Chapter five: Copyright and the Symbolic Nature of Art

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In addition to funding the arts, governments enforce the relevant property rights. Copyright law, by protecting the expression of artistic ideas, specifies who has rights to these revenues and thus shapes decentralized arts incentives. Copyright law is especially relevant in the United States, where reproducible popular culture has flourished to an unprecedented degree. In a typical year, the music industry accounts for revenue of $11 billion, the movie industry $44 billion, and book publishing $22 billion. The figures would be higher if artistic reproductions, magazines, and designs were included in the data.

In recent times debates over copyright have taken on special import with the rise of the Internet and the unauthorized copying and distribution of digital culture, a' la Napster and other on-line means for distributing content. It is unclear whether many cultural outputs, most of all popular music, will receive enforceable copyright protection in the future.

In theory copyright protection helps spur the production and dissemination of new ideas. In reality some aspects of copyright enhance discovery, while other aspects of copyright are more restrictive.

On the beneficial side, the prospect of copyright revenue draws more cultural goods and services to the marketplace. It also encourages the production of ideas, which are commonly a public good (see chapter two). While copyright does not protect ideas per se, it does (often) protect the expression of ideas in concrete form. This makes idea generation more profitable.

We can think of copyright as a response to the government's inability to pick winners. In a first best world (as opposed to what is feasible), a government would subsidize idea suppliers directly and reward the best ideas. Idea suppliers would receive higher returns without consumers having to pay higher prices. We do not, however, trust governments to do this job especially well. So we put rewards in the hands of the consumers, through copyright law. Suppliers receive copyright revenue only when they can convince consumers to spend their money on a good or service.

On the negative side, copyright law brings higher prices and thus limits the sale and distribution of culture. For many people Napster was a cheaper and more convenient way of getting music, until it was shut down. More Mickey Mouse T-shirts could be sold, and at lower prices, if Disney still did not hold the copyright to the image. Once a cultural good is produced, or if it is going to be produced in any case, copyright means that the good is spread less widely than otherwise. To the extent information is a public good, the very best outcome distributes that information as widely as possible. In other words, once a song has been recorded, I can download it off the Internet without stopping anyone else from hearing the same song. But copyright enforcement makes information more exclusive, and more like property, which, all other things equal, is undesirable for a public good.

Restrictions on dissemination can have a long-run negative impact on artistic output. Copyright makes it harder for one artist to borrow ideas from another. It makes it harder for rap artists to sample music. Many Shakespeare plays draw their plots from other works; Hamlet, for instance, was based on Thomas Kyd's The Spanish Tragedy. Large sections of Chaucer's poetry are borrowed from other writers, either through translation or paraphrase. Blues, jazz, and country music are all based on widespread borrowing of melodies and riffs, usually without any acknowledgement and certainly without any payment of licensing fees. It is debatable whether these artistic forms could have developed as we know them, had today's copyright laws been enforced all along.

I will address some questions of copyright by looking at the interaction between economic and symbolic goods. If we view the arts as an economic product in the narrow sense only, and neglect their symbolic component, we will misjudge the effects of the Internet. Specifically, weaker copyright enforcement, as brought by the Internet, will not eliminate decentralized cultural finance. The Internet is likely to make copyright law too hard to enforce, relative to an ideal state of affairs. Nonetheless the current regime enforces copyright too strictly, and the future is likely to be more workable than is commonly realized.

What is the potential problem?

The Internet, as a whole, is a boon for culture. Most obviously, the Internet lowers the costs of market entry. Cultural suppliers can sidestep intermediaries and reach consumers directly. Web postings have given poets new outlets and stimulated audience interest. Hollywood studios market movies through their web sites. Music companies give away free samples from CDs, to stimulate fan interest in longer recordings and live concerts; Amazon.com is one place of many where these samples can be found. Musical performers and groups use on-line services to track the interests of their fans, and fans use the services to discover new groups, or to track the activities of groups they already like. The Internet also makes it easier to order books and CDs, especially for buyers who do not live near major cities. Ebay and on-line galleries have increased art buying and collecting. A variety of computer games, short films, and promotional materials are available on-line. The Internet makes it easier to buy tickets, discover concert locales, follow a celebrity, exchange music recommendations, order books, and read book reviews. On-line museums stimulate individuals to visit the real locales. The Internet is the greatest publicity engine yet invented.

These benefits are well understood, however, so I wish to focus on some more problematic issues. Specifically, the Internet makes some kinds of copyright harder to enforce. Once a cultural good is converted into digital form, it can be posted on the Internet and offered free of charge for downloading. Many copyright-protected outputs, whether in art, music, or literature, are now available on the Web, often against the express wishes of the copyright holders. The future may hold no enforceable copyright protection for many creative outputs, which raises the question of how decentralized incentives will continue to operate. [1]

[1] In late 1998 Congress passed the Digital Millennium Copyright Act, which prohibits the unauthorized decryption of posted works. While this act regulates Internet-based copying in great detail, most of its provisions are already technologically obsolete. In some regards the Act opens the door for Internet copying, by limiting the liability of on-line service providers for the copying done by their accountholders.

It is outside the scope of this book to offer a lengthy discussion of whether encryption technologies will beat the hackers and copiers. The key point is the following: copyright has not been easily enforced throughout much of Western history, and it is only a matter of time before enforcement problems reemerge in one form or another. The relative strength of most copyright enforcement in the twentieth century has been a historical and technological accident. In the eighteenth century opera scores and printed manuscripts were zealously protected, often without much success, for fear that someone would make a copy and capture profit from the original creator. During most of cultural history copyright enforcement could not be taken for granted, and we are likely returning to such a state of affairs. Effective copyright enforcement depends on a delicate balance of technologies -- protection abilities must outpace copying abilities -- that is unlikely to reign continually during rapid technological change, as we are now experiencing.

We also have some specific reasons to believe that the enforcement balance is turning before our eyes. The decoding of digital information into output makes decryption difficult to stop. We can think of a DVD disk as "decrypted" by the DVD player whenever the movie is shown. A CD is decrypted when it is played and the digital stream of information is converted into music. In principle the hacker needs only to intercept this stream of information. If nothing else, the CD can be taped in analog, and the information can be reconverted into digital form. Any cultural output that can be copied and delivered to many consumers can also be decrypted and posted on the Internet.[2]

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[2] Suppliers may upgrade their offerings. So if the DVD code is broken, suppliers may market something like "DVD-plus," perhaps with superior color or sound, or an extra commentary track. Nonetheless the fundamental product -- the film -- will have been decoded and will be freely available. It will compete with any future upgraded offering that might be placed on the market. Or suppliers may inject "watermarks," which allow a copy to be traced to an original owner. "It's for keeping honest people honest," said one e-merchant of e-books, with no apparent trace of irony (see Max 2000, p.27). In addition to their technical problems, watermarks of this kind do not stop copying but instead rely on the law to apply stiff penalties to copiers. Other kinds of watermarks are contained

The hackers are favored further by the static nature of their target. Encrypted material sits around for years, and the supplier has only one chance to opt for an encryption technology. Once that technology is in place, it is a fixed target for hackers. Sooner or later the hackers are likely to succeed, just as one Norwegian teenager recently posted the code for how to hack into and copy DVD disks. It is only a matter of time before the "back catalogs" of many cultural areas become freely available; in other words, the hackers only need to win once to achieve a permanent victory, at least concerning the back catalog of previously issued material. [3]

Some cultural producers have brought lawsuits against the institutions that aid Internet-based copying, such as when the heavy metal band Metallica sued Napster. Many of these lawsuits have succeeded, but consumers have begun to trade copyright-protected material through other institutions. Some Napster alternatives do not rely on a central web site, while others do not require the company to keep a directory of which users hold copyright-protected material (Napster's downfall in its court case). Grokster is based on the Caribbean island of Nevis, and presumably outside the reach of United States law to considerable extent. The best of these technologies are no harder to use than was Napster, and we can expect them to become more convenient over time. Even if it could trace all the users, the American government is reluctant to throw large numbers of people in jail for copying cultural material off the Internet.

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only in "legitimate" copies. It is possible to program players only to play copies with the watermark embedded.

[3] So far experience indicates that we cannot prevent decryption of copyright-protected material. The Windows Media Audio program, released in 1999, was supposed to be secure, limiting the copying of songs to a single computer. Within hours of its release, some hacker developed a program called "unfuck" which broke the restrictions entirely. Several hours later the decrypting programs was available on web sites around the world. Often hackers break code for sport. In 2000 Stephen King posted his novella Riding the Bullet in special format to prevent unauthorized copying. The authorized version was available for free, but hackers broke into the special format and reposted it in plain text, just to show that they could. On the King and Windows anecdotes, see Mann (2000, p.48).

The American government, however much it now takes the side of the major entertainment corporations, holds some indirect responsibility for this state of affairs. Chapter one already has discussed how computers and the Internet were originally spin-offs from Defense Department research. Furthermore government regulation has ensured that all Americans receive free local phone service, no matter how many hours they stay on the line. This pricing structure dates from the early years of the phone industry, but today it is an artifact of regulation. Most individuals call up a local service provider and can access the Internet for zero marginal cost. This is one reason why the Internet has spread more rapidly in America than in most other parts of the world. American phone companies would gladly change this practice if they could, but the law will not let them. In the meantime the cost of downloading is subsidized to be artificially cheap.

So do we face the prospect of a world where creative artists cannot charge for their labors? Will consumers find that the supply of new culture is no longer forthcoming? Will the Internet, and by implication American telecommunications policy, force American popular culture into bankruptcy and overturn the principle of financial decentralization?

Love of symbols

Reenter the symbolic nature of culture. To put our earlier discussion in the context of copyright, cultural consumption is based on (at least) three underlying parts, the idea, the expression of the idea in concrete form, and the associated symbolic goods. Suppliers typically sell the expression of the idea, which is protected by copyright law and which generates revenue. A new literary idea, for instance, is sold in the form of a paperback book, bundling together the idea and its expression. As copyright becomes harder to enforce, idea suppliers will be less likely to reap revenue from the sale of the concrete expression, and more likely to reap revenue from associated symbolic goods. So they

will convert the idea into a form that cannot be reproduced so easily over the Internet. They will sell "the book-buying experience at a superstore," to name one possibility.[4]

Demands for cultural symbols will remain robust even when copyright protection for the accompanying information is weak. The Internet transmits many kinds of cultural information very well, but it cannot copy most of the associated symbolic values with equal facility. The Internet does transmit its own symbolic values, such as a certain idea of "technological cool," but rarely do these symbolic values provide exact copies of non-Internet symbolic values. So we should not think of the Internet as selling the same cultural products but at lower prices. More accurately the Internet is offering a different set of products altogether, most of all in the symbolic realm. When viewed in these terms, it is easier to see why popular culture will survive the on-line revolution, however radically it may change.

The book trade shows the importance of symbolic demands. To put it bluntly, most people do not read the books they buy. In January 2000 Marcel Proust's Remembrance of Things Past was #544 on the U.K. bestseller list, yet few of these buyers finish a single volume. Highbrow bestsellers by Stephen Hawking and Camille Paglia are read by only a small fraction of their purchasers. Most cookbooks are never used. Popular fiction bestsellers and self-help books are widely read, but even there the exact rate of reading is difficult to estimate.[5]

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[4] Cultural symbols typically involve both excludable private goods and non-excludable public goods, to use economic terminology. For an example of the private good, consider that most blues nightclubs also sell alcohol. Patrons enjoy not only the music, but they also enjoy the image of themselves drinking in a blues club. The club owner can charge for this symbolic good, by charging for alcohol, and thus it is a private good as well. Yet the symbols have a non-excludable public component as well, which no one can earn money from selling. An individual can go around claiming "I like the nightclub Blues Cavern," and thereby identify himself as a blues fan. The club owner earns nothing direct in return except the value of the publicity. Similarly, fans can enjoy giving their emotional loyalties to cultural celebrities without having to pay them anything.

[5] On Proust, see http://books.guardian.co.uk/Print/0,3858,3950488,00.html.

Non-reading buyers are not always wasting their money out of stupidity, as an elitist might believe. Rather most people buy books for reasons other than the desire to process the book's information. People buy books to put them on the coffee table, to show their friends, or as a measure of expressive support for some idea or celebrity. Perhaps most of all, people buy books to support their self-image as a kind of person who likes a certain kind of book. For these reasons, the book as we know it will not go away anytime soon. Book superstores have recognized this fact, and offer the book-buying experience, replete with Starbucks coffee, singles night, live concerts, high ceilings, stylish interiors, and celebrity lectures, rather than books alone. Superstores have increased the symbolic values associated with book shopping, and in a way that digital technologies and the Internet cannot easily replicate.[6]

When people care primarily about information, practicality and cheap access matter most. Then the Internet will triumph. The Internet is ideal for retrieving stock price quotes or serving as an encyclopedia. The Encyclopedia Britannica already has moved to the Internet completely, and the Web itself can be thought of as a giant encyclopedia. But in most spheres of reading, most people do not care if the Internet puts all the world's texts at their fingertips for free. They did not want to read much in the first place. They do not care if St. Thomas's Summa Theologae, 652 pages in a regular print edition, can be found for free on the Web.[7]

One of the biggest web successes in the book market came when 400,000 people downloaded Stephen King's "Riding the Bullet" in the first twenty-four hours. Yet most

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[6] Note that while many critics have criticized the lack of reading, it is a partial blessing in disguise for many writers. In addition to unintentionally supporting copyright protection, non-reading buyers protect the creative freedom of the author (again unintentionally). If all book buyers were to read what they buy, publishers would pressure writers to produce what these would-be readers would want. What the non-reading buyers would want is typically not what the author wishes to write, so often both sides are better off in this uneasy cultural truce, shored up by the demand for symbolic values. Authors now must write books that people will pretend to want to read.

[7] The page numbers are taken from the Amazon listing, of course there are many differing editions. The web version is http://www.ccel.org/a/aquinas/summa/FP.html.

of these people appear to have taken more interest in the downloading experience, and participating in a new trend, than in reading the work. One industry source estimated that three-quarters of the downloaders did not read the book.[8]

The symbolic nature of book ownership and purchase helps the book trade compete with free public libraries. Libraries already offer readers free access to many or perhaps most of the books they would like to read. (And to the extent that libraries are incomplete, this is the result of patron choices or at least patron indifference; if would-be readers and taxpayers pressured public libraries, they could change book ordering policies.) Yet the free public library does not put the book trade out of business. Books must be returned to the library within three weeks, and the library "book experience" is usually lacking in glamor. The existence of public libraries shows that the book trade can coexist with freely available book copies, provided the booksellers bundle their wares with attractive symbols and appealing complementary experiences.

Even a perfectly portable electronic book, with full downloading capacity, is unlikely to drive the book trade under. The electronic device is likely to be heavier and more costly than a paperback book. It remains to be seen how attractive the reading screen can be made. We would be reluctant to read it on the beach. The costs of losing it or damaging it would be higher. Nor would such an electronic device fulfill the "coffee table" function of a book, or fill the bookshelves in a sitting room. And even a cheap electronic device might cost more than all the books a person will read in a few years time.

But these technological imperfections are not the important point, given their contingency. We can imagine a portable electronic book that overcomes these limitations, even if we do not think that such a technology will exist anytime soon. The point is that any competing technology must also offer symbolic values, not just information. For reasons we will consider shortly, legitimate suppliers typically can sell symbols more effectively than rogue hackers can. As long as symbols can be presented

[8] See "Learning to e-read" (2000).

in a fashion that rogue hackers find hard to replicate, the for-profit production of popular culture will remain profitable, precisely because people are willing to pay for symbols.

Symbols and aura over the Internet

Internet suppliers compete to supply symbolic consumption just as they compete in terms of product and information transmission. Many web sites make cultural consumption a deeper and more interesting experience, or at least try to do so. Future cultural web sites may greet us with the image of a beautiful painting, a fanfare of trumpets, or the whiff of a pleasing scent. We can think of these symbols as producing an aura. So the phenomenon of aura can help Internet competitors rather than limiting them. In the case of on-line music, many young people enjoy the "outlaw" image of capturing copyrighted music from the large entertainment conglomerates. The very name "Napster" suggested something deliciously conniving.

Most cultural suppliers, however, offer unique forms of aura which hackers and outlaw web sites cannot replicate. The simplest point is that Internet auras are different, by the nature of computer technology. No matter how good the web site, looking at pictures over the Internet is not like being in a museum. So while Internet-based and non-Internet forms of aura will compete, there is no particular reason to think the Internet-based auras will generally win.

The two forms of aura may prove to be complements. That is, looking at pictures over the Internet, and enjoying the concomitant Internet-based aura, may interest viewers in finding out what a real museum is like. Similarly, people may be keener to buy books, for instance, if they can use their home web pages to tell others about what they have read. On-line music, even if it lowers CD sales, may encourage fans to see more concerts. And so on.

More specific factors give legal product suppliers an advantage in producing certain kinds of aura. Aura often comes through the association of a product with given

institutions, given celebrities, or a given history. This favors products supplied by identifiable institutions with well-established reputations. To give a simple example, the Academy Awards have an aura through history and tradition; it is hard to imagine an anonymous web posting developing a similar reputational cache. Book superstores, concert halls, and art museums have auras because institutions have invested resources in making themselves attractive, interesting, or otherwise focal. Outlaw or hacker suppliers, who wish to remain anonymous or at least low profile, are unlikely to make comparable investments. They cannot easily turn aura-producing investments into reputational or financial gains for themselves.

In other words, customers often do not want products supplied by anonymous institutions. This truth limits copyright-infringing web sites. If the copyright-infringing institution is truly anonymous, and thus impervious to legal sanction (as are many user-to-user file-sharing technologies), it will have a hard time producing aura. Other copyright-infringing institutions have a central identity and central web site and can develop aura more easily and effectively. These same web sites, however, can be shut down by law, or at least can be forced to charge customers and share royalties with the artists.

Individuals who download culture from the Internet are doing something akin to buying their product wholesale rather than paying higher retail prices. They are cutting out the middleman, which in this case happens to include the artist as well. Wholesale purchases exist in many markets, and they do constrain the level of retail prices. Nonetheless it is rare for wholesale purchases to destroy a retail market altogether. Typically many customers are willing to pay extra for services of packaging, presentation, selection, and aura. The existence of wholesale furniture outlets does not put department stores out of the furniture business, even though the price differential is often a large one. For similar reasons, the Internet will not bankrupt cultural industries, though it will change how they do business.

As Internet competition intensifies, cultural suppliers will have to invest more intensely in non-reproducible forms of aura. The Russian composer Scriabin prophesied that the music of the future would be a live, multi-sense experience, involving not only sound but also images, a communal atmosphere, and even smell. He was the first prophet of the drug-soaked "rave," a contemporary phenomenon in the world of electronic music. Scriabin also pointed out, unwittingly, the direction of culture in an Internet age.

Ironically the Internet will make much of our culture more "primitive," more visceral, and more orgiastic. As copyright protection weakens, cultural suppliers will move into areas that digital hackers cannot "steal." This will likely involve live entertainment, public spectacles, and remarkable, once-in-a-lifetime experiences. Culture will become more thrilling, and more like the cultures of ancient societies, such as the live theater or pagan rituals of ancient Greece. For-profit culture will move away from the mere transmission of information, and will become increasingly invested with non-reproducible aura. Haitian voodoo ceremonies, replete with trances, wild dancing, and live animal sacrifice, cannot be easily replicated on the Internet.

What about recorded music?

The problem of Internet copying is most serious when artistic products involve little or no aura. The consumption of recorded music, for instance, involves few complementary goods from the supplier, except perhaps for the album cover and liner notes. Consumers simply sit at home and pop a compact disc into a stereo. On-line music comes close to replicating this basic experience. The relevant symbolic complements, be they smoking pot or dancing in one's living room, are added by the consumer and do not come from the music company.

In the limiting case consumers could download any music they wished without having to pay money, other than computer time and cost of materials, such as software costs and costs for the disc (or some other medium) that the downloaded material is "burned" on to. In this world, how would musicians continue to earn a living from their product?

First note that Internet music services are unlikely to eliminate CDs and other material music technologies. Many individuals find computers and on-line music to be inconvenient or intimidating. While it is easy to predict that these cultural barriers will fall away, we are not close to this point in time. For most Americans buying music in the store remains the easiest way to get it. Furthermore on-line music does not give equivalent sound quality and is currently better suited to individual songs than to albums or long symphonies. Again, it is easy to proclaim that technology will remedy these shortcomings. But who would have expected that digital technologies, especially the mp3 file, would have lowered music quality to a level below that of many old 78s? The path of technology is notoriously unpredictable, but for the foreseeable future on-line music will be better in some ways and worse in others.

Extreme pessimism therefore is unwarranted. Nonetheless on-line music may cause music company revenues to fall significantly. On-line competition will constrain music companies and limit their pricing options.

Some CDs will become more expensive. In economic terminology, on-line music may drain off the "elastic" segment of market demand, the segment most responsive to changes in price. The remaining buyers may be richer, busier, older, less computer-literate, or somehow less able to shop around. People of these kinds might pay the higher price no matter what. Since those who would rebel against the higher price have already left the market, price might go up. Furthermore music companies sometimes charge low prices in the hopes of generating a snowball of fan interest in their product. If the natural market base is smaller, this motive for low prices will go away. Note that specialty CD issues in general have higher prices than very popular CDs.

At the same time other CDs would likely become cheaper. In these cases we are closer to the example of the videocassette, where the possibility of (illicit) copying lowers prices for everyone. When a large pool of potential buyers remain in the market, even in light of copying opportunities, the supplier will try to capture those buyers by lowering price

and expanding volume. Some new CDs might cost only a few dollars rather than almost twenty dollars.

In any case Internet competition will cut into the revenues of the music industry. The production and distribution of music will change dramatically as a result.

Madonna and Britney Spears earn millions in copyright income. In contrast, it has been estimated that 99.97 of all musical artists earn little or nothing from the sale of their recordings and thus earn little or nothing from musical copyright.[9] Instead these artists usually make their living, if they make a living at all, by giving concerts. Nonetheless the diminution of copyright income would affect the entire music industry, including these performers.

Music companies do not know who will be the next big stars. So they invest in a large number of musicians, not knowing what will hit. They lose money on most of their investments, and profit from a relatively small number of significant winners. It is the prospect of finding new stars that motivates the music companies to take chances on unknown artists. The economic problem is not only to get revenues to the artist, in return for music, but also to get other parties, such as entertainment companies, to invest in new artists and give them a chance to reach consumers.

Smaller returns to the mega-stars means that music companies will invest fewer resources across the board, to the possible detriment of the mid-level artists. If we examine a typical modern recording contract, we see that an artist receives about twelve to thirteen percent royalties for each compact disc sold.[10] So if a compact disc sells for $16.99, the artist is receiving less than two dollars for that disc. But the artist never sees this money in most cases. Musicians typically owe previously accumulated "debts" to their music companies for recording and promotion costs. The "debts" from unsuccessful releases

[9] See Mann (2000, p.50), working from data supplied by Simon Frith.
[10] See McPherson (1999, pp.66-7). This does not include any royalties that must be paid to the producer, but of course Internet music does not alter this cost.

typically are set off against their next recording. (These "debts" need not be paid off if the performer stops recording, but they do transfer from one album to the next.)

Without the gross copyright revenue flowing to the music company, most artists would be out of business after a single unsuccessful release, or could not have afforded the initial release in the first place. So even if artists see no copyright revenue, it keeps them out of debt. It is naïve to view copyright as an institution that benefits only the major entertainment corporations and a few mega-stars. If that were the case, significant parts of the music industry would have voluntarily abandoned copyright protection a long time ago.

Without copyright, music companies would invest less in studio time. Musicians would have to use cheaper technologies than at present. Music would likely become more immediate and less technologically refined. Classical CDs would draw more from tapings of live performances and less from expensive studio time. The sound of popular music would move closer to its roots, which were developed prior to the recording era. More musical experiments would reach the market, due to the publicity benefits of the Internet, but each experiment would be less capital-intensive.

The personal computer would play a greater role in musical composition and recording, relative to expensive studio effects, large orchestras, and costly sessions and retakes. Forms of electronic music such as techno and drum n' bass are already produced using relatively low capital expenditures, and this trend would continue. The expensive studio album, as represented by Queen, Yes, and Emerson, Lake and Palmer would be harder to finance, unless the effects could be replicated cheaply by contemporary digital technology or some comparable alternative.

As musicians invested less time in the studio, good live concerts would be easier to come by. Musical spontaneity would likely grow in market importance, relative to musical refinement as defined by studio expertise. Touring would become a more important source of musical income than it is today. Some recordings would be offered for free,

primarily to provide advertising for future tours. Many artists would earn more concert income and less royalty income. On net they probably would have to work harder. Artists who did not like to perform live, or who were poor at live performance, would be penalized.

In the classical market, the entire back catalog of Beethoven, Bach, and Mozart recordings would be available for free. Internet users already can download recordings by the great conductors and pianists of the past. In this environment it would be harder to justify a new studio-performed cycle of Beethoven symphonies. It is already the case that high-quality historic reissues, priced at budget levels, have damaged the market for new recordings by contemporary orchestras. We therefore can expect the market for new studio recordings of old works to continue to diminish, given that close substitutes are available for free. Nonetheless live concerts may be recorded and posted on the Internet for very low cost.[11] So modern interpretations of Beethoven symphonies need not disappear and in fact may skyrocket in number.

Songwriting would become a more important source of income for musicians. A songwriter is paid to the extent his or her songs are played or performed in public venues. The Internet would not make this form of copyright law any harder to enforce. Musical artists therefore would write their own material to increasing degree, to try to capture these gains. The music industry has already seen this trend.

The evolution of retailing would to some extent blunt these changes. On-line music makes it possible to save significant sums on retail expenses, which may run from ten to fifty percent of the price of a CD. The retail promotion outlet would decline in importance, as consumers find cheaper ways, whether legally legitimate or not, to get their music.[12]

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[11] Additional legal clarity would help here. In some cases orchestras and their unions have not determined how to divide revenues from Internet supply. It is harder for the sides to reach a bargain when the legal default rights to the revenue are not clear.

Marketing and talent selection

Entertainment companies currently serve as credit evaluators, banks, and risk poolers, advancing money to the more favorable musical prospects. Most of the costs incurred by the music company stem from finding, evaluating, recording, and promoting musical talent. If a given bundle of music brings in less revenue, many of these costs have to be covered in some other fashion, removed from the music company, or discontinued altogether.[13]

Most likely marketing expenditures would fall and recordings would have to generate their own publicity to a greater extent. Music companies would take fewer chances on recording artists, but this does not mean that recording artists would have fewer chances to make it. The same mechanism that makes copyright income harder to capture – the Internet – can lower the costs of sorting and evaluating talent.

The Internet and word-of-mouth would assume greater prominence in making records popular and spreading information about their quality. Volunteer means of producing evaluation and publicity would replace paid talent scouts and publicists. If an artist proves popular, or receives favorable Internet reviews and word-of-mouth, music companies would sign those artists and market them. The sorting function of the major entertainment companies thus would be replaced by a more decentralized set of gatekeepers. On one hand, many of the new decentralized gatekeepers will not have the same profit incentive as the record companies to make accurate evaluations. These new sorters will offer opinions without regard for profit and loss consequences. On the other hand, the more decentralized gatekeepers will have access to a greater diversity of opinion and information. Fans will rely more on the opinions of other fans, rather than relying on record company forecasts of fan opinion. We would expect a greater diversity

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[12] On the retail estimate, see "Siren Songs" (2000, pp.16-22).
[13] For more detailed information on the costs borne by record companies, see Schwartz (1997) and McPherson (1999).

of critical opinion and a greater diversity of publicity, perhaps leading to a more effective discovery process.

We already see that sorting is moving outside of the entertainment companies. Over a million fans downloaded the music of the band Fisher from mp3.com, leading to a lucrative recording contract for the group. The Internet site www.garageband.com offers music to listeners for free and allows them to vote for their favorites. On a periodic basis, the poll winners receive a $250,000 contract from a major record company. [14]

Todd Rundgren, a rock star from the 1970s, sends his fans regular shipments of music in return for a subscription fee. These same offering can be found through on-line music services, but Rundgren's price is low enough that many fans find it easier to buy from him. In essence Rundgren does the sorting and finding for his fans, and they are willing to pay him for those services, not just for the music. Of course the price of the sorted bundles is constrained by the possibility that consumers can copy the music on their own.

Note that if paying the artist enough to get the music produced is the relevant question (as opposed to paying the music company to do the sorting), Internet music faces a relatively low threshold. A typical CD sold on MP3.com, for instance, might have a sales price of $7.99 but offer fifty percent of gross revenue to the artist. Fewer CDs may be sold but the artist earns more per CD. So we need not think of these services as needing to bring in enough revenue to cover current CD prices.

The non-entertainment corporate world might increase in importance as a musical gatekeeper. Companies might give away music for free, over the Internet, but "wrap" the music in an advertisement. Downloading the song might require an individual to first hear or see an advertisement. This model will be sustainable as long as the cost of experiencing the ad remains below the inconvenience of pirating the music (ad-free) from the Internet. Internet advertising has failed in many cases to date, but one problem has

[14] On Fisher, see Mann (2000, p.54). Eli Lehrer has drawn my attention to garageband.com.

been that the consumer is required to click on the ad. In this model the consumer has to go through the ad to get to the music. Alternatively the company may serve as patron to the artists, in return for free publicity.

This model takes musical promotion out of the hands of the record companies and puts it into the hands of large non-musical corporations. The popular music sector, for all the publicity it receives, is small relative to many other sectors of the economy. Coca-Cola alone, for instance, has annual revenues almost twice as high as the entire music industry, which is closer in size to the annual revenues of Northwestern Mutual Life Insurance. In quantitative terms, it is not unrealistic to fund a large part of the music industry expenditure through advertising revenue. Tax law, which allows advertising to be written off as a business expense, helps in this regard.[15]

Some forms of music will move into the not-for-profit sector and fund themselves with donations rather than by sales. Just as people give money to support their local symphony orchestra, they might give money to support their city's leading jazz band or perhaps even a rock and roll group. Some record companies might reorganize as non-profits and fund their music through donations. Or existing non-profits could issue more recordings (orchestras are starting to do this). A symphony orchestra, for instance, can issue recordings under its non-profit status, rather than relying on for-profit record companies. Donors could be asked to support the free distribution of such recordings over the Internet, just as they are now asked to pay for construction costs of a new symphony hall.

To fund an artistic activity by donation, of course, requires that the activity be surrounded by an aura of status and prestige. When opera and the symphony orchestra moved from the for-profit to the non-profit realm in the nineteenth century, they abandoned their earlier carnival-like atmosphere and turned themselves into status clubs and networking

[15] Mann (2000) discusses the scenario of funding through advertisement; see Mann (2000, p.50) for the comparison with Northwestern Mutual. On Coca-cola, see http://biz/yahoo.com/p/k/ko.html.

institutions. Unable to sell their product for a profit, they instead traded reputation to their patrons, using the music as a focal point for organizing the production of status. Insofar as other forms of music or art enter the non-profit realm, they are likely to follow a similar path. [16]

Overall the weakening of copyright enforcement is likely to strengthen the aura of art. It will make the for-profit arts more pagan and more orgiastic, as they seek to distinguish their experience from the transmission of information over the Internet. Other arts will move to the non-profit realm, and thus become more status-oriented, again seeking to provide something that the Internet cannot replicate. The symbolic and informational functions of art may become increasingly separate, rather than integrated in the same products. The Internet will offer pure information, in the form of cultural "stuff," and other outlets for the arts will rely more heavily on the symbolic. Just as high and low culture have split, consumers may put together their own cultural portfolios by mixing and matching informational and symbolic experiences from a wide variety of genres and supply sources.

How should we evaluate music worlds?

Under one view, which I have called the perspective of the critic (see chapter two), we achieve a good result to the extent the music market produces masterpieces that stand the test of time. We therefore look to the judgment of history to evaluate institutions for producing music. In this perspective, 1968 was a great year for music because it had the Byrds' Sweetheart of the Rodeo and Captain Beefheart's Safe as Milk, even though the albums did not sell well at the time or subsequently. Similarly, we judge the Florentine Renaissance as magnificent because its artworks have entered the history books, rather than because they sold for high prices at the time (many did not).

The critic's point of view emphasizes peaks of achievement. It is commonly believed that the best albums of the 1960s were seminal works and thus that musical era has gone

[16] On this switch, see Caves (2000, p.241-2).

down in history. From today's vantage point, few people care that the average pop song of the 1960s was poorly constructed and overly sentimental. Few people downgrade the 1960s because Herman's Hermits and Herb Alpert and the Tijuana Brass sometimes pushed the Beatles and The Rolling Stones off the top of the charts. The critic cares about what lasts, rather than about the typical product, or about whether every listener at the time was happy.

From the critic's point of view, the weakening of copyright enforcement should not occasion serious worry. Most critics argue that today we have too much investment in mass culture, and too little investment in niche culture. On-line music, by weakening copyright enforcement, will force marketing expenditures to fall, moving us away from mass culture and limiting the creation of mega-stars. More generally, high marketing expenditures limit market access, require musical releases to reap a fairly high gross, and encourage entertainment companies to look for "the next big thing." To the extent that marketing costs fall, the music market will be less "winner-take-all," less oriented towards commonly shared celebrities, and more oriented to satisfying diverse and heterogeneous niche tastes. Most critics would like this result.

We already see that mega-stars expect to lose the most from downloadable music. The strongest opponents of Napster, for instance, have been the stars with well-established mass followings, such as Metallica. Conversely, the less popular musicians typically have a more favorable attitude towards Internet distribution of music. The Internet helps musicians aiming at small and sophisticated audiences, including audiences of critics.[17]

Note that the perspective of the critic, if taken alone, undervalues the benefits of on-line music. The aesthetic perspective, at least in its extreme form, focuses on whether great

[17] In the context of literature, William Warburton, an eighteenth century theologian, argued that the decline of copyright would spur creativity and quality. He argued that money was a corrupting lure, and that fame incentives would provide for a superior product, as they did for the ancients. Warburton noted approvingly Thucydides's comment that he wrote to be famous, not to be fed. On Warburton, see Cowen (1998, chapter three).

culture is "out there," rather than asking whether consumers enjoy it. Downplaying the importance of consumers distracts attention from the incredible on-line "universal jukebox" that the Internet brings. The Internet takes great music that is already there, and distributes it more widely to consumers.

In contrast to the perspective of critics, consider the preferences of consumers. Here it is harder to judge whether on-line music will improve economic efficiency.

First, how much music is sold in a given year is not a very good indicator of how much value consumers receive from music. Fans commonly experiment by buying a number of CDs, only a few of which pay off and become favorites. Many or most of the products bought are quickly regarded as disappointments; in this regard the market for CDs differs from the market for refrigerators.

We do expect that the Internet will help music companies track fan demands, and we already see this benefit at work. When fans sample on-line music, usually they can figure out whether or not they would like the entire CD. Some of these fans will still buy the CD, to get better sound, to have it in more convenient form, to receive the packaging, and so on, as discussed above. These fans will almost always be happy with their purchases. It will be harder for the music companies to issue low quality CDs, and of course this may cause the number of issues to decline. In nominal terms the industry will shrink, but at the same time it may produce more real value for consumers. For this reason, we cannot conclude that a shrinking industry is necessarily bad.

More generally, we do not understand the demand for music very well. We do not understand what most fans want from their music. Just as book buyers are not always readers, the music market is not always about music. Sometimes it is about the symbolic value of music.

A major mystery is why music fans spend almost all of their music money on product of very recent vintage. Until we untangle this puzzle, and we have not yet, we will not understand how the Internet is likely to affect consumer welfare.

Most consumers are not interested in buying much music from 1950, regardless of its objective quality in the eyes of the critic. Music from 1650 is even less popular. Few people search the entire history of music for "the best recordings" and focus their buying on those. Rather, in any given year the most recent recordings dominate the charts. At a typical moment, all of the Billboard Top 40 singles, or albums, come from the last two years of recorded output (the Beatles's recent "#1" CD is one exception to this). Upon reflection, it is difficult to believe that music gets so much better every year in any kind of objective sense. So we are left with the puzzle that consumers evince an overwhelming preference for music produced in the very recent past.

Most likely the music market is about more than simply buying "good music," as a critic might understand that term. People buy music to signal their hipness or to participate in current trends. Teenagers wish to share consumption experiences with their peers. Buyers use music to signal their social standing, whether this consists of going to the opera or listening to alternative rock or heavy metal. Others value partaking in newness per se. They find newness exciting, a way of following the course of fashion, and the music market offers one handy arena for this pursuit. For some people music is an excuse to go out and mix with others, a coordination point for dancing, staying up late, drinking, or a singles scene. Many fans seem to enjoy musical promotions, hype, and advertising as ends in themselves, and not merely as means to hearing music. They like being part of the "next big thing." The accompanying music cannot be so bad to their ears as to offend them, but the music is not always their primary concern.

The features of the market that matter to the critic may not be very special to consumers at all. Most of all, consumers seem to care about newness, and about trendiness, more than they care about music per se. So how much does it matter, from the consumer point of view, if weaker copyright enforcement reshapes the world of music?

Under one hypothesis, the specific musics of our day are easily replaced, or in economic terminology, highly substitutable. Different musics could satisfy consumer demand almost as well as current musics, provided that individuals could coordinate on common musics to the desired degree. Or perhaps half the supply of music could do almost as good a job of supplying symbolic goods, especially if music companies can track fan demand with greater facility. Perhaps individuals could rely more heavily on alternative means, such as fashion, to signal their social standing and participate in trends. These points are all speculations, but they show how difficult it is to pin down what music fans are really looking for.

Consider two examples. First, in the former Soviet Union, dissident rock and roll bands performed many popular culture functions, and commanded the fervent loyalties of many listeners. These bands fell short of the objective critical quality of their Western counterparts, but they still provided consumers with many useful services. Second, in 1941, the major radio stations refused to carry the catalog of the music publisher ASCAP, in a dispute over fees. At that time ASCAP was the leading music publisher and clearinghouse in the United States, and comprised most of the music market. The stations instead played BMI music, which was more oriented towards rhythm and blues and offered less Tin Pan Alley, crooning, and big band. Radio listeners and music fans seemed to take the sudden change in stride, and there is little evidence of a serious problem. Instead music fans continued pretty much as before, except for the change in styles and associated music publishers.[18]

For whatever reason, consumers find it much harder to move to old music. Perhaps only new music allows for effective signaling and sorting. When music is new, individuals can show that they are connected to current modes of thinking and feeling. Not everyone can know "what is in," because "what is in" is changing so frequently. That very fact makes it worthwhile for consumers to put effort into discovering "what is in." It is less useful for people to focus on "what was in, in 1953," because once discovered it remains

a fixed piece of information. The music market might therefore churn product to help people communicate their identities to others, and to help people play an ongoing dynamic game of clues and cues.

So the music of Chuck Berry "no longer fits" the world of 2001, and cannot be made to fit it. Critics still love the music, and some niche consumers will be drawn to its merits, but it can never hold the current place of Britney Spears or Ricky Martin, though it was the rage in the mid-1950s. That is why hit reissues are rare. It is not because consumers still remember the older musics, but rather because most consumers they do not care about them very much. It thus appears that the value of popular music, to consumers, consists of some temporally specific tracking quality, an ability to follow, correspond to, or perhaps even shape the spirit of the times. For consumers, this tracking quality is a significant part of the value of music. The music industry is delivering the goods when its music performs this tracking function, and otherwise not.

The Internet likely helps music perform this tracking function, or at least does not hinder it. On-line music will encourage decentralized production and evaluation, as discussed above. The largest prizes in the music market will decline, but it will be easier for upstarts to enter the industry. Individuals who wish to cluster around the biggest stars could do so, but others would find it easier to search for alternatives. The aura of live musical performance will become more important, and recorded music will become more dependent on live performance. In each regard the Internet brings customers closer to music and musical experience and thus appears to boost the tracking function of music. Despite the uncertain nature of the above analysis, we therefore have some reasons to be optimistic about the welfare consequences of on-line music, from the consumer's point of view, and not just from the critic's point of view.

The visual arts

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[18] On this episode, see, for instance, Crawford (2001, pp.720-1).

To date the visual arts have not experienced serious copyright problems with the Internet. Many individuals post unauthorized copies of paintings and other artworks, but these copies have not disrupted the markets for the originals. The difference in market value between an original artwork, or even a print, and a digital copy of that artwork remains enormous, much greater than for literature or recorded music, where the copy has almost the same value as the original.

We nonetheless can imagine a more distant future where digital holography, or some comparable technology, allows for the very accurate reproduction of visual artworks. In the limiting case, very accurate digital reproductions might allow viewers to enjoy their own copies of the Mona Lisa or of a Monet haystack painting, indistinguishable from the original to the naked eye.

This scenario, while far off, still would not spell doom for the art world. First, the original may continue to be worth much more than the copies. The price difference between an original artwork and a copy, even a very good copy, is significant. Experts have been fooled many times by artistic copies, frauds, and forgeries. But once an artwork is revealed to be non-authentic, its value plummets immediately, even though the quality of the non-authentic work remains constant. Buyers care about the aura of the original and its symbolic value, even when they cannot tell the difference between the real and the copy. Why they feel this way is an interesting question, but the attitude seems to be robust, and it may prevent copies from ever cannibalizing the market for original artworks.

If many copies are good enough, perhaps the difference in value between fakes and real art works will disappear or narrow over time. Perhaps we shun unauthorized copies of artworks because, deep down, we know they are not very good. Forgeries are devalued because, once we know they did not come from the hand of Rembrandt or van Gogh, it becomes common knowledge that they were weak in the first place. The fakes then drop to the value of their true aesthetic worth or lower. So if unauthorized copies were truly of high quality -- as good as the original Mona Lisa -- over time the premia for original

works might diminish. Social conventions might change. We already see that the current generation of art buyers is not so put off by the “multiple” nature of artistic photographs, whereas the previous generation of buyers was keener to buy "original" works. If we look to the past, prestigious museums once bought copies of famous artworks, though such purchases would be unthinkable today.[19]

Higher values for copies would not, however, ruin the market for art. Instead the arts would become more popular and less elitist. Artists would sell many copies of a single work to a large market, rather than selling only a few copies to very wealthy buyers. In essence, more artists would be forced into the print market, albeit with a higher quality of reproduction than is currently available.

As in the music or book markets discussed above, prints would have to sell more cheaply, given the possibility of unauthorized reproduction. The price of a print could not be much above its cost of unauthorized reproduction. The relatively low profit margin would mean a smaller role for art intermediaries, such as galleries, just as on-line music may mean a smaller role for record companies. Galleries currently certify product quality, and to some extent word-of-mouth and volunteer Internet surveys would take over this function, analogous to the above discussion of the music market.

We could expect art school training to become less profitable, given that art copiers could mimic the efforts of art producers. Art might become more "Outsider," more "naïve," and less schooled.

The effects on the art market might resemble how electronic recording reshaped the music market. Many new genres rose in visibility, such as jazz and country and western. Overall most music became more popular, but paradoxically many unpopular musics became more viable at the margin. Many relatively obscure musical forms, such as free jazz, have used recording to reach a wider audience and earn a better living. Recording

[19] On past museum purchases of copies, see Sassoon (2001, p.41).

has brought more diversity at the fringes, while making the center of the market more popular.

High-quality copies also would alter the symbolic values associated with art. The visual arts currently serve as a field for producing social status and differentiation. In contrast, a reproducible genre such as popular music is more likely to serve functions of common sharing and coordination around popular stars. The widespread availability of good copies would lower the exclusivity of art ownership, and make art easier to use as a signal of commonality, rather than as a signal of distinction. This might make art buyers more interested in very new products, and less interested in the classics, again as we have found in music markets.

Cinema

Cinema is one of the hard cases for any partisan of Internet culture, or for any advocate of weaker copyright enforcement.

Theater-based cinema, which bundles informational and symbolic goods, is likely to survive. Movies are about more than just seeing the film. Movies are "date movies," "family movies," sharing popcorn, making fun of other people waiting in line, and simply getting out of the house. Furthermore, many moviegoers are willing to pay to see the film on a large screen.

Nonetheless freely available digital DVD copies would damage business. Hollywood film studios (circa 1993, see Cowen 2002, chapter four) received almost half of their revenue through the home video market, and this source of income would likely fall. Furthermore some people will wait for the free digital broadcast at home, in lieu of going to the theater. That is why movies are the problematic case for any fan of Internet-transmitted digital culture.

Today it is not very convenient for most home users to download copies of films, due to slow transmission speeds. It is even harder to watch those films on a small computer screen, or to transfer them to one's television. Nonetheless these technical obstacles may fall away with the passage of time, thus opening up the market to unauthorized digital copying for the ordinary viewer. These changes may be distant, but at the very least we should contemplate their likely effects.

Unlike live movies, videocassette or DVD rentals do not offer many complementary symbolic goods in addition to the movie itself. This market is therefore vulnerable to Internet pirate copies. It is already the case that several hundred thousand DVD copies are downloaded off the Internet every day, usually through file exchange services. With more advanced technology the movie could be downloaded while it is being watched, with no glitches or interruptions.

Even if a production company refused to release a digital copy of a film, pirate digital copies might be sneaked out of the studio and posted on the Internet. Only a single pirate copy would be needed for it to spread to many hands. On the plus side, however, if a movie stays in analog form, it is relatively hard to convert an analog copy of a that movie into a digital version. Hackers have been known to go to movie theaters with digital video cameras hidden under their coats, to record the movie and then post it on the Internet. The loss of quality, however, is significant.

The more strongly the Internet competes with movie theaters, the more movie theaters will invest in non-replicable aura. Moviegoing would become more of a live experience, and the notion of a movie theater as a "pleasure palace," prominent in the 1920s, might be revived. Perhaps the movie would somehow interact with the live experience of being there to watch it.

Movies might adapt to Internet competition as they survived competition from television broadcast, despite the free nature of the latter. As television grew popular in the 1950s and 1960s, the movie industries were devastated in each Western country. It was

common for movie admissions to fall by as much as a factor of five.[20] At the time most movies were little more than B fare, "made-for-TV" movies on the big screen. Television took away this part of the movie market, probably forever, but Hollywood responded by investing in spectacles for the large screen and expensive special effects. Today Hollywood releases fewer films per year than it did before television, due to the migration of the "B picture" to that medium, but the industry as a whole is economically healthy.

If illicit Internet copies take over the home rental market, they must compete in terms of convenience more than in terms of price. Videocassettes have competed against illegal copies for a long time, but since it costs only two dollars to rent Raiders of the Lost Ark, few individuals bother to make an illegal copy. The possibility of illegal copies nonetheless keeps rental prices down, forcing video (and DVD) rentals into a low-price, high volume mode. So we know that individuals are willing to pay a higher price for the legal product, if the legal service somehow offers sufficiently greater convenience or greater product quality. This reopens the possibility that Hollywood studios will not only survive the age of digital culture, but prosper in it. Exactly how and why the legal copy might be superior, though, remains to be seen.

Whither copyright?

In sum, the Internet and weaker copyright enforcement will have complex effects on various artworlds. The technologies are exciting, but the relevant truths are often banal. Many people will be better off while others will be worse off. Even when some creators would be worse off, that does not mean that the arts would suffer. Some styles will flourish while others stagnate. For consumers, we are on the verge of having a universal jukebox of sorts at our disposal, granting access to the world's musical and literary treasures for a mere pittance. Yet most people don't actually care about this opportunity.

[20] Cowen (2002, chapter four) offers more information and data on this history.

When evaluating copyright enforcement, should we take the viewpoint of critics or consumers? And is the music or culture of a particular age easily replaceable or not? In neither case do we have clear answers. But none of the cases show that Internet-based digital reproduction, and weaker copyright enforcement, will bring obvious disaster to cultural markets. Cinema, however, was probably the hardest case we encountered, and the area where our fears should be strongest.

I therefore am inclined to welcome the new technologies and enjoy their benefits, rather than restricting them by legal means. I see digital technologies as supporting, rather than hindering, the decentralized finance of the arts.

That being the case, we may wish to consider rewriting copyright law to enable the new technologies to operate without hindrance. Much of musical copyright law, for instance, was written for technologies of player pianos and sheet music, and hardly seems appropriate for a world with digital reproduction.

One simple modification would give Napster-like services access to mandatory licensing. We already apply various forms of this practice to radio, jukeboxes, department store broadcasts of music, cable retransmission of television signals, or to individuals who wish perform somebody else's composition live. To provide a simple example, a radio station can play someone's song, provided they pay an appropriate fee to the copyright owner of the composition (not to the copyright holder for the recording, though). The fee is set by law, in recognition of the difficulty of negotiating an appropriate price in each and every case. Similarly, we could require compulsory licensing for the transmission of recordings over the Internet.[21]

Today the record companies have the right to withhold music from non-authorized Internet services, and have done so to keep those businesses from developing a market. Compulsory licensing would force the music companies to trade at a certain price. Compulsory licensing may seem like a curious position to encounter in a book that

heralds the virtues of decentralized markets. It looks like government-sanctioned price fixing. But compulsory licensing can be given an alternative interpretation. Whatever its favorable practical effects, copyright is a government grant of monopoly. Compulsory licensing is simply forcing the monopoly holder to share some of the government-sanctioned monopoly position with others, thus moderating the monopoly power. Whether or not it is an ideal system, it is one simple way of granting legal legitimacy to Internet-based music services. And while rogue services may escape paying the requisite fees to music companies, we face this same danger from the rogues in any case, with or without compulsory licensing. Compulsory licensing actually makes it harder for rogues to succeed, by giving legitimate services a legally recognized means of making a market.[22]

Copyright as corporate welfare and censorship

Historic copyright originates as a monopoly grant of privilege from the state. In the nineteenth century the U.S. Supreme Court ruled that copyright is a statutory monopoly rather than a natural law right of the author. Going back earlier, in Renaissance Venice, the home of Western copyright law, some printers were given monopoly rights to the entire printing industry. These rights then evolved into more specific monopoly rights to print particular works; early copyright was often vested directly in the publisher, rather than the author. The subsequent development of copyright shows similarly close links to state control. Throughout much of English history, copyright law served partially as a system of censorship. The grant of a copyright was considered equivalent to a decision to allow the particular work to be published. The censorship origins of copyright remain

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[21] On various aspects of compulsory licensing, see Samuels (2000).

[22] We can also see a possible public goods problem when the music companies set their fees for their on-line services. Each might tend to set fees too high. A high fee encourages more rogue services, but each single company only bears part of the cost of each rogue. Compulsory licensing, by opening up the market to competition and enforcing lower fees across the board, will require each company to give up some profits, in order to make the market harder for the rogues.

reflected in U.S. law. The 1976 Copyright Act, for instance, gives the government the power to "burn and damask" offending copies.[23]

As the nineteenth century developed, copyright protection was extended to prints, music, dramatic composition, photographs, and works of art. (Later the dominion of copyright was extended to cover new media such as electronic recordings and moving pictures, and in more recent times computer software.) The length of copyright was extended, and by the 1909 copyright act there was a first term of 28 years and a renewal of 28 years.[24]

Legislation in 1976 brought copyright protection to new extremes, namely the life of the author plus fifty years, and for a company seventy-five years from publication or one hundred years from creation, whichever is sooner. The renewal process was eliminated altogether. Over time the large corporations of the entertainment industry have captured Congress in this matter, and the copyright period has now been extended eleven times in the last forty years. The most recent extension was the Sonny Bono Copyright Term Extension Act of 1998, which expanded copyright protection to the life of the creator plus seventy years, rather than fifty. Corporate copyrights also were extended twenty years to a total of ninety-five years, as were copyrights for all works produced before 1978. The campaign to change these laws was led by the Disney corporation, which had feared the otherwise forthcoming expiration of copyright on Mickey Mouse and other lucrative cartoon characters.[25]

Note that many of the individuals and institutions pushing for copyright extension have relied heavily on artistic works within the public domain. Disney characters are frequently drawn from European fairy tales or American folk tales, without payment of any licensing fee. Some of Bob Dylan's songs are so close to the works of Woody Guthrie that Dylan would lose a lawsuit, had Guthrie received contemporary copyright

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[23] On the Supreme Court, see Patterson and Lindberg (1991, pp.61-2). See Rose (1993, chapter two) and Patterson and Lindberg (1991, p.26, passim).
[24] On these revisions for number of years, see Wyszomirski (1999, pp.129-130).
[25] See, for instance, Walker (2000).

protection (of course Guthrie borrowed heavily as well). This did not stop Dylan, once a populist 1960s radical, from joining the lobbying effort in favor of copyright extension.[26]

Wherein lies the true danger?

Fears about weakening copyright protection are likely overblown. Rather centralization of delivery is the greater danger of the Internet. The Internet, for all its decentralizing promise, is centralizing in one regard. It pipes information into the home, rather than requiring the consumer to go outside and get it. Piping networks are commonly natural monopolies at some level or another, and thus vulnerable to government censorship and control. As we will see below, this is not essentially an argument about market failure, but rather a fear that governments will overstep their bounds.

The Internet, of course, does not use pipes in the formal sense. Nonetheless delivery of on-line material into the home relies on several crucial relay points, at least under current technologies. This includes a service provider (such as AOL), Internet servers, a phone or cable company, and sometimes satellite networks. Government censorship of the Internet is possible at all of these nodes. We already find controversial web sites blocked in China and Saudi Arabia, typically through the control of servers and the use of filtering software.

Private monopoly power is most likely a problem at the level of the telephone or cable connection. The potential natural monopoly behind these piping networks is easy to see, and recurs in several contexts, including water, electricity, and cable television. It does not make economic sense to build more than a single set of telephone lines for a given neighborhood. The single set of lines, however, creates the potential for monopoly. Whoever owns the piping network can, in the absence of regulation, charge monopolistic prices. Alternatively, the government can guarantee multiple carriers access to the lines, which brings heavy regulation and control of access prices. Under any of these scenarios, government can potentially control the supplier and thus control content.

[26] On Dylan, see Walker (2000).

Note that we do not have the same monopoly and censorship problems when the consumer goes outside the house to make the relevant purchase. It makes economic sense to have many different grocery stores, gas stations, bookstores, etc., at least provided the relevant community is large enough. The resulting multiplicity of suppliers places an automatic check on monopoly power, and on the government's ability to choke off supply. Yet if the service is piped into the home, multiple suppliers do not typically make economic sense for a given neighborhood. Ironically, the vast decentralizing powers of the Internet in terms of content -- its ability to send so much information into our homes -- bring a corresponding danger of centralization at the level of delivery. Centralized delivery, however, may not in the long run support decentralized content.

As it stands, we rely on government to regulate the media – telephone wires and cable connections – along which Internet transmissions are carried. To date this has not proven problematic. But if the Internet grows to the point where bandwidth must be rationed more directly (as opposed to today's free-for-all queuing rules), we face a danger. Government might develop or regulate a rationing scheme, and either intentionally or unintentionally discriminate against some forms of speech and favor others. When government regulates a medium for transmitting information, it typically assumes some degree of control over what is transmitted. This has been the case with radio and television in the United States, although less so for the telephone network.

Debates over the NEA, discussed in chapter three, indicate that the American public is reluctant to allow a government-supported network to be used to support "obscene" material. In the past, when America faced a communist opponent, there was widespread public support for legal discrimination against leftwing, socialist, and communist art forms. Today, if the American government were perceived as supporting, subsidizing or regulating the Internet transmission network, we might see comparable calls to restrict the content of the medium or to provide differential regulatory treatment to various forms of content.

Even when explicit censorship is off the table, we are still faced with the possibility that regulators will be evaluating various schemes for pricing Internet transmissions. In the long run bandwidth will be scarce under most workable transmission systems. That is, only so much information can be sent over the "information superhighway" at any given point in time. As Internet transmissions increase in number and content, some kind of pricing scheme will be necessary, just as we price long-distance phone calls. The market may well find a good system of pricing, but the danger remains that the government will regulate these prices to control culture, thus limiting both freedom and decentralization.

In the meantime, the cultural benefits of the Internet far exceed its costs. We see once again that beneficial policy often arises through accident. Congress and the regulators debated telecommunications for decades and often chose ill-advised policies, such as restrictions on cable television. Yet Internet assistance came with little explicit debate and is likely to go down in history as a major success for both telecommunications and culture.