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## Keynote Address Digital Technology and Digital Piracy Issues

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# Keynote Address

Jesse Feder\*

Thank you very much for that introduction. I would like to thank the *Fordham Intellectual Property, Media & Entertainment Law Journal* for their invitation to speak today. It is always a great pleasure for me to come up to New York. I am from New York. I moved to Washington a few years ago to join the Copyright Office, and it is always a pleasure to come back.

In that regard, I want to put in a little bit of a plug for my employer. I think there is a dearth of knowledge about the U.S. Copyright Office. For example, I think it would surprise many of you to know that the Office is a part of the Library of Congress. Similarly, although many of our duties are not what might be considered traditional legislative functions, we are part of the Legislative Branch of the Government.

The Copyright Office has a long and distinguished history, particularly in the development of U.S. copyright law and legislation. The Office was instrumental in formulating the provisions of the 1976 Copyright Act.<sup>2</sup> Most recently, we played a very big role in working with the congressional committees in formulating the Digital Millennium Copyright Act.<sup>3</sup>

Most who are familiar with the Copyright Office know of its copyright registration function. That is where we employ the most people, but it is not where I work. I am part of the Office of Policy and International Affairs, which is my great love and my great interest. For those of you here who are students contemplating your legal careers, I would urge you to consider this form of public service at some point in your careers. It has been a very rewarding experience for me.

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<sup>2</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended throughout 17 U.S.C.).

<sup>3</sup> See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

I am not going to talk about any specific case because cases come and go. I want to talk more about some general principles. However, there is another reason for only discussing general principles. The U.S. Government filed a brief in the *Napster* case,<sup>4</sup> and once a brief is filed, the Justice Department policy is that a “cone of silence” descends over all who are involved. The brief was filed on a particular, fairly narrow issue of whether the Audio Home Recording Act<sup>5</sup> provides a defense for Napster in that case, and the government position is that it does not. It is available on our web site, and I would urge you to take a look at it.<sup>6</sup>

Digital technology and digital piracy are issues that have consumed the copyright community for most of the past decade. Much of the 1990s was spent in policy circles trying to come up with a way to meet some of the challenges of digital technology.

Now, what are these challenges? The first is that digital technology permits rapid, perfect reproduction from generation to generation. The *n*th-generation copy is identical to the first-generation copy. This is a problem that copyright owners have never faced before. There have been reproduction technologies that permitted rapid copying, such as photocopy machines, but ultimately the costs involved grow prohibitively expensive compared to purchasing a legitimate copy. By “costs,” I mean in the general sense, that convenience and quality of the output decrease each generation down the line. All those impediments go away in the digital world. So, one problem faced by copyright owners is that there are readily available means of making perfect reproductions at almost no cost.

Second, digital networks permit instantaneous dissemination worldwide, and enable viral dissemination. A few copies can go out on the Net and replicate on a geometric scale. Within a matter

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<sup>4</sup> See *A & M Records, Inc. v. Napster, Inc.*, Nos. 00-16401 & 00-16403 (N.D. Cal. filed Dec. 6, 1999).

<sup>5</sup> Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (amending 17 U.S.C. by adding a new chapter 10).

<sup>6</sup> See Brief of Amicus Curiae Department of Justice, *A & M Records, Inc. v. Napster, Inc.*, Nos. 00-16401 & 00-16403 (N.D. Cal. filed Dec. 6, 1999) available at <http://www.usdoj.gov:80/criminal/cybercrime/napsterbr.htm> (last visited Mar. 8, 2001).

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of hours or days, a single copy can result in thousands upon thousands of copies down the line. But, the same technology provides the seeds for restricting free copying and dissemination of works.

There are copy control technologies that also will prevent unlicensed copying. There are also technologies that permit only legitimate use of works.

Encryption is one of the principal bases for protecting copyrighted works on the Internet. You can scramble a work so that it cannot be accessed without adding a key or some other kind of information.

Rights management information can be embedded in or attached to a work so that the work can, in essence, “phone home” in order to get an authorization for use of the work in a particular way.<sup>7</sup> That drives down the cost of individual transactions and makes them easier.

So, on the one hand, you make illegitimate use harder through the use of technology; on the other hand, you make legitimate use easier through the use of technology. Sounds great. The problem is, of course, people can tamper with these. For any anti-copying technology, somebody can come up with an anti-anti-copying technology, and so on, in an endless spiral, like an arms race.<sup>8</sup>

The legislative approach to dealing with this was to enact a legal prohibition on anti-anti-copying technologies in order to break that arms race.<sup>9</sup> That was the premise behind the anti-circumvention

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<sup>7</sup> Digital Rights Management is any technology that allows a copyright owner to control the digital distribution of their work. See Jill Westmoreland, Digital Rights Management, CORPORATE COUNSEL, Sept. 1999, at 6; *infra* Part I.A; Wendy M. Pollack, Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium, 68 FORDHAM L. REV. 2445 (2000).

<sup>8</sup> Hon. Marybeth Peters, Register of Copyrights, The National Infrastructure: A Copyright Office Perspective, 20 COLUM.-VLA J.L. & ARTS 341, 343 (1996) (“In the area of computer programs, for example, every program developed to prevent unauthorized copying has ultimately been defeated by a program that instructs the computer to ignore the first program.”).

<sup>9</sup> See *supra* note 3. Under 17 U.S.C. § 1201(a) (the Digital Millennium Copyright Act), “[n]o person shall circumvent a technological measure that effectively controls

provision in the WIPO Copyright Treaty<sup>10</sup> (“WCT”) and the WIPO Performances and Phonograms Treaty<sup>11</sup> (“WPPT”) which were both adopted in 1996. Well, I say adopted — they were concluded. Neither will go into effect until ratified by thirty countries. At this point, the WCT has been ratified by about nineteen countries.<sup>12</sup>

The WCT began as an effort to update the Berne Convention.<sup>13</sup> Berne had not been updated since 1971, which was ten years before the IBM PC entered the market, so most of these digital copyright issues were not really around when the Berne Convention was formulated. As a result, there was an effort to bring this digital agenda into the multilateral copyright context through the Berne Protocol “exercise,” as it was called.<sup>14</sup>

In 1996, when the treaties were concluded, there were three provisions that addressed the digital agenda. The first was a prohibition on means used to circumvent technological protections.<sup>15</sup> The second was a prohibition on tampering with rights management information.<sup>16</sup> The third gave copyright owners the exclusive right to communicate their works to the public, including making works available in a way that the public can access them at a time and place of their own choosing, which

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access to a work protected under [the DMCA].” Furthermore, under § 1201(e)(2) offering to the public, or “otherwise traffic[ing]” in any technology or product designed to circumvent a technological measure controlling access to a copyrighted work is forbidden.

<sup>10</sup> See WIPO Copyright Treaty, adopted Dec. 20, 1996, CRNR/DC/94 [hereinafter “Copyright Treaty”] available at <http://www.wipo.org> (last visited Mar. 8, 2001).

<sup>11</sup> See WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, CRNR/DC/95 [hereinafter “Performances Treaty”] available at <http://www.wipo.org> (last visited Mar. 8, 2001).

<sup>12</sup> See Intellectual Property: WIPO Urges EU To Accelerate Ratification Of Internet Treaties, TECH EUROPE, Dec. 23, 2000, available at 2000 WL 20773863 (last visited Mar. 8, 2001).

<sup>13</sup> See WIPO Plans to Draft Protocol to Berne Convention, J. OF PROPRIETARY RIGHTS, Vol. 8, No. 4, at 28 (1996).

<sup>14</sup> See Jane C. Ginsburg, Copyright Legislation for the “Digital Millennium,” 23 COLUM.-VLA J.L. & ARTS 137, 141-42 (1999).

<sup>15</sup> See Copyright Treaty, *supra* note 10, at art. 11; Performances Treaty, *supra* note 11, at art. 18.

<sup>16</sup> See Copyright Treaty, *supra* note 10, at art. 12; Performances Treaty, *supra* note 11, at art. 19.

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is the typical paradigm of transmissions over the Internet.<sup>17</sup>

These provisions were examined in 1997 when we had to come up with a way of implementing them in U.S. law. We concluded that the third one, exclusive right of communication to the public, was already covered in U.S. law through a variety of provisions — the reproduction right, distribution right, performance right — that were all inherent in the Copyright Act.<sup>18</sup> All of the acts that would be covered by a general communication right were covered under existing exclusive rights in the Copyright Act, so no change was made in that area. What we did have to create were prohibitions on circumvention of technological protection measures and on tampering with the integrity of copyright management information. These formed the core of the Digital Millennium Copyright Act.<sup>19</sup> Now, around that core many other issues gathered.

One was the issue of what the liability of online service providers should be for acts that take place on their systems. A very complex provision, which is in Section 512 of the Copyright Act now, was formulated in order to shield service providers from liability for certain kinds of activities, so long as they conduct their business in a way that protects the interests of copyright owners.<sup>20</sup>

That brings us to the present. Now my remarks may become a little bit provocative. I just want to make sure you understand that

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<sup>17</sup> See Copyright Treaty, *supra* note 10, at art. 6; Performances Treaty, *supra* note 11, at art. 8 & 12.

<sup>18</sup> See 17 U.S.C. § 106 (2000) (granting a copyright holder the exclusive rights to reproduction, distribution and performance of their work).

<sup>19</sup> See *supra* note 3.

<sup>20</sup> See 17 U.S.C. § 512 (2000) (indemnifying on-line service providers from liability for indirect copyright infringement in the transmission, routing, storage or provision of connections for material through a network controlled or operated by it so long as: (1) transmission was not initiated by the service provider (either directly or indirectly); (2) the transmission, routing, provision of connections or storage is carried out automatically without selection by the service provider; (3) the service provider does not select the recipients of the material except as an automatic function to provide it to the original requester; (4) no copy of the material is made by the service provider in the course of intermediate or transient storage nor is a copy maintained by it in a manner accessible to anticipated recipients for a period longer than necessary for transmission, routing or provision of connections; and (5) the material is transmitted without modification of its content).

I am speaking on my own behalf and not on behalf of the Copyright Office.

The focus of the Copyright Office's efforts through the 1990s was really the question of decentralized copying by individuals. Individuals in their own homes can use technology in order to make personal copies, copies for their friends, and so on. If we have our law structured so that the only way a copyright owner can vindicate his rights is to go after individual end-users, we have lost the fight. As Barney Frank once said in a hearing, "there ain't enough cops in the world to go after all the end-users." Nor, as a matter of public policy, do we want the copyright cops chasing after end-users all over the world. And, frankly, companies do not want to sue their customers.

So the notion under the Digital Millennium Copyright Act, in a sense, was to move responsibility back a step to those who provide the means, the technologies, the devices, or services that break technological protections and you go after them. If you cut off the supply of anti-circumvention technologies, then it will just be too difficult for consumers to break these technologies, so they will abide by the law.

But, the problem arising now is a little different. The new challenge is that there are businesses entering the Internet world, that are constructing their business models around meeting consumer demand for delivery of digital content over the Internet. There are just two problems with this. One, it is not their stuff. These businesses are building their business models around delivery of digital content that they do not own and do not have rights to and do not pay for. And two, by and large, the demand for this material is the demand for "free stuff." Let's talk about that a little bit.

First of all, can you think of any other area of economic activity where this kind of business conduct is condoned? I cannot, outside of the Internet context. And yet, in the Brave New World of the Internet, there are many who are not only willing to condone it, but

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they applaud it.<sup>21</sup> And there have even been some in the Congress who have expressed interest in creating some kind of a compulsory license, or even an outright exemption, to facilitate these kinds of activities. That kind of leaves me wondering: How did we get here? Well, before we answer that question, let's just take a look. What is the problem with this?

First of all, this is not solely a question about money. Now, to be sure, when you build a business model that does not include provision for payment to the copyright owners for the use of their material, at least, until after you get sued, then that is going to have an economic impact on the copyright owners. Additionally, it represents a loss of control by the copyright owners over their assets.

Now, in the digital world, as I have already said, it is particularly dangerous to lose control over your material because it is readily copied and disseminated. The owners of this content have every incentive to take measures to protect their works when they go out on the Internet and to prevent them from being widely disseminated without authorization. But these third parties, who do not have any rights in the material, do not have any such incentive. The incentive that they have is to distribute it in a form that is most convenient for the consumer, which is basically unprotected.

Once third parties who do not have rights in the material get in and preempt the market, it forecloses legitimate business opportunities for the content owners themselves. It basically forces copyright owners to rely solely on existing business models. It does not give them the opportunity to develop new models that may work on the Internet.

The free aspect of this is also quite critical, because when you have business models that are founded on free distribution of intellectual property to the consuming public, the consuming public will then place little or no value on that intellectual

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<sup>21</sup> Christopher Breen, *The Great Giveaway: Where to Find the Best Free Stuff Online from Software to Soap*, MACWORLD, April 2001, p. 32.



property. Now, this is a problem that is not unique to the Internet, and it is one that I am quite familiar with.

One of my jobs is to travel around the world and have consultations with governments in places where intellectual property is perhaps not very well enforced — places like Hong Kong, where, up until a short time ago, there was a rampant piracy problem.<sup>22</sup> We encouraged these governments to crack down on the piracy problem and to reduce the amount of pirate product in the market.

Hong Kong is actually one of our great success stories. We have convinced the government of the Hong Kong Special Administrative Region to deal with the problem, to drive the pirates out, and to reduce the amount of pirate product on the market — which is great. But the problem is, it is still extraordinarily difficult for the legitimate copyright industries to reestablish a legitimate market there, because people have become accustomed to paying two or three bucks for a motion picture, and if you can get a motion picture for two or three bucks, that's the pirate price, who is going to pay fifteen or twenty dollars for a legitimate DVD? Who is going to pay ten bucks to go to a movie theater? So even though the supply of pirate product that is available has been reduced, it has not really boosted the legitimate markets that much because there is now a consumer expectation that this stuff is cheap, or almost free.

Well, there is anecdotal evidence that the same thing is now happening on the Internet. Now, there are many reasons why we find ourselves in this position. Conventional wisdom is that one of these reasons is that the copyright industries have just been too slow to resolve their technical and security issues and jump into the Internet. I have no doubt that this has been a factor. I am not here to apologize for the copyright holding industries. But I think there are some other factors that relate to the nature of the debate that has been going on over copyright policy that we need to look at a little more carefully. I am going to discuss two aspects of this

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<sup>22</sup> See Jane Moir, *Hong Kong Praised for Taking Right Path in Battle Against Copyright Crime*, S. CHINA MORNING POST, Sept. 21, 2000 at 3.

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copyright debate.

First, the policy debate is frequently couched as being an effort to strike a balance between the private interests of copyright owners on the one hand, and the public interest on the other hand. If you, as a copyright owner, find yourself in the policy debate in the position of defending your private interest against the public interest, you've got a big problem. But I submit to you that this is wrong.

First of all, the copyright law implements a vital public interest. It promotes the creation of new works of authorship, and it does this by granting authors certain defined rights that are alienable.<sup>23</sup> It is a very simple concept — it is a concept of incentive. It is the same basic concept that our free market economy is based on. That is the means to achieving a public goal.

In contrast, dot-coms that build their businesses around the free use of other people's stuff, as well as the consumers that they are catering to, and on whose behalf they claim to speak, have a much weaker claim on the public interest. They do little, if anything, to further the creative goals of copyright and they are enriching themselves without enriching our culture.

The second aspect of the debate that I would like to talk about is the rhetorical move of casting the copyright owners, and the copyright law itself, as being somehow anti-technology. Copyright law, up until recently, has been remarkably technology-neutral. It is actually a fairly recent phenomenon that the provisions of the law have become more and more specific to specific technologies, and that is not a trend that we have supported in the Copyright Office. Unfortunately, the legislative process seems to drive us in that direction because nobody wants to solve a problem that is not right before us at this very moment.

But on the side of the copyright owners, I think we, first of all, have to understand that copyright industries depend on technology

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<sup>23</sup> See U.S. CONST. art. I, § 8, cl. 8. ("Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.").

and they view technologies as being business opportunities. They are not anti-technology. When they seek to enforce their rights in the new digital age, in my view, this is not an effort to destroy or stymie technology, but it is an effort to remind us that technology must serve the interests of creators. Technologies must give incentives to create; they should not inhibit creation of works and they should not inhibit the *legitimate* exploitation of works by their owners on the Internet.

So in a large measure, I view the place where we stand today as being in the middle of a battle for hearts and minds — for the hearts and minds of consumers, for the hearts and minds of policymakers. People constantly need reminding that copyright is about creation and it is about enriching the cultural life of our country.

I would like to leave you all with one thought that is paraphrased from an ad campaign, I think, for the seat belt: Copyright is not just the law, it's a good idea.

Thank you.