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WORKING TOGETHER IN A DIGITAL WORLD: AN INTRODUCTION

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In May of 2006, The University of Denver Sturm College of Law and The Cable Center sponsored the Inaugural Summit on Intellectual Property and Digital Media (Summit).[1] The Summit brought together academics and industry leaders in a search for common ground and practical policy solutions concerning issues related to intellectual property and digital technology. Through a number of panels and roundtable sessions, academics and industry leaders outlined and addressed a variety of issues concerning existing business models, digital technology, and intellectual property rights. The Summit highlighted the ways in which scholars, representatives from various industries, public interest groups, and other organizations, despite their differences, are able to engage in productive conversation about the digital future and the legal structure shaping that future. This symposium issue of the *Denver University Law Review* includes the papers authored for the Summit and is dedicated to examining real world problems concerning the interaction between law, technology, innovation, and creativity. One of the strengths of intellectual property scholarship is its attention to the practical issues facing industries, individual users, and regulators, and the papers included in this volume reflect that strength.

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†† Assistant Professor of Law, University of Denver Sturm College of Law. The authors would like to thank The Cable Center for organizing the Summit on Intellectual Property and Digital Media. Susan Greene had the initial vision for the conference and through sheer force of will brought it into being. We also thank the *Denver University Law Review* for publishing this symposium issue.

1. For more information on the Summit, see The Cable Center, http://www.cablecenter.org/education/academic/digitalipsummit.cfm (last visited September 26, 2006). In addition to the participants who contributed papers, the speakers at the Summit included Sandra Aistars, Associate General Counsel for Intellectual Property, Time Warner, Inc.; Joseph Cantwell, Vice President of Marketing, Advanced Services, Starz Entertainment Group; Peter M. Fannon, Vice President, Technology Policy, Government & Regulation, Panasonic Corporation of North America; Edward Felten, Professor of Computer Science and Public Affairs, Princeton University; Richard Fickle, Executive Vice President of Strategic Development, Ascent Media Group; Eric Goldman, Assistant Professor of Law and Director of the High Tech Institute at Santa Clara University School of Law; Vince Groff, Director, Video Product Development, Cox Communications; Greg Harper, President, Cerberus Corporation; Robert Kasunic, Principal Legal Advisor, Copyright Office, and Adjunct Associate Professor of Law, American University's Washington College of Law; Ron Lamprecht, Vice President, New Media, NBC Universal Cable; Maria Mandel, Partner, Executive Director of Digital Innovation, OgilvyInteractive Digital Innovation; Scott Teissler, Executive Vice President, Chief Information Officer and Chief Technology Officer, Turner Broadcasting System; and Bob Zitter, Executive Vice President and Chief Technology Officer, HBO.

Ralph Oman, the former Register of Copyrights, the Pravel, Hewitt, Kimball and Kreiger Professorial Lecturer in Intellectual Property and Patent Law at George Washington University Law School, and attorney with Dechert LLP; and Peter Yu, Associate Professor of Law and Director of the Intellectual Property & Communications Law Program at Michigan State University College of Law, submitted papers and participated in our Academic Roundtable Discussion entitled "Digital Rights Management: Searching for Common Ground."[2] This panel provided the academic viewpoint on how intellectual property principles may be changing in a digital environment and how the digital environment may ultimately affect the legal infrastructure. In his essay, *How Digital Rights Management Will Save Authorship in the Age of the Internet*, Ralph Oman argues that the Digital Millennium Copyright Act (DMCA) and digital rights management (DRM) technologies have stabilized the marketplace and allowed parties to contract for content using legitimate services. According to Mr. Oman, some of the problems—ease of copying and distribution of quality copies of copyrighted works—and some of the benefits—widespread dissemination of copyrighted works—that digital technology and the internet allow are not new and mirror some of the issues raised by older technologies, such as the printing press, radio, television, laser printers, VCRs and CD players. Mr. Oman asserts that "[t]he best copyright laws have always protected the power of creators against the power of the companies that build the machines that exploit the creators' work." He believes that DMCA and the DRM technologies protected by DMCA will enable authors to use the internet and digital technology as strong allies in the creative process.

Professor Yu provides a very different perspective on the role of the DMCA and DRM technologies in the digital environment. Professor Yu's article, *Anticircumvention and Anti-anticircumvention*, examines the DRM debate, the anticircumvention regime, and makes four observations. Professor Yu asserts that DMCA has resulted in many negative unintended consequences and likely has not created benefits for copyright holders. He then extends his analysis to the international level and laments the extension of statutory schemes similar to DMCA to other countries through multilateral, bilateral, and plurilateral treaties. Importantly, his article concludes by offering four suggestions to provide guidance for the creation of the next wave of DRM systems and the legal scheme that supports those systems. His observations for policy makers include: awareness of how difficult it can be to change an entrenched law, the distinction between DRM and technological protection measures, understanding the difference between machine-interpretable nonin-

2. Phil Weiser, Associate Professor and Executive Director, Silicon Flatirons Telecommunications Program, University of Colorado School of Law, also participated in this roundtable on digital rights management.

fringing uses and machine-uninterpretable noninfringing uses, and the accommodation of consumer interests.

In response to a call for papers concerning DRM and the adaptation of the business sector to the shrinkage of the distribution change between creator and consumer in the digital world, many scholars submitted thought-provoking papers. The Summit committee selected five of these papers for presentation and publication.[3] Megan LaBelle's article, *The "Rootkit Debacle": The Latest Chapter in the Story of the Recording Industry and the War on Music Piracy*, focuses on Sony's decision to install invasive DRM on its music CDs sold in late 2005. As the title indicates, the attempt at curbing unlawful copying was a debacle for Sony, causing a public relations fiasco and ultimately forcing Sony to recall the CDs and to agree not use that form of DRM in the future. Ms. LaBelle uses the Sony story as a focal point for discussing the problems posed by the ease of digital copying in general. The article sets forth the background against which Sony's decision to install the rootkit on its CDs arose and evaluates the legal questions presented by the rootkit debacle. Finally and most importantly, the article proposes "a solution that attempts to strike a balance between the recording industry's right to protect its intellectual property and a consumer's right to enjoy purchased music." Concluding that DRM is the only reasonable way for the recording industry to protect itself against unauthorized copying of CDs—as there are no indirect infringers to pursue and tracking the copying of CDs is virtually impossible—Ms. LaBelle makes a number of concrete proposals for addressing the concerns of a variety of interested groups. She suggests that the Copyright Office "adopt a narrowly-tailored Security Research Exemption" for the purposes of protecting the work of academics, scientists and other researchers. She also proposes that the record companies take a different approach to copy-protecting CDs. In general, they should be mindful of security and privacy risks to individual consumers and, more specifically, have all DRM software independently analyzed and tested. In addition, Ms. LaBelle recommends that all copy-protected CDs carry "sufficient notice" of any anti-piracy technology they contain. Finally, the record companies ought to be more sensitive to consumer preferences in developing copy-protection or other DRM technology.

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3. Two other scholars presented papers at the Summit, but those papers do not appear in this volume. Roberta Rosenthal Kwall, the Raymond P. Niro Professor of Law and founding director of the Center for Intellectual Property Law & Information Technology Law at DePaul University School of Law, discussed her work on section 108 of the Copyright Act. Professor Kwall's commentary is published in the *Columbia Journal of Law & the Arts*. *See* Roberta Rosenthal Kwall, *Commentary: Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author's Perspective on § 108*, 29 COLUM. J.L. & ARTS 343 (2006). In addition, Tal Zarsky presented his paper, *Reassessing Alternative Compensation Models for Copyright in the Digital Age*, which will appear in issue 84:2 of the *Denver University Law Review*.

Christine Galbraith's essay, *Remembering the Public Domain*, traces the ways in which public domain materials are increasingly being restricted with technological, contractual, and legislative measures. These measures have generally been supported and upheld by courts such that much information that "constitute[s] the building blocks of knowledge" is made proprietary. Professor Galbraith argues that the legal support for these measures is the result of a "myopic view of property rights" that treats virtual space as equivalent to real property and thus tends to grant the "ability to exclude whomever and whatever they choose." Professor Galbraith concludes with the admonition that courts and legislators must acknowledge the importance of the public domain, something that is essential "for an enlightened citizenry."

Jeremy deBeer's article, *Locks & Levies*, provides a valuable comparative perspective on the digital piracy and DRM war raging in the United States. Professor deBeer compares the U.S. approach of strengthening the legal support for technological protection measures to Canada's broad levy system. Rather than adopting specific anti-circumvention legislation, Canada has adopted a levy on manufacturers of goods and service providers to address the issue of private digital copying. Professor deBeer compares the two approaches from a variety of perspectives: those of creators, technology firms, and consumers. The two approaches are not exclusive, however, and Professor deBeer explores "a worldwide trend toward the simultaneous presence of both locks and levies in digital entertainment markets." The paper discusses the consequences of "lock" systems, "levy" systems, and hybrid systems. Professor deBeer concludes that hybrid systems, which may be the most likely result of compromise between the various interests, may also present the worst possible scenario, placing consumers between a rock and a hard place: "consumers risk being caught in the middle of a regime that prohibits the circumvention of DRM systems in order to access or copy digital content, but at the same time mandates levy payments to compensate for copying that either cannot occur, is already licensed, or constitutes fair use/dealing." Professor deBeer's article thus provides a very real world understanding of both consumer behaviors and preferences and the likely results of political compromises over the issue of digital copying. In conveying this perspective, Professor deBeer emphasizes the practical problems that may result if the legislative and technological approaches to the issue are not coordinated and well thought out.

In his article, *Beyond Copyright: Managing Information Rights with DRM*, Viktor Mayer-Schönberger also takes a broad perspective on DRM, arguing that it might be useful "beyond the narrow confines of copyright" for managing "rights over information more generally." Professor Mayer-Schönberger describes the ways in which DRM systems are able to define specific usage rights of the information they accompany, arguing that these systems can be used for more than just copyright

protection. Professor Mayer-Schönberger then sets forth the ways in which privacy claims might be managed through DRM systems, concluding that such an approach has some specific advantages, including increased privacy protections for individuals, an improved ability to manage and control the information that does exist, and, potentially, a more nationally and internationally harmonious approach to privacy and information management issues. There are, of course, challenges posed by using DRM systems to manage informational privacy. Professor Mayer-Schönberger identifies and labels three challenges in particular: technical, foundational, and conceptual. He then proposes some methods of addressing these three broad challenges in order to make an informational-privacy DRM system successful.

Finally, there are two pieces included in this symposium issue concerning patent law. First, we have an article by Amy Landers, a professor at the University of the Pacific, McGeorge School of Law, and second, a comment by Thomas Walsh, a student at the University of Denver, Sturm College of Law. Professor Landers' article is titled *Liquid Patents*. She argues that a trend has emerged in the patent system wherein patent holders have developed systemized and strategic plans to leverage value from asserting patent rights. She labels this practice "liquidizing patents," and asserts that this practice is in contravention of the goals of the patent system. To address the problem of liquidizing patents, she proposes a modification of the remedies provisions of the Patent Act and an elimination of the antitrust protections for patent holders. In his comment, Walsh reviews and analyzes the United States Supreme Court's recent decision in *Illinois Tool Works Inc. v. Independent Ink*, concerning whether the existence of a patent on a tying product raises a presumption that the patent holder has market power in an unlawful tying claim. Walsh argues that the decision by the Supreme Court to eliminate the presumption that a patented product confers market power was the correct decision for three reasons. Those reasons include the lower court's erroneous interpretation of a prior Supreme Court decision, the fact that presumptions are traditionally disfavored by the Supreme Court in antitrust law, and the unfairness that results when an alleged tie is subject to an irrebutable presumption that a patent creates market power. Walsh argues that the adversarial system is well-equipped to determine the question of the market power of a particular product; that both parties will be able to muster evidence concerning the questions; and that, therefore, an irrebuttable presumption is inappropriate.

Thank you to all of the participants, presenters, and contributors to the Summit and to this symposium issue of the *Denver University Law Review*.