Keynote Speech
MPublishing Copyright Camp
University of Michigan
July 30, 2010

Readers' Copyright

– Jessica Litman*

I have high hopes for this talk. What I would like to do today is to kick-start a modest new movement to reclaim copyright law for readers.

It's conventional to talk about copyright as a law designed to provide an incentive to authors to encourage them to create new works of authorship. One version of this story is that that the way copyright provides that incentive is to encourage intermediaries to disseminate works to the public. Publishers, attracted by the opportunity to make profits, pay authors for the rights to their books and musicians for the rights to their recordings, and then sell copies of those books and CDs to people who want to read them or listen to them. Authors know that, and so they create works of authorship with the expectation of getting paid. Publishers buy the rights, manufacture the copies, and sell the copies to readers, listeners and viewers.[1] Conventional copyright talk tends to stop there, at the selling-of-copies moment, and not focus on what happens next. But the whole system makes no sense unless people read the books and listen to the music. The reason we want authors to create new works in the first place is that we want members of the audience to experience them.

The core purposes of copyright law, then, are three: to encourage the creation of new works of authorship, to encourage the broad dissemination of works of authorship, and to encourage the reading, listening, viewing and what I'm going to call "enjoyment" of works of authorship.

Until about 50 years ago, the idea that copyright law was designed, in part, for the benefit of readers was not particularly controversial. That understanding has evolved, or devolved, so that now we think that the idea that copyright law is intended to advance the interests of readers, listeners, and viewers is just a symbolic or metaphorical thing. Copyright law benefits readers in the sense that when it encourages authors to create new works and intermediaries to distribute them widely, readers can walk into bookstores and buy them, or can pay Amazon.com or iTunes and download them, and then they get to enjoy them. The more straightforward understanding of a copyright law that secures readers' rights as well as authors' and publishers' rights has simply faded from our consciousness.

---

* John F. Nickoll Professor of Law and Professor of Information.

1 See, e.g., 1 Paul Goldstein, Copyright: Principles, Law and Practice 4-11 (1989).

Indeed, if you talk to a gathering of copyright lawyers about "readers rights," "user's rights" or "fair use rights" they will bristle like porcupines. Any of you who read the J*ournal of the Copyright Society of the USA* will have noticed a steady stream of articles arguing that readers have no rights under copyright; that fair use is not a right but a narrow contingent privilege; that copyright law has never protected readers rights; that suggestions that it do so represent a radical anti-author agenda; and so forth.[2]

So, about 15 years ago, the late Ray Patterson, a legal historian and copyright law scholar at the University of Georgia, wrote a book and some articles arguing that copyright was in fact all about users' rights,[3] and even lefty law professors thought his arguments were full of holes.

The more I learn about copyright law and copyright history, the more I conclude that Ray was actually completely right about that. If you think about it, what is the purpose of encouraging authors to create and distributors to disseminate works of authorship? The system makes no sense unless your goal is to enable readers to read the books, listeners to hear the music, viewers to watch the movies and so forth.[4] You don't need an instrumental purpose for encouraging reading – like, say, that readers will be the authors of tomorrow – because reading (and listening, and watching) is a good in its own right. It doesn't matter whether people read your books and take from them something that will inspire them to grow up and win a Nobel or Pulitzer prize. At the same time, it doesn't promote the progress of science and the useful arts if the system merely results in the creation and duplication of loads of books, CDs, movies and computer programs that are then stored in some warehouse for 95 years. A copyright system only makes sense if it facilitates communication of the works to audiences who experience and enjoy them.

What made Ray's argument so hard to swallow? I think part of the problem was that he steadfastly insisted that reader's interests were the most important goals of copyright; that they did and should trump the interests of authors and publishers whenever the two came into conflict.[5] That's hard to swallow: much harder in today's world when the two interests conflict

2 See Henry Horbaczewski, *Copyright Under Siege: Reflections of an In-House Counsel*, 53 J. Copyright Soc'y 387 (2006); David R. Johnstone, *Debunking Fair Use Rights and Copy Duty Under U.S. Copyright Law*, 52 J. Copyright Soc'y USA 345 (2005); I. Fred Koenigsberg, *Humpty Dumpty in Copyrightland: The Fifth Annual Christopher A. Meyer Memorial Lecture*, 51 J. Copyright Soc'y 677, 689 (2004). See also Mark Helprin, Digital Barbarism (2009).

3 See L. Ray Patterson & Stanley Lindberg, The Nature of Copyright: A Law of Users Rights (1991); L. Ray Patterson, *Copyright Overextended:A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition*, 17 Dayton L. Rev. 385 (1992); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. Copyright Soc'y USA 365 (2000); L. Ray Patterson, *Copyright and the "Exclusive Right" of Authors*, 1 J. Intell. Prop. L. 1 (1993). Patterson died in 2003. The University of Houston Law Review recently published the manuscript of his final book, coauthored with Judge Stanley Birch, in a special issue of the law review. See Lyman Ray Patterson & Stanley Birch, *A Unified Theory of Copyright*, 46 Hous. L. Rev. 215 (2009).

4 I explore this argument at some length in Jessica Litman, *Real Copyright Reform*, 96 Iowa L. Rev. #1 (forthcoming 2010); Jessica Litman, *Creative Reading,* 70 L. & Contemp. Probs. 175 (2007); & Jessica Litman, *Lawful Personal Use,* 85 Tex. L. Rev. 1871 (2007).

5 See, e.g., Patterson & Lindberg, supra note 3, at 241:

> Truth and understanding are difficult enough to come by under the best of circumstances,

often than they might have been two hundred years ago. But, I think another part is that we've forgotten a great deal about copyright's history, so I want to start there. The assertion that copyright has never protected reader's rights, or that readers rights are inimical to copyright's core goals turns out to be flatly false as a historical matter.

As almost all of you know, the world's first copyright statute was enacted in England in 1710.[6] It's called the "Statute of Anne," because Anne Stuart was the queen of England at the time. The Statute of Anne granted exclusive rights to authors and printers, but it also imposed both limits and obligations on them designed to make it more likely that copyrighted books would actually be read, and it gave the reading public affirmative rights.

The Statute of Anne gave authors and printers only the exclusive rights to "print and reprint." The printing and reprinting rights were the only rights granted. That left the public free to do all sorts of other stuff with copyrighted books without the copyright owners' permission. It was fine to read the books aloud, in public; it was okay to resell used copies; there was nothing illegal about dramatizing the books and performing the play on the stage; one did not need permission to abridge the books and publish the abridgment, or to write and sell copies of a sequel or translation. The exclusive printing and reprinting rights, moreover, were only available for books that were *published.* In addition, the claim of right needed to be registered, so that everyone could find out who owned the exclusive printing right and when it would expire. These concepts are familiar to people who work with copyright, but the statute of Anne had two other provisions you may not know about. First, the copyright owner was required to donate free copies of the book to the royal library and to the libraries of the country's major universities.[7] Second, any member of the public who felt that the price the copyright

---

> but if we allow knowledge to be monopolized by copyright as merely another species of private property, we will dispense with an enlightened and confident public. … Truth and understanding cannot become wares to be traded in the marketplace, not least because such trade would be unconstitutional. There is a vital link between liberty and learning. Preserving the integrity of copyright law – including its law of users' rights – is critical to our free society.

See also Patterson, *Copyright and the "Exclusive Right,"* supra note 3, at 37-42 ("to allow the author to retain the right – for life and beyond – to control access to a publicly disseminated work is to grant him or her the power to defeat the purpose of copyright even after having received its reward"); Patterson & Birch, supra note 3, at 239 ("Congress cannot, under the Copyright Clause, give the author the ownership of his or her work, but only the exclusive right to market it. The property right that is copyright, then, is necessarily a limited right, because copyright cannot constitutionally inhibit the public's right to know and learn.").

6 See A*n Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned*, 1710, 8 Anne, c.19. A scan of the original parchment, a transcription, and commentary describing the statute are available online in the *Primary Sources on* Copyright database curated by Lionel Bentley and Martin Kretschmer at <http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1710%22>.

7 See id. ("It is hereby Enacted that nine Copyes of each book or books upon the best paper that ... shall be printed and published as aforesaid or Reprinted and published with additions shall by the printer and printers thereof be delivered to the Warehouse Keeper of the said Company of Stationers for the time being at the hall of the said Company before such publication made for the use of the Royal Library the Libraryes of the Universities of Oxford and Cambridge the Librarysof the four Universities in Scotland the Library of Sion College in London and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh respectively")

owner charged for copies of the book was unreasonable could petition the government to set a fair price.[8]

So, from the very beginning, copyright owners got bounded rights, and readers were free to engage in a host of potentially valuable uses outside of the boundaries. Copyright owners had an obligation to make copies of their books available to the public for purchase (by publishing them) and for reading without purchase (by being required to donate copies to libraries). Readers who wanted to buy the books but couldn't afford them could appeal to the government to order the copyright owners to lower the price. These are provisions designed to maximize reading.

The earliest US copyright law followed the Statute of Anne model. It gave the authors of books, maps and charts "the sole right and liberty of printing, reprinting, publishing and vending," their books, maps or charts.[9] The books needed to be published; the author needed to be a US citizen or resident. (Foreign books were fair game for copying for the next century). The copyright owner needed to register with the clerk of the local court, and to deposit a free copy with the Secretary of State to keep in his office. We didn't yet have a national library, and the Secretary of State kept all of these books in boxes in his office.[10]

It wasn't until 1800 that Congress established the library of Congress; and it wasn't until 1846 that Congress passed a law requiring copyright owners to deposit copies in the Library of Congress.[11] (As an aside, it took awhile for the Library of Congress to collect the boxes of deposits

---

8 See id:

> "it is hereby further Enacted by the authority aforesaid That if any Bookseller or Booksellers printer or printers shall after the said Five and twentieth day of March One thousand Seven hundred and ten set a price upon or sell or expose to sale any Book or Books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable It shall and may be Lawful for any person or persons to make Complaint thereof to [list of government officials] who or any one of them shall and have hereby full power and authority from time to time to send for summon or call before him or them such Bookseller or Booksellers printer or printers and to Examine and Enquire of the reason of the dearness and enhancement of the price or value of such book or books by him or them so sold or exposed to sale And if upon such enquiry and Examination it shall be found That the price of such book or books is inhanced or any wise to high or unreasonable Then and in such case the said [official] so enquiring and examining have hereby full power and authority to reform and redress the same and to limit and settle the price of every such printed book and books from time to time according to the best of their judgments and as to them shall seem just and reasonable …."

9 See *An Act for the encouragement of learning* , 1 Stat. 124 (May 31, 1790); Copyright Act (1790), available at <http://memory.loc.gov/ll/llsl/001/0200/02480124.tif>; see also Copyright Act (1790), *Primary Sources on Copyright*, supra note 6, at <http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1790%22>.

10 See *Study No. 20: Deposit of Copyrighted Works*, Copyright Law Revision: Studies Prepared for the Subcomm. On Patents, Trademarks and Copyrights of the Senate Judiciary Comm., 86th Cong., 2d Sess. (1960), available at <http://www.copyright.gov/history/studies/study20.pdf>.

11 The story is actually more complicated, as political winds shifted the entitlement to and responsibility for copyright deposits back and forth among the State Department, the Library of Congress, the Smithsonian Institution, and the Interior Department before lodging it securely in the Library in 1870. See *Study No. 20*, supra note 10; Harry Clark, *The Library of Congress in 1880: A User's Report,* 16 J. Library Hist. 523 (1981); John Y. Cole,

from the Secretary of State's office, and discover that the deposits were unsorted, uncatalogued, and stored completely haphazardly.) And US law didn't acquire any sort of provision allowing citizens to petition the government for a fair price until the Justice Department settled its antitrust suit against ASCAP[12]. But, you can see in the US law the same basic structure, giving authors bounded rights, but only in published works, giving readers a lot of freedom to use works so long as they didn't invade the boundaries of the rights, and obliging the copyright owners to publish the work and to donate a copy to the library of congress.

Bottom line: the claim that readers' rights are alien to copyright is simply inaccurate. Protecting and promoting the interests of readers was an integral part of copyright law from its earliest incarnations.

In the last 100 years, we've rethought copyright, so that it seems less like a law designed to encourage reading and more like a law crafted by rent-seeking. We no longer require publication; copyrights no longer expire within a reasonable period of time; copyright's exclusive rights are no longer so bounded.[13] We still require copyright owners to deposit two copies of published works with the Library of Congress,[14] but copyright lawyers argue that the deposit requirement is really unrelated to copyright – it's simply a tax on authors to subsidize the maintenance of a national library, and shouldn't be part of the copyright law at all. Copyright lawyers who represent authors or publishers insist that their clients are the primary and only direct beneficiaries of copyright, and that readers, listeners and other users have no copyright rights, so it's understandable that we've forgotten. But, in fact, US copyright law still has a bunch of provisions designed to protect the freedom to read, listen and watch. We just have come to talk about them as "exceptions" rather than rights or liberties.

So, importantly, copyright gives no exclusive rights to control private performance or display.[15] What you do with a book, movie, or sound recording in your living room is not copyright infringement, even if your copy is pirated. Private performance and display is simply off limits. (That isn't because copyright owners didn't ask for private performance and display rights – they did. But nobody took those demands seriously, I think, because at some level

---

Ainsworth Spofford and the Copyright Law of 1870, 6 J. Library Hist. 34 (1971).

12 See United States v. ASCAP, Civ. Action 13-95, 1950 U.S. Dist. Lexis 4341 (SDNY 1950); a similar suit against BMI resulted in a consent decree that was later amended to add a rate-court provision. See U.S. v. BMI, No. 64 Civ 3787 , 2000 U.S. Dist. LEXIS 2872, 2000-2 Trade Cas. (CCH) P72,979 (SDNY 2000). The rate court provisions of the consent decrees allow someone who wants a license to perform music publicly to ask a court to set a price for the license. In addition, the current copyright law calls for a panel of three copyright royalty judges appointed by the Librarian of Congress to decide the rates copyright owners charge for licenses for secondary cable television and satellite television transmissions, ephemeral recordings, digital transmissions of sound recordings, and recordings of musical works, if licensors and licensees cannot agree on negotiated rates. The copyright royalty judges are also charged with setting the royalty payable to copyright owners for the sale of a narrow category of digital audio recording devices. See 17 U.S.C. §§ 801-804.

13 See 17 U.S.C. §§ 102(a), 106, 302, 304.

14 Id. § 407.

15 Id. § 106 (4), (5).

everyone understood that the freedom to read and enjoy material without the copyright police looking over your shoulder is an interest that copyright law has and should protect.) Moreover, copyright gives no right to control the resale, loan or public display of lawfully made copies by the owner of the copies.[16] (And again, it isn't that some copyright owners didn't demand those rights.)

On top of that, the current statute has a number of express privileges designed to encourage reading, listening, viewing and enjoying copyrighted works. Some of those are carve-outs lobbied for by specific businesses; some of them are Congress's efforts to repudiate overreaching copyright claims as narrowly as possible; others are broader exceptions surviving from an earlier era when copyright laws were simpler and less encompassing. An example of a carve-out is the provisions allowing bars and restaurants to play copyrighted music over radio or television receivers.[17] An example of the narrow repudiation is the provision in section 117 allowing computer repair businesses to turn on consumers' computers if necessary to make repairs,[18] or the provision in section 110(11) allowing families to use censorware in conjunction with viewing DVDs in their living rooms.[19] An example of the surviving old-style limit is the school assembly provision in secition 110(4) allowing noncommercial performances of music or literary works.[20] Those of your who eat, drink and breathe copyright law will have noticed the regulations issued Monday exempting six classes of works from the anti-circumvention provisions of the DMCA.[21] The Register's analysis of those exceptions revealed an investment in the notion that people who have paid for access to a work should be entitled, under the copyright law, to some freedom to enjoy it the way they want to, even if it isn't the way the copyright owner wants them to enjoy it.[22] I think that sort of understanding could become the basis for an emerging consensus that readers, listeners and viewers have, and should have rights under the copyright statute, and that we need to interpret the law to ensure that readers and other audience members have sufficient liberty to enjoy works of authorship.

So, what's the next step? Importantly, I think we need to reform the discourse. Talking about readers' rights shouldn't be the province only of teenagers, communists and librarians. We need, I think, to reclaim the notion that one of the core goals of a healthy copyright system is to encourage reading, listening and viewing.

---

16 Id. § 109.

17 See id. § 110(5)(B).

18 Id. § 117(c).

19 Id. § 110(11).

20 Id. § 110(4).

21 See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 75 Fed. Reg. 43825 (July 27, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-18339.pdf>.

22 See Recommendation of MaryBeth Peters, Register of Copyrights, in RM-2008-8 (June 11, 2010), available at <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>.

After that, I think the next, next step is to think hard about what some of those reader, listener and viewer rights should be in a networked digital world. We need to protect individuals' liberty to perform and display copyrighted works privately, whether the copyright owner could make money from licensing the performance or not.[23] But, we should go further. If copyright is intended, in part, to protect audience interests in enjoying works of authorship, then I think we need to define the scope of copyright liberties to enjoy copyright works with some attention to what range of audience behavior copyright should encourage.

Let's focus for a minute on reading, since it's the oldest copyright liberty and the one we're most familiar with. Reading can be passive absorption – cramming for exams or watching some sitcoms are both more like that than not – but reading can also be a highly creative, imaginative activity.[24] We don't need post-modern literary theorists to persuade us that different readers imagine the characters in novels as very different people. Listening, too, can involve a great deal of imagination. Even watching movies involves creative contribution on the viewers parts. If you've seen the movie "Inception" and sampled just a small fraction of the debate about what the final shot signifies, you've seen this in action.

That process, of bringing individual imagination and creativity to works of authorship made by others is important. Having a society full of individuals with creativity and imagination who exercise both regularly is good for our society in a host of different ways. From that, I'd would argue that encouraging that creativity and imagination has been, and should continue to be, one of copyright law's core goals. When we think about the sorts of freedom that copyright law should secure to audience interests, we need to pay attention to leaving room for both the experience and the expression of individual reader, listener and viewer creativity.

Some things are uncontroversial: most people support a freedom to engage in format shifting – copying a copy to a new format to facilitate reading, listening or watching if one is already entitled to read, listen or look at a copy in some other format. Yes, a copyright owner could sell each format separately for additional money, and yes, copyright owners often argue that the law entitles them to do just that. Yet, mostly, they don't, because they recognize that public resistence to the idea is fierce. Thus, the lawyer for the record labels in the *MGM v. Grokster* case told his clients that if they wanted to win the case, they had to authorize him to tell the Supreme Court that it is not copyright infringement to rip a CD you own and copy the resulting file to an iPod.[25]

Revising for one's personal use is another freedom, akin to format shifting, that ought not to be deemed to encroach on the copyright owner's right to prepare derivative works. In this category, I would place the use of censorware to avoid seeing the sexually explicit or violent parts

23 The 2d Circuit seems to have appreciated this in its ruling in *Cartoon Network v. CSC Holdings,* 536 F.3d 121 (2d Cir. 2009), where it held that cable subscriber's use of a digital video recording system that caused a copy to be recorded remotely on servers operated by the cable system and played back via cable transmission from those servers resulted in copies made and privately performed by individual subscribers rather than made and publicly performed by the cable system.

24 See, e.g., *Creative Reading*, supra note 4.

25 MGM v. Grokster, 545 U.S. 913 (2005), No. 04-480, Oral Argument at 12 (March 29, 2005).

of movies on DVDs that they rent or own; or the modification of a videogame to speed it up or slow it down; or the adaptation of a computer program to make it do a better job of doing what one bought it to do. The statute and current court decisions already allow those activities in some narrow circumstances,[26] so it isn't much of a leap to decide they ought to be deemed to be okay as a general matter.

Archival or back-up copying: here, we see a general social consensus that making a spare copy of works – especially those in delicate formats – should not be copyright infringement. Copyright owner groups are resisting that understanding because they've imbued the word "copy" with talismanic significance. People shouldn't be able to make backup copies of anything because copyright right *means* the exclusive right to control the making of any and all copies. But that's silly. Even sillyer is the insistence that that principle extends to ephemeral copies in the random access memory of a computer or digital device. The idea that if you buy a Kindle book rather than a hardcopy book, the publisher should be able to give or withhold permission for every glance because each screenful of text is a new and potentially actionable copy is simply insupportable. No law designed to encourage reading should do that.

So far, I've been talking about uses that are primarily personal or private. But, I think readers' liberties need to extend to uses that are public. Sharing is important. Here, though, we need to pay attention to the fact that allowing people to make free copies and share them with other people threatens what lawyers call the "investment-backed expectations" of distributors. That doesn't mean that sharing is or should be illegal in every case, but it does mean that we need to exercise some care in defining the scope of permissible sharing. I've got an article coming out in the Iowa Law Review next fall that argues that the current copyright law gives too many benefits to publishers, record companies, and other distributors, and that cutting back on their share of the copyright bargain would have a number of virtues independent of any increase in reader and listener freedoms,[27] but that's a very controversial view, and if you don't agree with it, the scope of permissible sharing is something you need to think about seriously. But it is untenable to argue that *no* sharing is or should be permitted without the copyright owner's permission, and nobody who makes that argument expects people to swallow it whole.

Everyone agrees that fair use should secure the freedom to criticize, comment on, talk about or respond to works of authorship, but people disagree, violently, about how broad that freedom should be. It's important that any test we use to divide the permissible comment from the infringing comment take into account the value of encouraging readers, listeners and viewers to respond to works as well as the value, if any, of allowing copyright owners to control downstream conversations about the works they own.

We are on the verge of reaching a social consensus that mashing-up is an important copyright liberty that copyright owners should not want to prevent, so long as the mashups are noncommercial. For much the same reasons, the law should regard sharing mashups noncommercially as within the sphere of permissible enjoyment. We have always encouraged

26 See 17 U.S.C. §§ 110(11), 117(a); Lewis Galoob Toys v. Nintendo of Am., 964 F.2d 965 (1992).

27 See *Real Copyright Reform*, supra note 2.

readers, listeners and viewers to talk with each other about works of authorship. Today, that conversation is as often as not over digital networks and as often as not includes snippets of the works. If we pay attention to copyright's goal of encouraging enjoyment of copyrighted works, then permitting those conversations seems like an easy policy call.[28]

That's just a beginning. I'm sure you can think of others. In order to resist encroachment on them, we need to be able to name them, and talk affirmatively about their value in enhancing enjoyment of copyrighted works, rather than just assert that they don't do much harm.

So, I'm hoping to plant a small seed of awareness, so that when you talk about copyright and think about copyright, you envision an ecosystem designed to advance the interests of authors, distributors, and readers, listeners and viewers. I'm hoping that you start to take readers' copyright liberties seriously, and that you convince the people you work with to take them seriously as well. I'm hoping, finally, that this little infection proves contagious enough that the next time Congress sits down to amend the copyright law, the questions surrounding readers' rights will be central to the discussion.

28 See Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VANDERBILT J. ENT. & TECH.L. 889 (2010).