function as a usable public record. Is this acceptable in a world of computer technology easily capable of on-line real-time information?[6] Is improvement possible in the light of the continuing budget cuts which have hindered the Copyright Office as much as any other branch of government? Complicating the goal of a more efficient and thus more usable recording system is the demand for reduction or elimination of formalities as a prerequisite for enjoying the benefits of the Copyright Act,[7] thus lessening the need for copyright owners to register their works with the Copyright Office. Finally, and perhaps most basically, it must be asked whether the Copyright Office is adequately serving its most basic functions, and will it be able to do so in the future.[8]

Currently, there are serious political pressures on the Copyright Office. It is no secret that the United States Patent and Trademark Office has long cast covetous eyes on the Copyright Office in the never-ending Washington turf wars. Although this author believes this would be detrimental to copyright, it is an issue that should at the least be brought into the open and debated on its merits.[9] On an external level the Copyright Office has to increasingly represent American copyright interests in the international arena as well as continue its role as an advisor to Congress on the national scene.

As we move from an era of trade between nations to multinational trading blocs, from the Cold War to an uncertain future, it is no surprise that the Copyright Office is subject to the same types of stresses and tensions that effect copyright and even society generally. I submit to the reader that the following papers do an admirable, insightful, and provocative job of illuminating these issues, and, individually and collectively, are well worth the reading.

6 To take a relatively straight-forward example, consider a bank or other lender financing a motion picture or sound recording on a secured basis. How long should they reasonably be expected to wait before they can determine the priority of their security interest?

7 Bills have been introduced in Congress that would reduce or eliminate the registration provisions of the Copyright Act. *See* H.R. 897, 103d Cong., 1st Sess. (1993); S. 373, 103d Cong., 1st Sess. (1993).

8 The papers submitted by Eric Schwartz and Richard Weisgrau both address different aspects of this issue from different perspectives. Eric Schwartz, *The Role of the Copyright in the Age of Information*, 13 CARDOZO ARTS & ENT. L.J. 69 (1994); Richard Weisgrau, *The Copyright Office: A Proposed Direction*, 13 CARDOZO ARTS & ENT. L.J. 81 (1994).

9 Professor Pamela Samuelson's exploration of this issue in her paper is a much needed step in the right direction. Pamela Samuelson, *Will the Copyright Office be Obsolete in the Twenty-First Century?*, 13 CARDOZO ARTS & ENT. L.J. 55 (1994).

THE EXCLUSIVE RIGHT TO READ

JESSICA LITMAN*

For what the king fundamentally insisted upon was that his authority should be respected. He tolerated no disobedience. He was an absolute monarch. But, because he was a very good man, he made his orders reasonable.

— THE LITTLE PRINCE[1]

The hottest of hot topics in the copyright community these days is the information superhighway, officially dubbed the National Information Infrastructure.[2] Copyright specialists are attending conferences, writing articles and speeches, convening advisory councils, holding public hearings, and caucusing over the Internet about how the information superhighway will, indeed must, be paved with copyright asphalt.[3] Some view the coming of the information superhighway as an opportunity to redesign intellectual property policy before stakeholders acquire vested interests;[4] others see an occasion to consolidate the advantages they currently enjoy under the copyright law or to close copyright "loopholes" that they feel have inadvertently sprung up in their way.[5]

* Professor of Law, Wayne State University. I would like to thank Marci Hamilton and Pamela Samuelson for helpful comments on earlier drafts, and, as always, Jonathan Weinberg, who read many drafts and had insightful comments on each of them. I am also grateful to Mary Jensen and the Coalition for Networked Information for moderating CNI's provocative copyright mailing list.

1 ANTOINE DE SAINT-EXUPERY, THE LITTLE PRINCE 42 (1943).

2 *See* Request for Comments on Intellectual Property Issues Involved in the National Information Infrastructure Initiative, 58 Fed. Reg. 53,917 (1993).

3 *See, e.g.*, UNITED STATES PATENT & TRADEMARK OFFICE, UNITED STATES DEPARTMENT OF COMMERCE, *National Information Infrastructure Task Force Working Group on Intellectual Property, Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative* (Nov. 18, 1993) [hereinafter *NII Hearing*]. A transcript of the November 18, 1993 Hearing, along with other relevant documents, is available in a compilation of material related to the work of the Working Group, which is collected on the University of South Dakota gopher server, sunbird.usd.edu., in the Academics Divisions directory, School of Law subdirectory, under the heading NII Working Group on Intellectual Property. URL: gopher: //sunbird.usd.edu:70/11/Academic%20Divisions/School%20of%20Law/NII%20Working%20Group%20on%20Intellectual%20Property.

4 *See, e.g.*, SOFTWARE 2000: A VIEW OF THE FUTURE 2-16 to 2-20 (Brian Randell et al. eds., 1994); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992); John P. Barlow, *The Economy of Ideas: A framework for rethinking patents and copyrights in the Digital Age (Everything you know about intellectual property is wrong)*, WIRED, Mar. 1994, at 84.

5 *See, e.g., NII Hearing, supra* note 3, at 107-21 (testimony of Hilary B. Rosen, Recording Industry Association of America); *id.* at 193-201 (testimony of Ronald J. Palenski, Information Technology Association of America); *id.* at 211-20 (testimony of Thomas M. Lemberg, Business Software Alliance and Alliance to Promote Software Innovation).

The federal government's Information Infrastructure Task Force[6] has, with much fanfare,[7] issued a Draft Report containing its preliminary analysis of copyright issues affecting and affected by the Information Infrastructure, and its suggestions for copyright revision.[8] The Draft Report recommends what it characterizes as minor clarifications of well-settled principles, and modest alterations to better secure copyright owners' control over works they produce.[9] The minor changes it recommends, however, would amount to a radical recalibration of the intellectual property balance.

The Report takes the position that current law secures to the copyright owner control over virtually any reproduction,[10] but finds the state of current law regarding transmission to be less than clear.[11] It therefore recommends amending the law in several respects. First, the distribution right should be amended to "reflect that copies of works can be distributed to the public by transmission, and such transmissions fall within the exclusive distribution right of the copyright owner."[12] Second, the Draft Report recommends expanding the current definition of "transmit" in section 101, to encompass transmissions of reproductions as well as transmissions of performances or displays,[13] and to add a test distinguishing between transmissions of reproductions and transmissions of performances and displays based on "the primary

6 President Clinton appointed the Information Infrastructure Task Force last year, and asked Commerce Secretary Ronald Brown to serve as its chair. The IITF is charged with coming up with "comprehensive telecommunications and information policies aimed at articulating and implementing the Administration's vision for the NII." *NII Hearing, supra* note 3, at 8 (opening remarks of Bruce A. Lehman, Chairman, Assistant Secretary of Commerce and Commissioner for Patents and Trademarks). The IITF set up a Working Group on Intellectual Property Rights, chaired by Patent Commissioner Bruce A. Lehman, to assess the intellectual property implications of the NII. *See* 58 Fed. Reg. 53,917, *supra* note 2. The Working Group held a public hearing and solicited written comments on intellectual property issues before formulating its recommendations. *See id.*; *NII Hearing, supra* note 3.

7 *See* Heather Bruce, *Study Urges Copyright Update for Digital Age*, BOSTON GLOBE, July 8, 1994, at 61; Jeff Leeds, *Cyberspace Copyright Proposal Draws Praise*, L.A. TIMES, July 8, 1994, at D1; Theresa Riordan, *Writing Copyright Law for an Information Age*, N.Y. TIMES, July 7, 1994, at D1; Sandra Sugawara, *What's Out of Line, When On Line? White House Report Says Copying of Computer Service Files May be Illegal*, WASH. POST, July 7, 1994, at D9.

8 INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (July 1994) [hereinafter IITF GREEN PAPER]. An electronic copy of the Green Paper is available on the University of South Dakota gopher server, sunbird.usd.edu., see *supra* note 3.

9 *See* IITF GREEN PAPER, *supra* note 8, at 120-34.

10 *See id.* at 35-37.

11 *See id.* at 42-43, 121.

12 *Id.* at 121.

13 *Id.* at 122.

purpose and effect of the transmission."[14] Third, the Draft Report suggests an amendment making it clear that transmission of a work into the United States violates the copyright owner's exclusive importation rights.[15] Fourth, the Report suggests that the first sale doctrine, which allows the owner of a lawfully made copy to sell, loan, rent or otherwise dispose of the possession of that copy, be repealed insofar as it might apply to transmissions.[16] Finally, the Draft Report offers miscellaneous suggestions to forestall the emergence of other perceived threats to the copyright owners' bundle of rights.[17]

By vesting copyright owners with control of any reproduction or transmission of their works, and then defining reproduction and transmission to include any appearance, even a fleeting one, of a protected work in any computer, and any transfer of that work to, from, or through any other computer,[18] the Draft Report's recommendations would enhance the exclusive rights in the copyright bundle so far as to give the copyright owner the exclusive right to

14 *Id.* My initial reaction to this proposal was to wonder why the Report's drafters believed such a test to be necessary. If, as the Report asserts, any transmission would involve an actionable reproduction, I could not immediately see why a test would be needed to resolve whether the right it would violate in addition to the reproduction right would be the display right, the performance right, or the distribution right. Because copyright is divisible, however, the different rights in the copyright bundle can be, and often are, owned or controlled by different entities. If the copyrighted work is a popular song, for example, the reproduction and distribution rights are typically owned by a music publisher and licensed through the Harry Fox Agency to record companies, while the performance right is licensed through a performing rights society like ASCAP. The proposal to treat a transmission as an invasion of the distribution right rather than the performance right, therefore, drew intense opposition from ASCAP and enthusiastic support from the record companies and music publishers during the September 1994, public hearings on the Green Paper. The "primary purpose and effect" test drew nearly unanimous protest.

15 *Id.* at 123.

16 *Id.* at 124-25 & n.353. The Report promises that its ongoing work includes examining all of the statutory exceptions to the copyright owner's distribution right to ascertain whether they, too, should be rescinded in the context of distribution by transmission. *Id.* at 125. The statutory exceptions it mentions are ones that are incidental to a statutory reproduction privilege. Section 108(d) permits libraries to make photocopies of protected works in specific circumstances for the purpose of interlibrary loan and to distribute those photocopies to the users requesting them. Section 112(c) allows a non-profit organization to make a single copy of a performance of religious music and distribute it at no charge, so long as the copy is never publicly performed except pursuant to a license and is destroyed within a year. Section 115, the mechanical compulsory license, permits the making of cover versions of previously recorded music, and the distribution of those recordings to the public, on payment of a statutory royalty. Repealing the incidental distribution privileges would, of course, make the reproduction privileges pretty useless: what good does it do a library to be entitled to make a copy for purposes of interlibrary loan if the copy cannot be passed on to the person requesting it?

17 *See supra* note 16 and *infra* notes 21, 49.

18 *See* IITF GREEN PAPER, *supra* note 8, at 36-39, 54-55, 120-23. The Draft Report does appear to recognize that a work might, as a theoretical matter, reside in a computer's random access memory for too brief an interval to invade the copyright owner's rights, *see id.* at 37, but does not offer any examples of an appearance that would be sufficiently fleeting to qualify.

control reading, viewing or listening to any work in digitized form. The Draft Report comes down firmly on the side of increased rights for copyright owners and it endorses the goal of enhanced copyright protection without acknowledging any countervailing concerns.[19] Because it is an advocacy document, it at times misrepresents the state of current law.[20] It gives voice to only one side of complicated policy debates.[21] In some cases, the Report identifies

[19] During the November 18, 1993 Hearing, copyright-affected industries presented their wish lists to the Working Group. *See NII Hearing*, *supra* note 3. Although the majority of the twenty-eight witnesses at that Hearing represented copyright-owner interests, there were a few witnesses who did not. Robert Oakley, Professor of Law and Director of the Law Library at Georgetown University, and an ACCORD Commissioner, testified on behalf of thirteen library and educational organizations; John Masten testified on behalf of the New York Public Library; Gary J. Shapiro testified on behalf of the Electronic Industries Association and the Home Recording Rights Coalition; Professors Henry Perritt and Frank W. Connolly appeared in their individual capacities. The Draft Report, however, takes the side of copyright owner interests in every dispute. Indeed, it reads as if it were Santa Claus' response to the wish lists presented by current stakeholders.

[20] Two examples are the Report's assertion that it is settled law that loading a protected work into a computer's random access memory is an actionable reproduction, IITF GREEN PAPER, *supra* note 8, at 36, see *infra* notes 54-64 and accompanying text, and its crabbed reading of Supreme Court cases on fair use under 17 U.S.C. § 107. IITF GREEN PAPER, *supra* note 8, at 45-52.

[21] One example is the Draft Report's endorsement of a broad prohibition of devices and services that defeat technological copy-protection or other means of blocking access or reproduction.

> The Working Group finds that prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use is in the public interest. Consumers of copyrighted works pay for the acts of infringers. The price of copyrighted works for legitimate users is higher due to infringement losses suffered by copyright owners. The public will also have access to more works via the NII if copyright owners can more effectively protect their works from infringement.
>
> Therefore, the Working Group recommends that the Copyright Act be amended to prohibit the importation, manufacture and distribution of devices, as well as the provision of services, that defeat anti-copying systems.

IITF GREEN PAPER, *supra* note 8, at 126. Devices that overcome technological copy-protection methods can have legitimate uses. *See, e.g.*, Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, COPYRIGHT & HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 52-61 (1989) [hereinafter OTA, COPYRIGHT & HOME COPYING]. Copy protection devices can, after all, block access in situations when the copyright statute would privilege it. In addition, relying on technological copy protection can be self-defeating:

> I would argue that initial efforts to protect digital copyright by copy protection contributed to the current condition in which most otherwise ethical computer users seem morally untroubled by their possession of pirated software.
>
> Instead of cultivating among the newly computerized a sense of respect for the work of their fellows, early reliance on copy protection led to the subliminal notion that cracking into a software package somehow "earned" one the right to use it. Limited not by conscience but by technical skill, many soon felt free to do whatever they could get away with.

Barlow, *supra* note 4, at 129. For these reasons, and others, requests to reinforce technological copy-protection tools with legal prohibitions have generated opposition from a variety of camps. Prior suggestions to outlaw such devices have therefore been narrowly drawn. *See generally Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Intellectual Property of the House Comm. on the Judiciary*, H.R. 3204, 102d Cong., 2d Sess. (1992). Congress enacted one such prohibition in the Audio Home Recording Act of 1992 (codified at 17 U.S.C. §§ 1001-1010). The audio recording device prohibition was sufficiently controversial that, after the introduction of legislation in 1987, four years of negotiations among record companies, hardware manufacturers, songwriters, music publishers, and performing rights societies were required to reach agreement on the form and specifications of a limited prohibition. *See* H.R. REP. 873, 102d Cong., 2d Sess., pt. 1, at 14-18 (1992); Gary S. Lutzker, Note, *DAT's All Folks:* Cahn v. Sony *and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes*, 11 CARDOZO ARTS & ENT. L.J. 145 (1992). During the legislative process, the prohibition was narrowed and narrowed again to ensure that it would not be construed to apply to devices other than home audio recording devices. As enacted, it was balanced by a provision preventing the imposition of copyright liability for noncommercial copying of audio recordings, or for manufacturing, importing or selling audio recorders. *See* 17 U.S.C. § 1008 (Supp. V 1988). The Communications Act has a provision relating to the manufacture or distribution of descrambling equipment. *See* 47 U.S.C. § 605 (1988). It, too, is narrow in scope, and carefully distinguishes between legal and illegal uses. Broadly phrased prohibitions can interfere with legitimate behavior, and can hamstring technology in unanticipated ways. In presenting its finding that such devices should be prohibited across the board, the Working Group's Draft Report does not mention any countervailing concerns.

a particular alternative as more desirable *because* it gives copyright owners rights subject to fewer exceptions.[22] The Report's drafters apparently did not perceive objectivity or balance to be their job.

Nor is anyone else clamoring to volunteer. The general public's interest in copyright legislation is diffuse; a grass-roots revolt of copyright users seems unlikely. Interest groups with copyright on their agendas have a long history of dropping their opposition to copyright amendments of general application in return for narrow provisions addressing their specific concerns.[23] Congress, for its part, has, since the turn of the century, been delegating the policy choices involved in copyright matters to the industries affected by copyright.[24] But, before we succumb to calls for further enhance-

[22] Thus the Draft Report notes: "One of the important aspects of defining a transaction as a 'reproduction' rather than something else is that the potentially relevant exceptions to the reproduction right are substantially fewer in number than those that apply to certain other rights . . . ." IITF GREEN PAPER, *supra* note 8, at 36 n.107. A few pages later, the Report discusses the exclusive distribution right, and notes that it is limited by the first sale doctrine codified in 17 U.S.C. § 109. *Id.* at 38. In considering how to characterize the dissemination of a work by means of the NII, the Report concludes that "the reproduction right, rather than the distribution right, may be both more logically applicable and more legally appropriate (by virtue of its more limited exceptions)." *Id.* at 39. The Report nonetheless proposes to amend the first sale doctrine to prohibit owners of copies of protected works from transmitting their copies. *Id.* at 124-25. *See supra* note 16 and accompanying text.

[23] *See generally* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989). Thus, to pick a single example, the American Library Association and the American Association of Law Libraries initially opposed the partial repeal of the first sale doctrine as it applied to sound recordings and computer programs. Both associations switched their positions when the proponents of the bill agreed to exempt non-profit libraries from the legislation. *See id.* at 351-52.

[24] *See generally* Litman, *supra* note 23; 1 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 1.03[A] (release #3 1994); Abe A. Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954* (1955), *reprinted in* SUBCOMM. ON PATENTS, COPYRIGHTS AND TRADEMARKS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS. COPYRIGHT LAW REVISION STUDIES (Comm. Print. 1960); Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987); Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y 109 (1989).

ment of the rights in the copyright bundle, we need to reexamine the intellectual property bargain from the vantage point of the public, on whose behalf, after all, the copyright deal is said to be struck in the first place.[25] Does the shape of the law as it currently stands make sense? Do the changes that are being proposed cause it to make more sense, or less sense?

I.

At the turn of the century, U.S. copyright law was technical, inconsistent, and difficult to understand,[26] but it didn't apply to very many people or very many things.[27] If one were an author or publisher of books, maps, charts, paintings, sculpture, photographs or sheet music, a playwright or producer of plays, or a printer, the copyright law bore on one's business. Booksellers, piano-roll and phonograph record publishers, motion picture producers, musicians, scholars, members of Congress, and ordinary consumers could go about their business without ever encountering a copyright problem.[28]

Ninety years later, the U.S. copyright law is even more technical, inconsistent and difficult to understand; more importantly, it touches everyone and everything. In the intervening years, copyright has reached out to embrace much of the paraphernalia of modern society.[29] The current copyright statute weighs in at 142 pages. Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission—potentially actionable events under the copyright statute—into commonplace daily transactions.[30] Most of us can no longer spend even an hour

25 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

26 *See* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 74-77 (1991); LIBRARY OF CONGRESS, REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1903, H.R. Doc. No. 10, 58th Cong., 2d Sess. 68-69 (1903).

27 *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 190-93 (1986) [hereinafter OTA, INTELLECTUAL PROPERTY RIGHTS].

28 *See* PATTERSON & LINDBERG, *supra* note 26, at 71-72; Litman, *supra* note 23, at 284-98.

29 Copyright now extends to works as diverse as computer programs, buildings, stuffed animals, doodles, electronic mail, picture postcards, snapshots and shopping lists. Everything you see on television, hear on the radio, read in the newspaper, or see posted as signage or scrawled on the wall of the subway or bus on the way to work is protected by copyright; as is everything you write, or draw, or tape. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

30 Consider the fax machine. One could send a document to its recipient by courier or U.S. mail, but it now can travel more quickly by facsimile. The original document will remain with the sender while it is both reproduced and transmitted to its recipient. Faxing documents has become sufficiently common that there are pay-facsimile booths in many metropolitan airports, and at least one major airline has plans to install facsimile devices in passenger seat-backs.

without colliding with the copyright law. Reading one's mail or picking up one's telephone messages these days requires many of us to commit acts that the government's Information Infrastructure Task Force now tells us ought to be viewed as unauthorized reproductions or transmissions.

What we know about the general public's impression of the shape of copyright law suggests that the public believes that the copyright statute confers on authors the exclusive right to profit commercially from their copyrighted works, but does not reach private or non-commercial conduct.[31] The law in this country has never been that simple; the copyright statute has never expressly privileged private or non-commercial use.[32] Until recently, however, the public's impression was not a bad approximation of the scope of copyright rights likely, in practice, to be enforced. If copyright owners insisted, as sometimes they did, that copyright gave them broad rights to control their works in any manner and in all forms,[33] the practical costs of enforcing those rights against individual consumers dissuaded them from testing their claims in court.[34] So long as nobody proposed to sue the nation's teenagers for copying music onto audio cassette tapes, or copying computer games onto floppy disks, what did it matter that some folks argued that if

31 *See, e.g.*, OTA, INTELLECTUAL PROPERTY RIGHTS, *supra* note 27, at 121-23, 208-09; OTA, COPYRIGHT & HOME COPYING, *supra* note 21, at 163-65; Pamela Samuelson, *Modifying Copyrighted Software: Adjusting Copyright Doctrine to Accommodate a Technology*, 28 JURIMETRICS 179, 198-99 (1988).

32 *See, e.g.*, Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of* Sony, Galoob *and* Sega, 1 J. INTELLECTUAL PROP. L. 49, 67-73 (1993). *But see* PATTERSON & LINDBERG, *supra* note 26, at 177-96 (arguing that copyright is or should be so limited).

33 *See, e.g.*, Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868); Baker v. Selden, 101 U.S. 99 (1879); Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908); Jewelers' Circular Publishing Co. v. Keystone Publishing Co., 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922); Aldrich v. Remington Rand, Inc., 52 F. Supp. 732 (N.D. Tex. 1942); Twentieth Century Music v. Aiken, 422 U.S. 151 (1975); West Publishing Co. v. Mead Data Central, 799 F.2d 1219 (8th Cir. 1986); Educational Testing Servs. v. Katzman, 793 F.2d 533 (3d Cir. 1986); Worlds of Wonder, Inc. v. Vector Intercontinental, Inc., 653 F. Supp. 135 (N.D. Ohio 1986); Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994); Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Lotus Dev. Corp. v. Borland, Int'l, Inc., 799 F. Supp. 203 (D. Mass. 1993).

34 *See, e.g., Audio Home Recording Act of 1991: Hearing on H.R. 3204 before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1993). In a small number of recent cases, copyright owners joined allegedly representative individuals as nominal parties defendant to lawsuits challenging the sale of goods or services said to facilitate infringement, but neither sought nor received relief against them. *See, e.g.*, Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979), *aff'd in part, rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); Edwin McDowell, *Ideas and Trends: College "Copy Mills" Grind Quickly, So Publishers Sue*, N.Y. TIMES, Dec. 19, 1982, § 4, at 18; Samuelson, *supra* note 32. *But cf.* Demetriades v. Kaufmann, 690 F. Supp. 289 (S.D.N.Y. 1988) (individual home buyers sued for hiring builder to construct look-alike house).

they chose to sue they could win?[35]

Nonetheless, by asserting that what members of the public think of as ordinary use of copyrighted works was, in fact, flagrant piracy, and that, as such, it undermined the national economy,[36] copyright owners may well have won a rhetorical battle the rest of the country never realized was being fought. As industries lobby, scholars analyze, and bureaucrats convene in too many meetings to consider the shape of the new-and-improved national information infrastructure, few people have seriously challenged copyright owners' claims to control all access to and use of the material they say they own.[37] Arguments for universal access are, so far, cast in terms of good citizenship rather than entitlement.[38] Even those who favor liberal subsidy of public access to the information highway seem to accept the contention that if copyright owners cannot maintain control of their asserted property, the wellspring of

[35] *See, e.g., Home Video Recording: Hearing on Providing Information on the Issue of Home Video Recording Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 22-27 (1987) (memorandum from Jon Baumgarten, Proskauer Rose Goetz & Mendelsohn).

[36] *See, e.g., Copyright Reform Act of 1993: Hearing on S. 373 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (Oct. 19, 1993) (prepared statement of Enid Green Waldholtz, Software Publisher's Association); *Copyright Amendments Act of 1991: Hearings on H.R. 2372 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 99-100 (1991) (statement of James M. Burger, Apple Computer, Inc.); *Fair Use and Unpublished Works: Joint Hearing on S. 2370 and H.R. 4263 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 278 (1990) (written statement of the Electronic Industries Association); *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 4-5 (1982) (statement of Jack Valenti, Motion Picture Association of America).

[37] Professor L. Ray Patterson has recently published an articulate expression of the minority view.

> The author receives the reward for making his or her original work of authorship accessible to all. Contrary to the common notion, the reward is not for the act of creation, but for distribution to provide public access: public learning comes not from the creation of a work, but from reading and studying it, a truism that copyright owners have apparently managed to hide from courts for many years.

L. Ray Patterson, *Copyright and "The Exclusive Right" of Authors*, 1 J. INTELLECTUAL PROP. L. 1, 37 (1993).

[38] In one of the Draft Report's rare nods to the possible conflicting claims of copyright owners and the public, we find the following discussion:

> The Copyright Act exists for the benefit of the public. To fulfill its constitutional purpose, the law should strive to make the information contained in protected works of authorship freely available to the public. "Freely available," of course, does not necessarily mean "available free." The Working Group does not believe that authors should be required to donate access time to their works on-line, but some reasonable approach must be adopted to ensure that the economically disadvantaged in this country are not further disadvantaged or disenfranchised by the information revolution.

IITF GREEN PAPER, *supra* note 8, at 133.

American creativity will dry up, our trade deficit will turn into a mushroom cloud, and our balance of payments will drop off and fall into the sea.[39] Meanwhile, because the assumptions underlying copyright owners' claims to expansive control over the works they create and disseminate crept into our discourse without much examination at a time when the price of acknowledging them was only nominal, we have so far allowed important policy choices to be made without debate.

II.

Imagine that you have been retained as the public's copyright lawyer. One morning, your client, the public, walks into your office to consult you about a deal that it has been offered. It seems that all of the industries with substantial economic stakes in copyright have gotten together and written up a proposal. Here it is: the current copyright statute. It's 142 pages long, and, frankly, it's a little hard to decipher. Your client stayed up all night to read it, and can't seem to make head or tail of it. In any event, your client drops this 142 page tome on your desk.

> *Client:* "So, whaddya think? Should I sign it? Is it a good deal?"
> *You (temporizing):* "It depends," you say. "What sort of a bargain do you want?"
> *Client:* "Look; I'm not out to get something for nothing. I understand that authors won't write stuff if they can't get paid. I want them to make new works and I'm willing to pay them to do so. I want to encourage authors to write as many new works as they can. As for me, I want to be able to read, see, hear or download any work in captivity, and pay appropriate royalties for doing so.[40] Will this proposal let me do that?"

Would you recommend that your client sign on the dotted line?

I would not. The text we're considering wasn't really written with your client's interests in mind. Most of it was drafted by the representatives of copyright-intensive businesses and institutions, who were chiefly concerned about their interaction with other copyright-intensive businesses and institutions.[41] For that reason, there's lots of verbiage speaking to the behavior of a public televi-

[39] *See* IITF GREEN PAPER, *supra* note 8, at 6.

[40] I have appropriated the turns of phrase from Dani Zweig. I have never met Dr. Zweig, but we have corresponded electronically.

[41] *See* 1 ABRAMS, *supra* note 24, § 1.03[A][2][b]; 1 NICHOLAS HENRY, COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD xi-xxii (1978); Litman, *supra* note 23, at 311-54; Olson, *supra* note 24.

sion station or a cable system operator with respect to the programming it might transmit,[42] but very few words addressing the behavior of a consumer with respect to the programming she might watch or record. You can find a fair amount of language relevant to the actions of a publisher bringing out an author's new novel, and the film producer that seeks to adapt the story for the screen,[43] but not so much about the actions of the police officer who buys and reads the book, rents and sees the film, and wishes the producer had not cast Tom Cruise in the leading role.[44] The law has a specific provision for retail stores who play the radio for their customers, but no language that seems to contemplate fraternities who play loud music for their neighbors.[45] Thus, the statute fails to discuss your client's ability or obligation to pay appropriate royalties in return for access, and there is no provision securing your client's opportunity to read, see, hear, or download copyrighted works.

One can draw different conclusions from the paucity of language speaking to the behavior of individuals who are consuming rather than exploiting copyrighted material. One conclusion that is commonly voiced is that the statute really doesn't address the legal obligations of individuals acting in their private capacities.[46] An equally plausible interpretation, favored by copyright owners and copyright lawyers, is that the statute forbids private individuals, acting without permission, to invade the copyright owner's broad rights unless their behavior falls within an express statutory exception.[47] In the words of the Draft Report: "Users are not granted

[42] *See* 17 U.S.C. §§ 111, 118 (1988).

[43] *See, e.g.*, 17 U.S.C. §§ 106, 201, 203 (1988).

[44] *See Anne Rice Jabs Stake Into Cruise*, USA TODAY, May 23, 1994, at D2. In theory, the police officer who succumbs to temptation and imagines the film as it might have looked if Daniel Day Lewis had been cast in Tom Cruise's role may be violating the copyright owners' exclusive rights under 17 U.S.C. § 106(2) to prepare derivative works, since a violation of the derivative work right requires no tangible embodiment whatsoever. *See* H.R. REP. 1476, 94th Cong., 2d Sess. 62 (1976).

[45] Public performances of copyrighted works are copyright infringement unless privileged by §§ 107-119. Section 110(5) permits:

> communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public;

17 U.S.C. § 110(5) (1988). The subsection expressly privileges the use of home-style televisions or radios (but not records, tapes or disks) in small commercial establishments. *See, e.g.*, ROBERT A. GORMAN AND JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 46 (4th ed. 1993). No comparable provision exists for use of a boom-box in public, or the playing of automotive stereo equipment in a car with its windows rolled down.

[46] *See, e.g.*, OTA, INTELLECTUAL PROPERTY RIGHTS, *supra* note 27, at 190-93; OTA, COPYRIGHT & HOME COPYING, *supra* note 21, at 5-6; *see also supra* note 45.

[47] *See, e.g.*, Litman, *Copyright, Compromise, and Legislative History supra*, note 24, at 883-84.

any affirmative 'rights' under the Copyright Act; rather, copyright owners' rights are limited by certain exemptions from user liability."[48] There are not very many specific exceptions addressed to individuals' private actions, which means that individuals are routinely prohibited from doing the sorts of things that businesses have statutory exemptions for unless they first secure the copyright owner's permission.[49]

Either way, though, it doesn't seem as if the agreement reflected in the 142 pages is yet in your client's interest as your client has expressed it. Perhaps the changes suggested by the Draft Report will help.

III.

The IITF Draft Report presents its task as the proposal of modest adjustments to repair the unintended damage that the passage of time and the growth of technology have had on the copyright law:

> It is difficult for intellectual property laws to keep pace with technology. When technological advances cause ambiguity in the law, courts rely on the law's purposes to resolve that ambiguity. However, when technology gets too far ahead of the law, and it becomes difficult and awkward to apply the old principles, it is time for reevaluation and change. "Even though the 1976 Copyright Act was carefully drafted to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes."
>
> The coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations.[50]

The Draft Report recapitulates oft-voiced complaints about the damage to the integrity of the rights in the copyright bundle caused by the unanticipated fallout from digital technology.[51] The ease of digital copying is frequently said to pose a profound threat to copyright at its core.[52] The same technological miracles that

[48] IITF GREEN PAPER, *supra* note 8, at 44-45 n.130.

[49] Individuals can, of course, seek to rely on the fair use privilege codified in 17 U.S.C. § 107. *See* Samuelson, *supra* note 32, at 67-73; OTA, COPYRIGHT & HOME COPYING, *supra* note 21, at 68-70. The Draft Report suggests that, in the context of the NII, the fair use privilege should not be generously construed. *See* IITF GREEN PAPER, *supra* note 8, at 45-53, 133-34.

[50] IITF GREEN PAPER, *supra* note 8, at 120 (footnotes omitted) (quoting H.R. REP. 735, 101st Cong., 2d Sess. 7 (1990)); *see also id.* at 9-10.

[51] *See id.* at 8, 71-72, 120-21.

[52] *See, e.g., U.S. Adherence to the Berne Convention: Hearings before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 47 (1987) (prepared statement of Barbara Ringer, former Register of Copyrights); *NII Hear-*

pose the threat, however, have served up some unanticipated windfalls for the copyright owner.[53] The most crucial example is the evolution of the reproduction right into something more encompassing than envisioned in any copyright revision until now. United States copyright law has always given copyright owners some form of exclusive reproduction right.[54] It has never before now given them an exclusive *reading* right, and it is hard to make a plausible argument that Congress would have enacted a law giving copyright owners control of reading. A handful of recent interpretations of the statute, however, insist that one reproduces a work every time one reads it into a computer's random access memory.[55] For all works encoded in digital form, any act of reading or viewing the work would require the use of a computer, and would, under this interpretation, involve an actionable reproduction. One might therefore expect an analysis proposing modest alterations of the law (to fix unintended ambiguities) to suggest clarifying this point: amending the law to provide explicitly that an individual's ordinary reading, viewing, or listening to an authorized copy of a work does not invade the copyright owner's rights. Instead, debates on the intellectual property underpinnings of the proposed National Information Infrastructure have proceeded on the assumption that copyright does, and should, assure such rights to the copyright

ing, supra note 3, at 211-20 (testimony of Thomas M. Lemberg, Business Software Alliance and Alliance to Promote Software Innovation); Eric Fleischmann, *The Impact of Digital Technology on Copyright Law*, J. PAT. & TRADEMARK OFFICE SOC'Y, Jan. 1988, at 5; William H. O'Dowd, Note: *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249 (1993); *see also* Barlow, *supra* note 4.

Current stakeholders are not responding to the perceived threat by recommending fundamental changes to the copyright law, with which they appear to be well satisfied; rather, they want to make sure that tomorrow's players will have to play by today's rules. *See NII Hearing, supra* note 3, at 14-23 (testimony of Steven J. Metalitz, Information Industry Council); *id.* at 31-40 (testimony of Stephen L. Haynes, West Publishing Company); *id.* at 40-50 (testimony of Lisa Freeman, Association of American University Presses); *id.* at 99-107 (testimony of Fritz Attaway, Motion Picture Association of America); *id.* at 130-41 (testimony of Benjamin F.P. Ivins, National Association of Broadcasters).

[53] *See* Jerome H. Reichman, *Electronic Information Tools—The Outer Edge of World Intellectual Property Law*, 17 U. DAYTON L. REV. 797 (1992).

[54] *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124; Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171; Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436; Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212; Rev. Stat. § 4952; Copyright Act of Mar. 4, 1909, § 1(a), 35 Stat. 1075; 17 U.S.C. § 106(1); *see generally* L. RAY PATTERSON & STANLEY W. LINDBERG, *supra* note 26; LIBRARY OF CONGRESS, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES RELATING TO COPYRIGHT (1963).

[55] *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993); Triad Sys. Corp. v. Southeastern Express Co., 31 U.S.P.Q. 2d (BNA) 1239 (N.D. Cal. Mar. 18, 1994); Advanced Computer Servs. v. MAI Sys. Corp., 845 F. Supp. 356 (E.D. Va. 1994); *see also* NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 39 (1978) ("The protection afforded by section 106 of the new law seemingly would prohibit the unauthorized storage of a work within a computer memory, which would be merely one form of reproduction . . . .").

owner.[56] The Draft Report adopts this view; it claims that "[i]t has long been clear that under U.S. law the placement of a work into a computer's memory amounts to a reproduction of that work"[57] and suggests that the expansiveness of the reproduction right should be exploited to ensure copyright owners' enhanced control of protected works.[58]

In fact, the Draft Report's characterization of current law is dubious, and the Report does not cite authority to support it. There is support available: the Report could have mentioned three recent cases,[59] a stray remark in the CONTU Report,[60] and brief

[56] *See NII Hearing, supra* note 3, at 130 (testimony of Benjamin F.P. Ivins, National Association of Broadcasters); *id.* at 14 (testimony of Steven J. Metalitz, Information Industry Association); *id.* at 201 (testimony of Mark Traphagen, Software Publishers Association).

[57] IITF GREEN PAPER, *supra* note 8, at 36. It is apparent from the Draft Report's examples of infringing reproductions, see *supra* note 21, that by "placement . . . into a computer's memory" the Report means reading a work into random access memory, or RAM. A work's appearance in RAM is, by its nature, temporary; the work will disappear from RAM when the computer is turned off.

[58] The Draft Report puts it this way:

> This fundamental right—to reproduce copyrighted works in copies and phonorecords—appears likely to be implicated in innumerable NII transactions. Indeed, because of the nature of computer-to-computer communications, it appears to be a right that will be implicated in most NII transactions. For example, when a computer user simply "browses" a document resident on another computer, the image on the user's screen exists—under contemporary technology—only by virtue of the copy that has been reproduced *in the user's computer memory*. It has long been clear under U.S. law that the placement of a work into a computer's memory amounts to a reproduction of that work (because the work may be, in the law's terms, "perceived, reproduced, or . . . communicated . . . with the aid of a machine or device").
>
> In each of the instances set out below, one or more copies is made, and, necessarily, in the absence of a proof of fair use or other relevant defense, there is an infringement of the reproduction right:
>
> • When a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a very brief period, a copy is made.
>
> • When a printed work is "scanned" into a digital file, a copy—the digital file itself—is made.
>
> • When other works—including photographs, motion pictures, or sound recordings—are digitized, copies are made.
>
> • Whenever a digitized file is "uploaded" from a user's computer to a bulletin board system or other server, a copy is made.
>
> • Whenever a digitized file is "downloaded" from a BBS or other server, a copy is made.
>
> • When a file is transferred from one computer network user to another, multiple copies are made.
>
> • Under current technology, when a user's computer is being used as a "dumb" terminal to "look at" a file resident on another computer (such as a BBS or Internet host), a copy of the portion viewed is made in the user's computer. (Without such copying into the RAM or buffer of the user's computer, no screen display would be possible.) As long as the amount viewed is more than *de minimis*, it is an infringement unless authorized or specifically exempt.

IITF GREEN PAPER, *supra* note 8, at 35-37 (emphasis in original) (footnotes omitted).

[59] MAI Sys. Corp., 991 F.2d 511; Triad Sys. Corp., 31 U.S.P.Q. 2d (BNA) 1239; Advanced Computer Servs., 845 F. Supp. 356.

[60] *See* NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS,

discussions in a couple of recent law review articles.[61] This is some support, but it is hard to argue that the proposition "has long been clear under U.S. law." The CONTU reference is ambiguous; the other sources are recent. Authority on the other side of the question includes the statutory language,[62] and the following passage from the House Report accompanying the 1976 Act:

> Reproduction under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).[63]

I would argue that the better view of the law is that the act of reading a work into a computer's random access memory is too transitory to create a reproduction within the meaning of section 106(1).[64]

FINAL REPORT 39 (1978) ("The protection afforded by section 106 of the new law seemingly would prohibit the unauthorized storage of a work within a computer memory, which would be merely one form of reproduction . . . .").

61 *See, e.g.*, Jane C. Ginsburg, *Copyright Without Walls?: Speculations on Literary Property in the Library of the Future*, 42 REPRESENTATIONS 53, 56, 70 n.17 (1993).

62 The relevant language states:

> "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed . . . .
>
> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. . . .
>
> "Phonorecords" are material objects in which sounds . . . are fixed by any method now known or later developed. . . .

17 U.S.C. § 101 (1988).

"[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords . . . ." 17 U.S.C. § 106(1)(1988).

63 H.R. REP. No. 1476, *supra* note 44, at 62. *See also* Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, Communications of the ACM, Dec. 1994, at —.

> Proponents of the view that RAM copies infringe copyrights argue that as long as the machine is on—and it can be on indefinitely—a copy of the copyrighted work stored there can be perceived or reproduced, thereby satisfying the "more than transitory duration" standard. (By this logic, holding a mirror up to a book would be infringement because the book's image could be perceived there for more than a transitory duration, i.e., however long one has the patience to hold the mirror.)

Id.

64 Indeed, the Draft Report itself seems a little confused about this; compare IITF GREEN PAPER, *supra* note 8, at 14 ("A transmission is not a fixation. While a transmission may result in a fixation, a work is not fixed by virtue of the transmission alone.") with *id.* at 36 ("[W]hen a computer user simply 'browses' a document resident on another's computer, the image on the user's screen exists—under contemporary technology—only by virtue of the copy that has been reproduced *in the user's computer memory*." (emphasis in original)).

In any event, even if the Draft Report's characterization of current law were not skewed, its endorsement of what it presents as well-settled law deserves examination. If a bargain between the public and the authors and producers of copyrighted works were negotiated (at arms length) and drafted up today, it might include a reproduction right, but it surely wouldn't include a "reading" right. It might include a performance right but not a "listening" right; it might have a display right, but it wouldn't have a "viewing" right. From the public's vantage point, the fact that copyright owners are now in a position to claim exclusive "reading," "listening," and "viewing" rights is an accident of drafting: when Congress awarded authors an exclusive reproduction right, it did not mean what it may mean today.

The Draft Report's proposed resolution of the ambiguities introduced into the law by the passage of time and the invention of new media is not, from the public's point of view, an improvement. If you were the public's copyright lawyer, you would, in my view, be hard pressed to assure your client that the Draft Report's proposals for modest alterations were in fact a good deal.

IV.

The Draft Report argues that its proposed enhancement of copyright owner's rights is without question in the public interest, for it is a necessary first step in the creation of the information superhighway. This is the central justification for further enhancing the rights in the copyright bundle: without strong copyright protection, there will be no national information infrastructure. The public might believe that what it wants is unfettered access to copyrighted works in return for reasonable royalty payments to authors, but, if we let the public set the freight charges, we risk underproduction of freight. If authors and publishers cannot reliably control their works, they will decline to make them available at all. The Draft Report puts it this way:

> [T]he potential of the NII will not be realized if the information and entertainment products protectible by intellectual property laws are not protected effectively when disseminated via the NII. Owners of intellectual property rights will not be willing to put their interests at risk if appropriate systems—both in the U.S. and internationally—are not in place to permit them to set and enforce the terms and conditions under which their works are

> made available in the NII environment. Likewise, the public will not use the services available on the NII and generate the market necessary for its success unless access to a wide variety of works is provided under equitable and reasonable terms and conditions, and the integrity of those works is assured. All the computers, telephones, fax machines, scanners, cameras, keyboards, televisions, monitors, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful NII, if there is not *content*. What will drive the NII is the content moving through it.[65]

If the public wishes an NII, the argument goes, it must offer strong copyright protection as a bribe to those whom it hopes to persuade to create enough stuff to make an NII worthwhile. Relying on a hope that if the public only builds the infrastructure, the information to travel it will come is said to be naive; of course the owners of protectible works will refuse to permit those works to be exploited unless their ownership rights are secure.

It appears to follow from that analysis that my thought experiment is ill-considered. We should not pursue the public's hypothetical interest in paying reasonable fees in return for unfettered access to copyrighted works because the deal cannot be struck on those terms. If the public stops promising authors "a reward in the form of control,"[66] we will soon run short of new copyrighted works to read, see, hear or download. Representatives of copyright owners have made this argument repeatedly in the context of the NII.[67] They couldn't be bluffing about that, could they?

A.

Imagine for a moment that some upstart revolutionary proposed that we eliminate all intellectual property protection for fashion design. No longer could a designer secure federal copyright protection for the cut of a dress or the sleeve of a blouse. Unscrupulous mass-marketers could run off thousands of knock-off

65 IITF GREEN PAPER, *supra* note 8, at 6-7 (emphasis in original).

66 Goldstein v. California, 412 U.S. 546, 555 (1973).

67 *See, e.g., NII Hearing, supra* note 3 (testimony of Steven Metalitz, Information Industry Association):

> If we aren't able to protect copyright in the new information environment, then the information that will be available, the useful information, the supply of that will be drastically be curtailed. [sic] Or just as troubling, it will be limited to the information that the government chooses to create or some other powerful institution chooses to create.

It's worth noting that the Internet, which the Draft Report uses as its model for the NII, see IITF GREEN PAPER, *supra* note 8, at 2 n.2, is experiencing no dearth of material. *See infra* text accompanying notes 83-84.

copies of any designer's evening ensemble, and flood the marketplace with cheap imitations of haute couture. In the short run, perhaps, clothing prices would come down as legitimate designers tried to meet the prices of their free-riding competitors. In the long run, though, as we know all too well, the diminution in the incentives for designing new fashions would take its toll. Designers would still wish to design, at least initially, but clothing manufacturers with no exclusive rights to rely on would be reluctant to make the investment involved in manufacturing those designs and distributing them to the public. The dynamic American fashion industry would wither, and its most talented designers would forsake clothing design for some more remunerative calling like litigation. And all of us would be forced either to wear last year's garments year in and year out, or to import our clothing from abroad.

Or, perhaps, imagine that Congress suddenly repealed federal intellectual property protection for food creations.[68] Recipes would become common property. Downscale restaurants could freely recreate the signature chocolate desserts of their upscale sisters. Uncle Ben's® would market Minute® Risotto (*microwavable!*); the Ladies' Home Journal® would reprint recipes it had stolen from Gourmet® Magazine. Great chefs would be unable to find book publishers willing to buy their cookbooks. Then, expensive gourmet restaurants would reduce their prices to meet the prices of the competition; soon they would either close or fire their chefs to cut costs; promising young cooks would either move to Europe or get a day job (perhaps the law) and cook only on weekends. Ultimately, we would all be stuck eating Uncle Ben's Minute Risotto® (*eleven yummy flavors!!*) for every meal.

But, I'm boring you, you tell me; you've heard all of this before. It's the same argument motion picture producers make about why we need to extend the duration of copyright protection another 20 years;[69] the same argument software publishers make about what will happen if we permit other software publishers to decompile and reverse-engineer their software products;[70] the

68 *See generally* Malla A. Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991).

69 *See Copyright Office: Hearing Held on Possible Extension of Copyright Term*, 46 PAT., TRADEMARK & COPYRIGHT J. (BNA) 466 (Sept. 30, 1993).

70 *See, e.g., Copyright Amendments Act of 1991: Hearings on H.R. 2372 Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary*, 102d Cong., 1st Sess. 115 (1993)(testimony of William Neukom, Software Publishers Association); ANTHONY LAWRENCE CLAPES, SOFTWARS: THE LEGAL BATTLES FOR CONTROL OF THE GLOBAL SOFTWARE INDUSTRY 6-9 (1993); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 97, 1013-32 (1993); *see generally* Charles R. McManis, *Intellectual Property Protection*

same argument database proprietors make about the huge social cost of a failure to protect their rights in their data.[71] Perhaps the most important reason why we have intellectual property protection is our conclusion that incentives are required to spur the creation and dissemination of a sufficient number and variety of intellectual creations like films, software, databases, fashions and food.

Of course, we don't give copyright protection to fashions or food.[72] We never have.

B.

The model suggesting that production and dissemination of valuable, protectible works is directly related to the degree of available intellectual property protection is much too simplistic.[73] In fact, history teaches us a more equivocal lesson. Whenever we have discovered or enacted a copyright exception, an industry has grown up within its shelter. Player piano rolls became ubiquitous after courts ruled that they did not infringe the copyright in the underlying musical composition;[74] phonograph records superseded both piano rolls and sheet music with the aid of the compulsory license for mechanical reproductions;[75] the jukebox industry arose to take advantage of the copyright exemption accorded to "the reproduction or rendition of a musical composition by or upon coin-operated machines."[76] Composers continued to write music, and found ways to exploit these new media for their works.

The videotape rental business swept the nation shielded from copyright liability by the first sale doctrine.[77] The motion picture

and Reverse Engineering of Computer Programs in the United States and the European Community, 8 HIGH TECH. L.J. 25 (1993).

71 *Cf.* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 353 (1992) ("Absent protection for the effort and expense of compiling information, one may fear the substantial diminution of incentives to invest in compiling information.").

72 *See, e.g.*, Pollack, *supra* note 68; Malla A. Pollack, *A Rose Is a Rose Is a Rose, But Is a Costume a Dress? An Alternative Solution in* Whimsicality, Inc. v. Rubie's Costume Co., 41 J. COPYRIGHT SOC'Y 1 (1993).

73 *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291-323 (1970); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700-39 (1988); *see also* Barlow, *supra* note 4, at 127.

74 *See* Kennedy v. McTammany, 33 F. 584 (C.C.D. Mass. 1888); White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

75 Copyright Act of 1909, Pub. L. No. § 1(e), 35 Stat. 1075; *see* U.S. LIBRARY OF CONGRESS, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, Ch. IX (1975).

76 Copyright Act of 1909, *supra* note 75; *see* U.S. LIBRARY OF CONGRESS, *supra* note 75, at ch. X.

77 *See* 17 U.S.C. § 109 (1988).

industry predicted that if Congress failed to rush in to correct the problems posed by the invention and marketing of the videocassette recorder, American television would slowly be destroyed, and American motion picture production would sustain grave injury.[78] Howard Wayne Oliver, Executive Secretary of AFTRA (American Federation of Television and Radio Artists) told the House Subcommittee:

> Unless we do something to ensure that the creators of the material are not exploited by the electronics revolution, that same revolution which will make it possible for almost every household to have an audio and video recorder will surely undermine, cripple, and eventually wash away the very industries on which it feeds and which provide employment for thousands of our citizens.[79]

Notwithstanding all of the gloom and doom, however, both the motion picture and television industries discovered that the videocassette recorder generated new markets for prerecorded versions of their material.

Cable television began spreading across America with the aid of a copyright exemption;[80] it eclipsed broadcast television while sheltered by the cable compulsory license.[81] Yet, there is no dearth of television programming,[82] and the popular media image of the new information superhighway includes 500 television channels to accommodate it all.[83]

Even an erroneous assumption of copyright immunity can stimulate a nascent industry. The commercial photocopy shop prospered in part because of the university coursepack business made possible by a supposed fair use privilege.[84] Commercial and

78 *See Video and Audio Home Taping: Hearing on S. 31 and S. 175 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 276-306 (1983) (testimony of Jack Valenti, Motion Picture Association of America); *id.* at 307-09 (testimony of Kay Peters, Screen Actors Guild); *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 4-16 (1982) (testimony of Jack Valenti, Motion Picture Association of America).

79 *Home Recording of Copyrighted Works*, *supra* note 78, at 142.

80 *See* Teleprompter Corp. v. Columbia Broadcasting Sys. Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968).

81 *See* 17 U.S.C. § 111; Litman, *supra* note 23, at 342-46.

82 *See, e.g., NII Hearing*, *supra* note 3, at 130-41 (testimony of Richard Ducey and Benjamin F.P. Ivins, National Association of Broadcasters).

83 *See, e.g.*, Paul Farhi, *TCI's Malone Quietly Assembling an Empire*, WASH. POST, Oct. 14, 1993, at A1; Benjamin J. Stein, *More Channels, More Laziness*, WASH. POST, Nov. 2, 1993, at A19.

84 *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991); Princeton Univ. Press v. Michigan Document Serv., 855 F. Supp. 905 (E.D. Mich. 1994).

non-commercial subscriptions to services providing access to the Internet are increasing geometrically,[85] and much of the activity on the net takes place on the mistaken assumption that any material on the Internet is free from copyright unless expressly declared to be otherwise. Nonetheless, there are scores of electronic magazines and news services developed specifically for electronic distribution, and many commercial publishers are currently releasing their works over the Internet despite the absence of effective coercive means of protection.[86]

Of course, copyright owners would prefer to maximize their own control over the works they produce. Of course, if we ask them to come up with an optimal copyright law, they will draft one that meets that specification. If the general public had a lawyer to sit at the copyright negotiating table on its behalf, however, the law that emerged from the negotiating process might be a different one.

V.

Neither the authors of the Draft Report nor the current stakeholders whose views the Report appears to endorse are oblivious of public opinion. They realize that some of their proposals would be controversial, indeed, even unpopular to some segments of the public, if the public were paying attention. The Draft Report suggests that one solution to this problem is education.[87] The Report acknowledges that the task might not be easy.[88]

We know quite a bit about the problems that inhere in educating the public about copyright law, because copyright owners have

The popularity of the course-pack services provided by commercial photocopy shops eventually enabled publishers to establish a lucrative course-pack photocopy licensing business. *See id.*

85 *See* SOFTWARE 2000, *supra* note 4, at 2-5 to 2-15; Philip Elmer-Dewitt, *Technology: Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50; Peter H. Lewis, *A Boom for On-Line Services*, N.Y. TIMES, July 12, 1994, at D1; Peter H. Lewis, *Business Technology; Even in Cyberspace, Overcrowding*, N.Y. TIMES, Feb. 2, 1994, at D1.

86 An "Electronic Newsstand" at enews.com, URL: gopher://gopher.enews.com:70/11/magazines/alphabetic, offers free samples from magazines including BUSINESS WEEK, the ECONOMIST, the NEW REPUBLIC and the NEW YORKER to encourage the purchase of subscriptions. Tor Books, URL: gopher://gopher.panix.com:70/11/TBON, and Del Rey Books, URL: gopher://gopher.panix.com:70/11/DRB, offer free excerpts from forthcoming novels on the Panix Gopher Server. Associated Press, UPI and Reuters are available on Compuserve, and TIME magazine maintains a presence on America Online. Meanwhile, both West Publishing Company and Mead Data Corporation conduct extensive (and expensive) online information services notwithstanding the rudimentary state of available protections for the material they have at their disposal.

87 IITF GREEN PAPER, *supra* note 8, at 117-19.

88 *Id.* The major difficulties highlighted in the Draft Report are practical, rather than substantive concerns. My own view is that the substantive problems far outweigh the logistical questions. *See infra* text accompanying notes 89-106.

been expending huge sums of energy, time, and money with that goal in mind. The music performing rights societies have been trying to educate a recalcitrant public for the past eighty years, and the effort has hardly made a dent in the psyches of their customers or the people who patronize them.[89] Restaurateurs would not think of selling their patrons stolen food, or sitting them in stolen chairs, but they think nothing of selling them stolen music; many of those who buy performing rights licenses from ASCAP, BMI and SESAC say that they do so only because they are afraid of the copyright police.[90]

The performing rights situation is straightforward: if you run an establishment open to the public, you need to buy a license to perform music unless your performances fit into one of the exceptions; and licenses are sold relatively cheaply.[91] But, compliance is grudging at best.[92] People perceive the law to be grossly unfair,[93] partly because enforcement is incomplete and uneven; there's no guarantee that the business down the street is licensed, and who wants to be a chump?[94] Then there are all of the exceptions in section 110, which don't make any sense.[95] How come a bar with one 27" television doesn't need a license, while another bar with

89 *See generally Music Licensing Practices of Performing Rights Societies: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (Feb. 23-24, 1994) [hereinafter *Music Licensing Hearing*]; Ralph Oman, *Source Licensing: The Latest Skirmish in an Old Battle*, 11 COLUM.-VLA J.L. & ARTS 251 (1987).

90 *See Music Licensing Hearings*, *supra* note 89, at — (testimony of Guy Gregg, Owner, The Publick House Restaurant).

91 *See id.* at — (testimony of Morton Gould, American Society of Composers, Authors and Publishers); *id.* at — (statement of Marvin L. Berenson, Broadcast Music, Inc.); *id.* at — (statement of Representative Craig Thomas).

92 The music performing rights situation is exemplary; I choose it because of the long-standing campaigns waged by ASCAP, BMI and SESAC to educate the public. Organizations like the Software Publishers Association have been in business for far fewer years, with no more success. On compliance with the copyright law as it concerns software, John Perry Barlow recently wrote:

> The laws regarding unlicensed reproduction of commercial software are clear and stern . . . and rarely observed. Software piracy laws are so practically unenforceable and breaking them has become so socially acceptable that only a thin minority appears compelled, either by fear or by conscience, to obey them. When I give speeches on this subject, I always ask how many people in the audience can honestly claim to have no unauthorized software on their hard disk. I've never seen more than 10 percent of the hands go up.
>
> Whenever there is such profound divergence between law and social practice, it is not society that adapts. Against the swift tide of custom, the software publishers' current practice of hanging a few visible scapegoats is so obviously capricious as to only further diminish respect for the law.

Barlow, *supra* note 4, at 88.

93 *See Music Licensing Hearings*, *supra* note 89, at — (statement of Joe Johnson, National Licensed Beverage Association).

94 *See id.* at — (statement of John Deion, Owner, Last Call Saloon).

95 *See id.* at — (statement of Mike Leonard, National Licensed Beverage Association).

two 13" televisions does? Copyright lawyers might understand that the reason for this is that the words in section 110(5) say "*single* receiving apparatus of a kind commonly used in private homes,"[96] but there is nothing intuitively appealing about the distinction. Some prospective licensees fail to buy licenses because they believe the law could not possibly have been intended to apply to their situation; others find its complex provisions arbitrary and incomprehensible, and, therefore, unfair. And, every single year, despite the fact that the liability of unlicensed commercial establishments is well settled, people choose to *litigate* rather than pay up. And, of course, they lose. Their lawyers could have told them they would lose at the beginning, but they go through the painful and expensive litigation process anyway.

The moral of the story: some things are easier to teach than others. The current copyright statute has proved to be remarkably education-resistant. One part of the problem is that many people persist in believing that laws make sense. If someone claims that a law provides such and such, but such and such seems to make no sense, then perhaps that isn't really the law, or wasn't intended to be the way the law worked, or was the law at one time but not today, or is one of those laws, like the sodomy law, that it is okay to ignore. Our current copyright statute has more than merely a provision or two or three or ten that don't make a lot of sense; it's chock-full of them.[97] That is a direct result of the process we use to come up with our copyright laws. Whatever the strengths of the negotiated legislation approach to an area as complex as copyright, the statutes that result from the process are long, complex, and counterintuitive.[98]

The dynamics inherent in the negotiation process discourage brevity and intuitive appeal. Lawyers representing affected interests respond to the issues raised by new technology by ratifying all of the "accidents" that favor their clients and repudiating the "accidents" that work to their disadvantage. You know the drill: One does this by claiming that the first sort of accident is no accident at all, but part of Congress's grand design; while the second sort of accident is a completely unintended, unexpected "loophole." That is precisely the approach taken by the Draft Report, which treats the apparent expansiveness of the reproduction right as a design feature of the copyright law,[99] but presents the apparent leaks in

96 17 U.S.C. § 110(5) (1988) (emphasis added); *see supra* note 45.
97 *See* Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991).
98 *See* Litman, *supra* note 23.
99 *See* IITF GREEN PAPER, *supra* note 8, at 35-37.

the transmission right as accidental ambiguities that Congress should plug.[100] If interested parties disagree on which accidents are which, there is a predictable negotiated solution. Negotiating stakeholders have always resolved differences through specificity and detail.[101] By the time we're done the new statute is even worse than the old one. Thus, the recent Audio Home Recording Act,[102] even in its streamlined "DART Lite" version,[103] is one of the longest and least comprehensible copyright enactments of all time. And while it is easy to claim that the interplay among all of the interests affected by copyright provides a proxy for the public interest, the statutes that interplay produces demonstrate that it isn't so.[104]

Our current copyright law is a descendent of the copyright laws in force at the turn of the century and before, which were designed to bring order to the interaction among affected industries. Because affected industries, and their lawyers, were invited to draft those rules themselves, the law became so technical, detailed, and counterintuitive that those industries now need to bring their copyright lawyers along to tell them how to play. If the law is intended to affect only the behavior of players with substantial economic stakes in copyright-affected matters, there is not much wrong with that degree of complexity. As soon, however, as the law is claimed to control the ordinary behavior of ordinary members of the public going about their ordinary daily business, then that species of law will no longer serve.

If we want ordinary people to look at unlicensed music, unlicensed software, and unlicensed digital reading material the same way they see stolen personal property, and to treat them accordingly, then we need to teach them the rules that govern intellectual property when we teach them the rules that govern other personal property, which is to say, in elementary school. That proposition should not be controversial; the Draft Report suggests that very thing.[105] The problem, though, is that our current copyright statute could not be taught in elementary school, because elementary school students couldn't understand it. Indeed, their teachers couldn't understand it. Copyright lawyers don't understand it.[106]

100 *See id.* at 120-23.
101 *See* Litman, *supra* note 23.
102 Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237, *codified at* 17 U.S.C. §§ 1001-1010; *see Audio Home Recording Act Hearings*, *supra* note 21; H.R. REP. NO. 873, *supra* note 21.
103 *See* H.R. REP. 873, *supra* note 21.
104 *See supra* notes 24-45 and accompanying text.
105 IITF GREEN PAPER, *supra* note 8, at 117-19.
106 I make this statement with no intention of being hyperbolic. Anyone with access to the Internet can join a number of online virtual communities in which copyright law is

If we are going to teach the copyright law to school children, then we need the law to be sensible, intuitive, and short enough that school children can hold its essential provisions in their heads. What we have now is not even close. We need, in other words, to abandon entirely the idea that we can make members of the public conduct their daily affairs under rules thought up by and for major players in copyright-affected industries. If the public is to play by copyright rules, then those rules must be designed with the public's interests in mind.

VI.

Imagine once again that the public has retained you as its copyright lawyer. Acting in your new role, you review the current statute, and the government's proposals for adjusting it, and you chat with your client about where to go from here:

> *You:* "Look. I think the copyright concept is a good one, but I'm not happy with the details. There are a bunch of places where I think the language is unfortunate, and not in your long term best interest. Let me take it home and see if I can draft up a counterproposal that'll meet your needs, here."
> *Client:* "Gee. That's great; that's what I hoped you'd say. But lookit. This time, when you're writing it up, could you make it real short? I don't read so fast, and this is real important to me. I want to understand what it says."

So, you have yourself a drafting project. Your job is to construct a copyright law that affords members of the public the opportunity to read, see, hear, and otherwise experience, download, buy, borrow and keep copies of all, or at least most, of the works that are

discussed by groups including experts and interested laypeople. One story I like to tell involves a debate that went on for a couple of months on a wonderful copyright mailing list that has more than 1000 subscribers, some of whom are prominent experts in the field. The debate was over whether one could dedicate one's electronic postings to the public domain, and, if so, how might that be accomplished, and could one, having done that, attach any conditions to the further distribution of the contents of those posts? Participants were not sure that it was possible to dedicate works to the public domain anymore, after the Berne Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988); they were not sure how, if it were possible, one could accomplish it; they could not agree on what words to use. None of these folks are copyright naifs; both the original inquirer and most of the posters offering views on this particular issue had substantial copyright backgrounds. But, if 1000 sophisticated people with enormous copyright expertise among them cannot over a two month period resolve this simple a question, then the law has gotten way too complicated for any purpose; it surely cannot be taught to school children.

Someone asked me the other day why, if music stores could play music without a performing rights license, videotape stores couldn't play videotapes without a performing license, and why, if television stores were not allowed to play all of their television sets without a license, they did it all the time? Can you think of an answer to those questions that would sell in junior high school? I can't.

out there, while according ample compensation to the authors and publishers of copyrighted works, and encouraging them to produce and disseminate as many copyrighted works as they are able to. The law should be about three pages long, should strike more folks than not as more fair than not, and should be sufficiently intuitive to appeal to school children. Let's say that you take about an hour, and come up with some language that meets spec.[107] Your client approves it. You take it over to Congress. Or maybe you take it over to the Patent and Trademark Office at the U.S. Commerce Department, home of the Information Infrastructure Task Force's Working Group on Intellectual Property Rights. Or, maybe, you sign on to the Internet and post it for all to read. You have only one final problem: Congress isn't going to enact it.

The only way that copyright laws get passed in this country is for all of the lawyers who represent the current stakeholders to get together and hash out all of the details among themselves.[108] In the past, this process has produced laws that are unworkable from the vantage point of people who were not among the negotiating parties,[109] and it won't generate any better results this time. The public needs to sit at the negotiating table and insist that any solution must seriously address its interests, as well as theirs.

What the public needs is a copyright lawyer of its own to represent it in the revision or replacement of the copyright law we now have, and the proposals for amending it that the National Information Infrastructure is inspiring. If you were unable to take the assignment yourself, where would you send your prospective client to find someone who would act as the copyright lawyer for the general public? Where would you send your prospective client to find someone who could do it well?

That is supposed to be Congress's job, of course. Congress *is* the public's copyright lawyer. The problem is that Congress is also the public's bankruptcy lawyer, and our trade lawyer, and our outer-space lawyer. Congress seems to lack the interest, expertise, and institutional memory to represent the public on this particular project; indeed, what Congress has done more often than not is delegate the job of coming up with legislation to interested private

107 My own view is that a number of different approaches would each yield a copyright law more hospitable to the public's interests than the one we have now. My three page proposal would differ from yours, but perhaps no more so than would any lawyer's draft of a short agreement on a more conventional topic. I am much less confident that anything I write will persuade readers to attempt the exercise than I am with my suggestion that an hour's concentrated thought would generate interesting and probably useful language.

108 *See supra* note 24.

109 *See* Litman, *supra* note 23.

parties, which is how the statute got so long and convoluted in the first place.

But, Congress *has* a copyright lawyer of its own. That is the Copyright Office's job. The Copyright Office *does* have both the expertise and institutional memory; it has functioned as Congress's copyright lawyer and copyright expert for almost a century. The Office has, of course, some history of being "captured" by industry for most of the usual reasons (limited budgets, revolving doors, and the growing perception that copyright owners were in fact the Office's real constituency), but the public badly needs a copyright lawyer. The Copyright Office is in the very best position to perform that function. Besides, the Draft Report issued by the Working Group headquartered in the Patent and Trademark Office indicates that the Patent Office has already managed to assume much of the job of serving the interests of industry. This may be an unusually good moment for the Copyright Office to think very hard about redefining its role.

The Copyright Office's enormous expertise could enable it not only to persuade all of us (that is, both stakeholders and individual members of the public) that the public's interests *are* compatible rather than adverse to the interests of copyright owners, but also to make it so. What it would require, though, is a different sort of legislative proposal than the ones we have gotten used to seeing over the years. The Copyright Office has focused much of its recent attention on the threats that technology might unbalance the copyright bargain to the detriment of copyright owners, and has failed to attend to the danger that the bargain might unbalance to the detriment of the public. All it would take would be for the Office to view the public as its copyright client. And somebody certainly should.

WILL THE COPYRIGHT OFFICE BE OBSOLETE IN THE TWENTY-FIRST CENTURY?

PAMELA SAMUELSON*

When contemplating possible futures for copyright law in the twenty-first century, we should not forget to consider what future the U.S. Copyright Office may have. During the century now drawing to a close, the Office has played an important role in the formation of copyright policy in the United States and in its administration.[1] When a governmental institution has existed for as long as the U.S. Copyright Office, one tends to take for granted that the institution will continue for the indefinite future and will play the same role in the future that it has played in the past. Abolition of a government agency is, after all, an exceedingly rare event in U.S. history. In view of this, the Copyright Office would seem to have a secure future.

And yet, I perceive a number of circumstances that might cause the Copyright Office to become obsolete in the coming century. This article will discuss these circumstances—some of which are offered with tongue only partly in cheek—and will make some more general observations about possible futures for copyright law in the twenty-first century. The future of the law of copyright and of the Office responsible for its administration are, as one might expect, closely intertwined.

Here, then, are some circumstances which might render the U.S. Copyright Office obsolete.

I. REPEAL OF THE REGISTRATION AND DEPOSIT REQUIREMENTS

First, if the U.S. Congress repeals the registration and deposit provisions of the current copyright statute, there may be little or nothing for the Copyright Office to do. In this event, Congress might decide to abolish the Office entirely. Under the current stat-

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[1] From 1790 to 1870, registration of claims to copyright was the responsibility of clerks of the federal district courts for the district in which the author resided. The Library of Congress took over this responsibility in 1870. Congress appropriated money for a Copyright Department of the Library of Congress (which became the U.S. Copyright Office) in 1897. The Copyright Act of 1976 contains many provisions setting forth the responsibilities and registration procedures of the Office. 1 PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW & PRACTICE § 3.19 (1989); *see* 17 U.S.C. §§ 408-409, 701-710 (1988).