’s true in many cases.

What gets the mention here is one remarkable sentence late in the commentary: “Neither suite has a database manager like Microsoft Access, but I can’t think of a reason to consider that a deficit.”

Wow. Either Dickinson’s saying that Access is crapola, or that nobody needs a database manager—or at least not an SQL-based relational database. That’s quite an assertion.

UPS, eBay, and Insurance

Bill Machrone tells an astonishing story in the March 21, 2006 *PC Magazine*: “What brown did for me.” Machrone’s always been a solid writer; while this is only his word, I don’t doubt it for a minute. It’s worth reading the column itself.

Machrone *loves* messing around with guitar amps. He saw a Fender Blues Junior amp on ebay (an early one with tweed fabric); he managed to get it for a reasonable price. When it arrived, he could see a big gash even before he opened the box: “The cut went through the cardboard, through the bubble wrap, through the tweed, and into the wood.” The amp was insured and repairable, but UPS “preferred that the damage claim be filed by the shipper.” So he contacted the seller, who filed the claim, and a driver picked it up.

Time passes. Machrone contacts UPS, who says the matter’s been settled with the shipper. The seller says he hasn’t heard anything. Turns out the seller used a store to do the shipping—and UPS settled with the *store*, even though Machrone paid for shipping, insurance, and the amplifier. Meanwhile, the shipping store had gone out of business.

Maybe the storeowner will send the amp back (after all, UPS has apparently settled an insurance claim the owner’s not entitled to). But on what basis can UPS say “We don’t care that you paid for this, in-

cluding shipping and insurance; we settled with somebody, and that's it?"

If UPS wants to be the shipper of choice for eBay, this seems like a most curious attitude.

The Wikipedia FAQK

This charming *Wired News* piece by Lore Sjöberg appeared April 19, 2006. Lore used to run the Brunching Shuttlecocks, and he's still dangerously witty.

Of course Wikipedia has value. This piece doesn't deny that—but it does look at the extent to which Wikipedia becomes a place to argue over stuff. After all, Wikipedia is "simultaneously a shining, flawless collection of incontrovertible information, and a de-based pile of meaningless words thrown together by uneducated lemurs with political agendas."

We get five key definitions for Wikipedia discussions, including "vandalism: An edit you didn't make" and "neutral point of view: Your point of view." The FAQK notes that anyone can contribute—"Wikipedia is absolutely open to absolutely anyone contributing to absolutely anything! As long as you haven't been banned, or the article you're contributing to about hasn't been locked, or there isn't a group of people waiting to delete anything you write..."

Good snarky fun. Can't we all use more of that?

The New Web Menace

Speaking of good snarky fun, I encountered two particularly good April 1 posts this year (in what seemed generally a cautious day of foolishness). One of them was a link that linked to a link that...well, you had to be there. The other was on *Infomancy*, and it's a solid discourse on the dangers of Digitally Re-Shifted April Fool's Jokes. Or, if you will, "April Fool's Joke 2.0." (A direct quote. Don't blame me.)

Fun with School Rankings

Newsweek does an annual list of America's top high schools. I haven't seen the list—but I have read Ed Felten's critique of the ranking, and it's pretty devastating. Last year, he noted that the ranking was based on "the number of Advanced Placement and/or International Baccalaureate tests taken by all students at a school...divided by the number of graduating seniors." It doesn't matter whether students get acceptable scores on the tests—just that they show up.

He considered a hypothetical school, Monkey High, where all the students are monkeys. The principal requires all of the students to take at least one

AP test; it doesn't matter that they do miserably. But none of them graduate—after all, they're monkeys. That would yield an infinite score on the *Newsweek* formula: Many tests, no graduating seniors. (Or, you know, let *one* monkey graduate so you just get the nation's best ranking.)

This year *Newsweek* changed the rules. Not the formula, but who was eligible. Last year, schools with selective admissions policies were excluded "on the theory that they could boost their ratings by cherry-picking the best students." So magnet schools and other exceptional high schools weren't eligible. (As Felten notes, that means Monkey High would also be excluded, since it only admits monkeys.)

This year, selective schools are eligible—but only if their average SAT or average ACT isn't too high. The flawed ratio is still there. *Newsweek* even lists some of the schools that were excluded. "Newsweek excluded these high performers from the list of Best High Schools because so many of their students score well above average on the SAT and ACT."

As Felten says, "If that doesn't sound wrong to you, go back and read it again."

I remember a dystopian science fiction story in which everyone was equal—because anyone with talents was handicapped (smart people wore transmitters that disrupted brain functionality, etc.) Maybe that's the theme here: *Newsweek* only wants the Best High Schools at Not Overeducating Students.

Masthead

Cites & Insights: Crawford at Large, Volume 6, Number 8, Whole Issue 78, ISSN 1534-0937, a journal of libraries, policy, technology and media, is written and produced by Walt Crawford, a senior analyst at RLG.



Cites & Insights is sponsored by YBP Library Services, <http://www.ybp.com>.

Hosting provided by Boise State University Libraries.

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