

# AMERICAN COPYRIGHT STRATEGY: A BRILLIANT, DECENTRALIZED PLAN

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At first glance, American copyright law and policy seem to be dictated entirely by a monolithic block of corporate owners. Over the last twenty years, powerful interests, including Disney, ASCAP, Microsoft, and the American Motion Picture Association (AMPA), have successfully lobbied Congress for copyright term extensions, software anti-circumvention legislation, and a series of bi-lateral and international agreements designed to increase protection of American copyrights overseas. Just before I arrived here in London, I read Jack Valenti rage against new motion picture screening policies in China, threatening governmental retaliation to vindicate the AMPA's private rights. Even the U.S. failure to protect databases, touted as a victory for the public interest, has been driven by opposition from large corporate database gatherers. Serious public debate over issues raised by corporate influence on copyright policy is limited to academic conferences, internet bloggers, and the occasional letter to the editor. The Sonny Bono Copyright Term Extension Act (CETA),<sup>1</sup> a piece of legislation that will cost consumers untold billions over the next twenty years, was passed with only a single lawmaker voting in opposition.

Indeed, the endorsement of CETA by the U.S. Supreme Court in *Eldred v. Ashcroft* suggests a nearly complete capitulation to copyright lobbyists, prompting some commentators to conclude

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<sup>1</sup>Copyright Term Extension Act (CETA), Pub. L. 105-298, §§ 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304).

that the Copyright Act most clearly resembles the Internal Revenue [Tax] Code. In other words, it stands as a body of law with no coherent underlying theory, a code that merely reflects which groups have sufficient political power to obtain an exception or a subsidy. A quick look at *Eldred* reveals the starkest example of corporate control over copyright policy, a state of affairs that has been quite transparent for some time to observers in non-industrialized “pirate” jurisdictions around the world. It is critical to note, however, that standing in the way of total corporate control within the U.S. is a hodge-podge of regulations, legislation, and judge-made rules that relieve *local* consumers from the most onerous costs of the over-protection of copyrights. An examination of the entire situation in the United States reveals a brilliant, but casually coordinated, dual treatment of copyright: One set of rules for U.S. consumers, and a different set intended for the rest of the world. The present strategy allows for the capturing of rents from abroad while minimizing costs at home.

The Supreme Court’s treatment of the Copyright Term Extension Act in *Eldred v. Ashcroft* is a good place to begin the story. In 1998, Congress unconditionally extended the term of copyright protection for existing works for twenty additional years. Without the extension, over the subsequent twenty years, every book, film, and musical composition published from 1928 to 1948 would have fallen into the public domain. In return for retaining this vast twenty-year income stream, copyright owners were asked to part with nothing; The grant was entirely unconditional. A group of small publishers and a choir director (my wife) brought suit, arguing that an unconditional extension of rights in existing works was unconstitutional.

The most convincing argument that Congress lacked the power to grant such an extension was based on the language of the intellectual property clause of the Constitution, which reads: “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.”<sup>2</sup> Prior to *Eldred*, the Court had consistently viewed this unique language as authorizing Congress to strike an economic bargain with “Authors” on the public’s behalf. For example, it had stated, “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts’.”<sup>3</sup> Continental lawyers will recognize here the utilitarian rationale for copyright protection that has long co-existed uneasily with moral rights theories and which helped justify the exclusion of such rights from Article 9(1) of the TRIPS Agreement.

A utilitarian *quid pro quo* theory of copyright, where the state is authorized to provide incentives for authors rather than to make gifts to publishers, cannot justify an unconditional extension of the copyright term in an existing work. Such an extension cannot provide an incentive for the creation of a work that already exists. Of course, if CETA were struck down, Micky Mouse would now be in the public domain, so the Court engaged in an astounding about face: “We reject the proposition that a *quid pro quo* requirement stops Congress from expanding copyright’s term in a manner that puts existing and future copyrights in parity.”<sup>4</sup> The gift given by Congress to Disney, members of the AMPA, and a host of other corporate owners was affirmed by a 7-2 vote by the Court, and the death knell was sounded for the utilitarian theory of copyright in the United States.

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<sup>2</sup>U.S. Const., Art. I, sec. 8, cl. 8.

<sup>3</sup>*Mazer v. Stein*, 347 U.S. 201, 219 (1954).

<sup>4</sup>*Eldred v. Ashcroft*, 537 U.S. 186, 217 (2003). *See also id.* at 216 (“We note, furthermore, that patents and copyrights do not entail the same exchange, and that our reference to a *quid pro quo* typically appear in the patent context.”).

This is a development that should not be missed by those negotiating with United States over issues as diverse as moral rights and rights to geographical indications.

To those familiar with the role of the U. S. government in advocating the rights of its copyright owners before WIPO, the WTO, and in bi-lateral negotiations with trading partners around the world, the success of the corporate copyright lobby before Congress and the Supreme Court might come as no surprise. After all, corporate copyright owners have been driving U.S. foreign policy for years. Observers should not draw the conclusion, however, that *Eldred* evinces a commitment on the part of the U.S. to extract maximum rents from its own consumers. To be sure, CETA imposes significant costs on local interests, but a wide variety of legal safeguards, for the time being, continue to protect American consumers from the full brunt of the copyright lobby's TIRPS Plus/Berne Plus worldwide strategy. In other words, although *Eldred* nicely exposes corporate control of copyright, one must look deeper at American law to appreciate the whole of U.S. strategy.

*Eldred* notwithstanding, U.S. copyright law is riddled with exceptions that dilute the local rights of copyright owners. When these exceptions are viewed as a whole, it becomes easier to understand why American consumers have yet to organize to advocate their interests and, concomitantly, why they remain uninterested in the effects of U.S. copyright policy abroad. In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, public outrage over the behavior of prominent monopolists led to the adoption of strong and effective competition laws and the establishment of federal regulation of mergers and acquisitions. What follows is a description of important doctrines that have so far prevented a parallel sense of public outrage over copyright monopolies from emerging in 21<sup>st</sup> century America.

The list shall focus primarily on doctrines that implicate users of computer programs and textbooks (as well as other learning materials), because overprotection of these sorts of works probably does the most harm, especially in developing countries. Copyrights potentially confer what competition law economists call “market power” only in the context of works that are analagous to physical tools. This is most obvious in the context of software, which in many jurisdictions can be patented as a machine, but it may be true of more traditional learning tools as well. I will explain at the conclusion why copyright protection for American cultural products like movies, music, and video games poses no significant threat to developing economies.

(1) The *Altai* test for software infringement. Strong protection for the ideas expressed in computer programs would lead to significant anti-competitive effects. For example, if solely the first publisher of a tax preparation program were allowed to market a product with that function, it could charge a significantly higher price than if it were faced with multiple competitors in the field. After flirting with broad protection in the 1980's, the U.S. Courts of Appeal have unanimously adopted some version of the test for software infringement presented in *Computer Associates Int'l v. Altai, Inc.*<sup>5</sup> The test famously requires the jury to “dissect” the protected and allegedly infringing programs, “filter out” a wide variety of unprotected features from the protected program, and “compare” the allegedly infringing program with the “golden nugget” of protected expression that remains dissection and filtration. The case permits the assembly of a competing software program by all but the most blatantly duplicative means. Copyright law is such a poor means of stifling competition in the United States that a recent survey by Ronald Mann reveals that venture capitalists

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<sup>5</sup>982 F.2d 693 (1992).

in the software industry do not rely on copyrights as a means to recoup investments.<sup>6</sup> Only a patent can provide a competitive edge. Strong competition has kept software prices in the United States below the antagonism level of most consumers. In fact, much important and useful software is available for free, e.g. internet browsers and digital photography software.

(2) Treatment of Databases. In 1991, the Supreme Court declared that facts contained in publicly available databases could be freely extracted and used, as long as original aspects of the selection, coordination, and arrangement of the borrowed-from work were not duplicated.<sup>7</sup> This concept of “thin” protection for databases facilitated the internet explosion throughout the 1990's. Although an hour spent surfing on the internet illustrates best the massive borrowing and reuse of information encouraged by *Feist*, a brief peek at the travel and real estate markets tells a vivid story. Competition is fierce in both fields, where multiple web-sites, all deriving information from the same data sources fight to offer the best services to consumers. Comparative pricing web sites may be the best example. Pay a visit to [www.mysimon.com](http://www.mysimon.com), enter a product you would like to purchase (try Olympus “camedia C-50” zoom digital camera), and the Mysimon web crawler will extract prices and product information from multiple databases and provide you with a long list of competing internet sellers. *Feist* has helped make the internet a happy place for American consumers.

(3) Contributory Liability Rules. The growth of the internet has also been fueled by the failure of U.S. courts to hold internet service providers (ISP's) broadly liable for infringement

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<sup>6</sup>Ronald Mann, *The Myth of the Software Patent Thicket: An Empirical Investigation of the Relationship Between Intellectual Property and Innovation in Software Firms*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=510103](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=510103) (2004).

<sup>7</sup>*Feist Publications v. Rural Telephone Service*, 499 U.S. 340 (1991).

committed by their customers. American consumers use American On-Line, MSN, or a variety of broadband service providers to commit massive copyright infringement. Although the *Napster* decision<sup>8</sup> shows a judicial willingness to hold web sites contributorily liable when they facilitate infringement through peer-to-peer file sharing or knowingly make protected works available for download, infringers can simply move their servers outside the physical confines of the United States to escape liability. The virtual immunity of ISP's that provide internet access to infringing web sites (or allow the direct transfer of infringing digital goods) is complemented by rules protecting the anonymity of ISP customers. As one appellate recently held, Congress has not authorized federal courts to issue a general subpoena allowing copyright owners to search through ISP records to look for infringers. The internet has grown in large part because its primary architects have not had to worry about the uses to which it can be put. This is not true in other jurisdictions, for example Germany, where courts have been willing to hold ISP's liable even when they do not knowingly facilitate infringement.

(4) Competition Law. Microsoft is still a force to be reckoned with, but the decision in *U.S. v. Microsoft* exposed a multitude of the software giant's anti-competitive practices and cowed its behavior in ways noticeable to consumers. For example, the case revealed Windows 95 and Windows 98 were deliberately programmed to give users problems when they chose Netscape as their browser instead of MS Internet Explorer. As a dedicated Netscape user, I can testify that newer versions of Windows no longer cause my computer to crash when I use my browser of choice. The full effects of the litigation are not clear, and Microsoft still has a huge share of the market for operating systems in the United States, but it has slowed its most aggressive attempts to expand its

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<sup>8</sup>*A & M Records v. Napster, Inc.*, 239 F.3d 1004 (2001).

monopoly at the expense of American consumers. One proposed remedy, the forced revelation of the Windows source code, may have a singularly salutary effect. Finally, American consumers also remain quiet for a reason wholly unrelated to legal doctrine. The MS Windows operating system is bundled with the purchase of new personal computers, so consumers do not see how much they pay for the system.

At this point, it is worth noting that the first four doctrines mentioned have significant positive spillover effects for foreign consumers who benefit from competition within the American software market, benefit from visits to American web sites, and benefit from the extra-territorial reach of U.S. competition law protects U.S. firms competing with Microsoft overseas. Other doctrines discussed below have significantly fewer spillover effects.

(5) Exhaustion and Sham Licenses. Large American software producers would like to stop the resale of their products. They do not want competition developing in the form of a secondary market. Section 109 of the Copyright Act,<sup>9</sup> however, provides that the first sale of a copyrighted work produced in the U.S. exhausts the rights of seller as to the particular copy sold. If Intuit sells me a copy of TurboTax for \$29.95, then I have the right to use it to do my taxes and then resell it to my friend for \$9.95, even if it costs Intuit a subsequent full-priced sale. For this reason, Intuit does not purport to sell me the copy of the software. The shrinkwrap packaging around the CD-ROM states that my payment of \$29.95 merely buys me a license to use the CD-ROM, subject to various restrictions, including my ability to resale the CD-ROM. As long as the terms are visible, the act of opening the shrinkwrap purports to bind me to the terms of a license.

American courts, however, have been quite aggressive in policing the terms of these so-

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<sup>9</sup>17 U.S.C. § 109.

called “licenses.” Borrowing from a long line of case that distinguish between sham leases and authentic leases in the personal property context, the “sham license” doctrine applied to software contracts directs courts to exam the economic realities of a given transaction to reveal whether it is, in essence, a true license or a sale. The labels used by the parties are irrelevant, and most courts have found that “licenses” to consumers of software are really sales. Because they bear all the attributes of a sale (one-time purchase price encompassing the full value of the good, most subsequent risks born by the buyer, no continuing monitoring of the good by the seller, etc.), they are treated as sales for the purposes of exhaustion doctrine. Therefore, resale in violation of the terms of the sham license is permitted. Although very few consumers are aware of the sham license doctrine, they experience its monetary benefits whenever they buy used or unbundled software.

(6) Sovereign Immunity. According to the Supreme Court in *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*,<sup>10</sup> Congress lacks the power to make States liable for copyright infringement. Since states have historically not been substantial infringers, this may seem like a minor development. The case has, however, had a real impact at public educational institutions. Many professors at my institution require their students to purchase customized “course packs” of photocopied materials rather than multiple textbooks for a class. For example, since there is no good textbook for my course in Law and Literature, I have developed a set of photocopied materials that draw from a wide variety of sources. Before *Florida Prepaid*, I obtained permissions for longer excerpts, but now the university copy center will assemble the course packs with no questions asked. The cost to my students was is now one-third the amount they used to pay for the same materials. Empirical data on photocopying practices of teachers at public elementary,

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<sup>10</sup>527 U.S. 627 (1999).

secondary and post-secondary institutions is lacking, as is data on the awareness of sovereign immunity. It may be that *Florida Prepaid* merely blessed an existing expansive view of fair use or blissful ignorance, but there's little doubt that the public school coffers are fatter now than they would be in a world of effective copyright protection.

(7) *Fair use*. Even in the absence of a doctrine of sovereign immunity, a strong argument can be made that the photocopying done to assemble an educational course pack is a privileged fair use under section 107 of the Copyright Act.<sup>11</sup> Although the course pack issue is far from settled, the fact that such a practice is theoretically defensible illustrates the breadth of the fair use exception. In the United States, an amorphous four-part test privileges a wide variety of unauthorized copying. Whether copying is fair will be determined in light of: The purpose and character of the use (transformational v. non-transformational; non-commercial v. commercial); the nature of the copyrighted work (fact intensive v. creative); the amount used; and the effect of the copying on the potential market for the work. For example, under the fair use doctrine, the slavish copying of computer object code is permissible when the purpose is to discover interoperability protocols or to extract unprotected elements of the program.<sup>12</sup> Used in this way, the fair use doctrine can enhance competition and lower prices. As used by consumers, it is a convenient rationalization for necessary everyday uses of protected materials. For example, my wife photocopies music for her choir that has been ordered, but is late in arriving. Every jurisdiction has some form of a fair use doctrine, but the American version is famously broad, certainly much broader than what is mandated by the Berne Convention.

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<sup>11</sup>17 U.S.C. § 107.

<sup>12</sup>*Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9<sup>th</sup> Cir. 1992).

(8) Photocopy Machines in Libraries. Unlike other jurisdictions that tax library photocopy machines and copies on them to compensate copyright owners,<sup>13</sup> U.S. law renders this common variety of copying inexpensive and easy by providing immunity to libraries that post a written warning over their machines.<sup>14</sup>

(9) Taxation of Blank Media and Internet Commerce. With the exception of obsolete digital taping technology, the U.S. does not tax blank media or copying equipment in order to compensate copyright owners for lost revenue. In addition, Congress has extended its moratorium on the taxation of internet commerce. Compared to other jurisdictions with aggressive taxation schemes, Congress is effectively subsidizing both the copying and transfer of goods that can be delivered electronically. Copyright law has not stood in the way of legal policies designed to keep access to goods and delivery inexpensive for consumers.

(10) Treatment of Legal Materials. Cases, statutes, and regulations promulgated at all governmental levels are unprotected by copyright law. Access to them is cheap and easy.<sup>15</sup>

(11) The First Amendment. The Constitution lurks in the background of several U.S. copyright doctrines (including the fair use doctrine). It was unsuccessfully invoked in *Eldred*, but it provides significant consumer benefits in areas other than copyright term extension. For example, copyright law excepts performances of copyrighted works during religious services.<sup>16</sup> Churches need not pay for the right to sing or play copyrighted works. Although seemingly a minor exception,

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<sup>13</sup>See Eugen Ulmer & Hans Hugo von Rauscher, Germany (Federal Republic), in *International Copyright and Neighbouring Rights* 422-23 (Stephen M. Stewart & Hamish Sandison eds., 2d ed. 1989).

<sup>14</sup>17 U.S.C. § 108(f).

<sup>15</sup>See [www.findlaw.com](http://www.findlaw.com).

<sup>16</sup>17 U.S.C. § 110(5).

a contrary rule enforcing copyrights in this context in the U.S. would be very controversial. More importantly, the First Amendment provides strong protection for parody. In recent high profile case, an appellate court upheld the right of an author to publish a full-length version of *Gone With the Wind* from the perspective of a slave in Scarlett O’Hara’s household.<sup>17</sup> The book, entitled *The Wind Done Gone*, represents the sort of critical expression that American consumers expect to be able to enjoy. In particular, parody is a popular art form on television and film. Strong protection of copyrights in the parody context would be sure to raise strong public protest. Americans are mostly willing to respect copyrights and pay the full price for the entertainment they enjoy. They are certainly willing to tolerate laws that protect the pirating of music, books, and films, but they would be utterly unwilling to suffer a law that denied an author or artist the right to borrow heavily from a copyrighted work in order to make fun of it.

(12) Home-style Music System Exception. Not only is parody a staple of American culture, but the right to hear background music in bars, restaurants, and shops is apparently so fundamental that Congress has been unwilling to amend section 110(5) of the Copyright Act<sup>18</sup> to confirm with its obligations under the TRIPS Agreement. In the U.S., businesses that play broadcast music over “home-style” stereo systems are exempt from paying royalties to the owners of the music or the recordings. When the EU complained on behalf of rights organizations representing uncompensated copyright owners, the WTO ruled that the exemption was not in compliance with TRIPS.<sup>19</sup> Rather than ask Congress to amend U.S. law to remove the exception, the U.S. government has agreed to

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<sup>17</sup> *SunTrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001).

<sup>18</sup> 17 U.S.C. § 110(5).

<sup>19</sup> Report of the Panel (WTO DSB, June 15, 2000), WT/DS160/R.

pay compensation on behalf of U.S. businesses in order to keep radios playing freely for American consumers.

## CONCLUSION

Although the passage of CETA, the Digital Millennium Copyright Act, and U.S. foreign policy all evidence the strong influence of corporate America, the many exceptions listed above seems to indicate that its control over the law is far less than complete. Before concluding that the U.S. has struck some sort of harmonious balance of public and private interests, we should note two facts. First, many of the exceptions serve powerful business interests in the United States. The *Altai* test is endorsed by many computer software firms as mirroring an accepted culture of borrowing within the industry. The failure to protect databases has been driven by hugely influential database firms in the U.S. The lack of contributory liability is applauded by the U.S. telecommunications industry. Every software and hardware firm, except Microsoft, thinks ratcheting up anti-trust scrutiny is a good idea. The internet commerce tax moratorium and the home style music system exception were both pushed by large and well-financed business coalitions. To summarize, the shape of copyright protection seems to be driven by corporate interests, albeit of a diffuse and uncoordinated nature.

Second, even the exceptions that some large businesses do not like—sovereign immunity for state governments, exhaustion rules and, to a certain extent, fair use—help keep the sleeping giant of the American public quiescent and unconcerned about overreaching copyright owners. As long as copyright law does not weigh too heavily on the average American, we will not see a repeat of the anti-corporate backlash of the anti-trust era at the beginning of the last century. More importantly, Americans will remain blissfully unconcerned about overreaching by corporate copyright owners

overseas as the brilliant, organic strategy of American copyright law slowly unfolds.

Finally, there are at least two important lessons here for the rest of the world, in particular for the non-industrialized “pirate” jurisdictions that have drawn so much attention from copyright owners and therefore the U.S. government. First, the list of exceptions above shows that creative tools of resistance are available. The list, and other exceptions too numerous to detail, provide a blueprint for lowering the cost of copyright law to local consumers.<sup>20</sup> To the extent that a nation resents having to amend its law to comply with TRIPS and the Berne Convention, it should consider the permissive aspects of the internal American approach.

A final important lesson is that all copyright protected works are not created equal. A non-industrialized country has a much greater need to access computer software and textbooks than the latest Hollywood thriller or MTV hit. Pirate jurisdictions, for example, should seriously consider bargaining for concessions in the software market by promising strict and effective enforcement of foreign copyrights in music, film, and video games. Such a bargaining strategy might have multiple benefits. Currently, in many countries, unauthorized copies of American music and films sell for the same rock bottom price as those produced by local artists. As long as pirate copies are plentiful and cheap, local artists cannot price compete. But, if only authentic CD’s and DVD’s can be sold, then their prices will increase significantly, driven by scarcity and the desire of their owners to maximize profits. Only when foreign works are strongly protected can local musicians and film makers price compete and develop their markets. It is no coincidence that the Indian film industry and Malian musicians are pushing for stronger protection of copyrights in their countries. Similarly, it is clear

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<sup>20</sup>See Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 *Minn. L. Rev.* 249 (2003).

that copyright piracy fuels American cultural imperialism. As long as cheap pirate copies of American cultural products are available, they will be consumed in massive quantities. The consequence of increased protection for American owners will be what the monopolist always demands, decreased supply and higher prices. Copyright law should be recognized as a powerful tool to resist American culture. Given the internal benefits of increasing protection for foreign cultural works, delivering such protection in return for concessions concerning software and textbooks seems a promising negotiating strategy.