Denver Law Review

Volume 84 | Issue 1 Article 3

December 2020

How Digital Rights Management Will Save Authorship in the Age of the Internet

Ralph Oman

HOW DIGITAL RIGHTS MANAGEMENT WILL SAVE AUTHORSHIP IN THE AGE OF THE INTERNET

RALPH OMAN†

Editor's Note: The following is an edited transcript of Ralph Oman's presentation at the Inaugural Summit on Intellectual Property and Digital Media held at The Cable Center, Denver on May 23, 2006.

RALPH OMAN: Thank you very much for inviting me to the University of Denver Law School and The Cable Center for the Intellectual Property Summit. I like the idea of holding a summit meeting in the Mile High City. And I like the title of the conference—"Working Together in the Digital World." That is a concept I have advocated for a long time.

Unless all of the parties in the chain of distribution work together—the equipment manufacturers, the internet service providers (ISPs), the cable companies, the broadcasters, the content providers, and the consumer—we will never see the internet reach its full potential as a broad avenue for scholarly discourse, mass entertainment, and e-commerce. Without security for the content and certainty of payment, the internet will not attract the really valuable content, and authors will find other ways to get compensated, and the constitutional purpose of encouraging the broad public dissemination of copyrighted works will be thwarted. The internet will remain an email convenience and a haven for hackers, pirates, and porno creeps.

Let me mention some of the history of copyright to help us understand that these new technology-driven problems are not really all that new. They are just the latest wrinkle in a recurring theme that goes back to the invention of the printing press—the tension between new machines and authors' rights. We saw a terrific display of those wizard machines yesterday. Of course, they would be much less valuable without content—the songs, movies, and computer games that make them so popular.

---

† Ralph Oman is counsel in the intellectual property group of the Washington, DC office of Dechert LLP. Mr. Oman was the Register of Copyrights of the United States from 1985-93. Before becoming Register, he served as Chief Counsel for the Subcommittee on Patents, Copyrights, and Trademarks of the U.S. Senate Judiciary Committee. In his 10 years on Capitol Hill, he participated directly in many legislative enactments, most notably the 1976 revision of the copyright law. In addition, Mr. Oman has taught for 13 years as an adjunct professor of intellectual property law at George Washington University Law School. Mr. Oman is a graduate of Hamilton College (AB, 1962) and Georgetown University Law Center (JD, 1973).

First, the history: In 1897, Congress created a new right for songwriters—the exclusive right to perform their music publicly, and the exclusive right to license other people to perform their music publicly.[1] At the outset, that new right was more theoretical than real. The songwriters found that they could not enforce their right. They had no way to know when and where their music was being performed in the tens of thousands of locations across the United States that used their music.

There was another problem. The people who used the music had no practical way to locate the copyright owners and negotiate licenses for the music they wanted to perform.

Enter the performing rights organizations. Beginning in 1914, individual songwriters and music publishers created organizations to collectively manage their rights. They licensed and monitored the live public performances of music in concert halls, hotels, dance halls, sporting events, restaurants, taverns, theaters, and amusement parks. Starting in the 1920s, they licensed and monitored performances by radio broadcast. They licensed motion picture theaters, television, and now the internet. And they didn't normally license individual works. Under collective management, they usually negotiated blanket licenses that allowed people to use all of the music in their repertoire—millions of songs.

Now the songwriters are thinking creatively about marketing their music online. We have seen the tremendous innovation on the hardware side. We are also seeing fresh thinking on the creators' side. They are not locked into the old paradigm of physical distribution of hard copies. Let's see what the songwriters are doing to accommodate the new consumer options before we declare the Death of Copyright and the unworkability of business models based on exclusive rights. The songwriters have taken many concrete steps to make it easy for the online music websites to license the public performance right.

- FAST TRACK[2]

The songwriters have standardized the digitized copyright management information for over 20 million musical works.[3] They call it Fast Track, and it creates the digital tools needed to manage authors' rights around the world in the online environment.[4]

1. Act of Jan. 6, 1897, ch. 4, § 4966, 29 Stat. 481, 481-82 (1897).
2. *See* Fast Track, http://www.fasttrackdcn.net (last visited Sept. 13, 2006).
3. *See id.*
4. *See id.*

- UNILICENSE[5]

The music industry has also proposed what they call the UniLicense.[6] To expedite the licensing process for the new online music websites, this new license would permit the songwriters and the music publishers to offer "one-stop-shopping."[7] An online music service could obtain a single license to clear all rights for an interactive subscription service.[8] Of course, to do so, all the parties would need an antitrust exemption from Congress and some explicit authorizations.[9] Congress would establish a fixed license rate as a percent of website revenues (with minimum fees as appropriate).[10] This rate under the UniLicense would give the songwriters and music publishers reasonable compensation for the use of their songs on the internet.[11] It is the ultimate blanket license.

- DIGITAL RECOGNITION TECHNOLOGY[12]

Last, let me vent on a new technology that is about to be launched that will use pattern recognition technology to identify music distributions and performances, and motion picture distributions and performances, from any electronic source—radio, television, cable, satellite, the internet.[13] It is extremely accurate, and only has to "listen to" or "watch" one second of the song or movie. It will help solve the monitoring problem, as well as the problems that have always bedeviled the distribution of royalties among the various copyright claimants.

So the songwriters are thinking creatively about how to make this amazing digital technology a strong ally in the creative process.

Let me put on my ex-Register of the Copyrights hat. On-line hacking and piracy undermines creativity, hurts songwriters, singers, filmmakers, actors, and musicians, and costs us jobs in the record and movie business all over the world. Worst of all, it destroys the market for legitimate online music and motion picture delivery services. The honest entrepreneurs who pay for licenses can't compete with "free." Digital rights management will bring order to the chaos and move us in the right direction. It's not there yet, but we see more and more of the key players starting to work together. The last panel confirmed the importance of

---

5. *Music Licensing Reform: Before the S. Comm. on the Judiciary Subcomm. on Intellectual Property*, 109th Cong., July 12, 2005 (statement of Del R. Bryant, President & CEO, Broadcast Music, Inc.), *available at* http://judiciary.senate.gov/hearing_search.cfm (search witness testimony for "music licensing reform").
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See* BMI.com, http://www.bmi.com/news/200508/20050830a.asp.
13. *See id.*

working together. Just last month in Washington, I moderated a panel that included a senior lawyer for a motion picture powerhouse and a senior lawyer for one of the major telephone companies. After a decade of confrontation and name calling, the two sides are finally singing from the same hymnal. They finally agree on the need for security on the net.

The *Grokster* decision,[14] and its reaffirmation of copyright, helped create that new environment. The Supreme Court decision has encouraged the ISPs to get actively involved in enforcement and security—implementing filtering technology, installing digital fingerprints, and pulling the plug on their infringing customers—all without losing their safe harbors as passive carriers.

And in that new environment, the movie studios are aggressively licensing their content online.

The Digital Millennium Copyright Act (DMCA)[15] and digital rights management have stabilized the online marketplace and prompted the parties to do deals for content over legitimate services.

Verizon is making a deal with Disney for the exclusive rights to carry dozens of hot Disney programs over its fiber optic broadband network to compete against cable.[16] And with companies like Verizon helping enforce security on the net, we have a much better chance of shutting down the hackers and pirates. Sure, there will be losses around the edges—just as cable lost some revenue to amateur hackers who figured out how to break into the wire to get the signal for nothing; just as pay-tv has lived with theft; just as satellite delivery companies lost revenues to unlicensed dish owners; and just as the telephone companies lost long-distance revenues because some computer nerds could figure out how to install switches to break into the dial tone.

But, the large mass of the population just wants to get the services conveniently and at a reasonable cost. They want to obey the law. Digital technology greatly accelerates the magnitude of the theft problem, but there is no reason to throw up our hands and admit defeat. The answer to the machine is in the machine, and this technology will get as sophisticated as necessary to protect the lion's share of the market. You don't need Fort Knox, as Peter said. Business models will evolve and legalized markets will develop that rely on digital rights management (DRM). As Mr. Vitter said, DRM is the enabler for the evolution of these new consumer choices.

14. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
15. Digital Millennium Copyright Act, 17 U.S.C.A. §§ 1201-1205, 1301-1332 (West 2006).
16. *Verizon and Disney in Deal*, N.Y. TIMES, Sept. 22, 2005, at C18.

CONCLUSION

Since we live in a free society, motion picture producers, songwriters, publishers, and record companies will ultimately decide how best to harness the internet to serve their needs. The new digital technologies will allow much more flexibility in licensing. The industry will be able to offer users a rich menu of options, with terms and conditions spelled out in great detail, if that is what users want. If users want instead the convenience of a blanket license—a monthly or yearly charge for access to the entire repertoire—then that too is easily accommodated.

The copyright industries had a tough time detecting unauthorized uses in the flesh and blood world of penny arcades, circuses, theaters, and dance halls at the turn of the last century. Remembering that experience, but not dwelling on it, they know they will have to be careful marketing their works in cyberspace. Energized, computerized, and digitized, they will shape that future in ways that will make the internet reach its full potential. The trick is to encourage the development of these terrific new technologies in a way that discourages piracy and promotes the creation of the new works that the technologies can then exploit.

The best copyright laws have always protected the power of creators against the power of the companies that build the machines that exploit the creators' works. This has been so whether the technology was the printing press, radio, television, laser printers, photocopying machines, motion picture projectors, jukeboxes, VCRs, cable systems, CD players, satellite transmitters, digital tape recorders, CD burners, recordable DVD players, mainframe computers, personal computers, or the internet. The debate over technology and the interests of authors is the very essence of copyright thinking—the core that makes copyright law historically unique, socially revolutionary, and worth fighting for.

Thank you.