

Cites & Insights

Crawford at Large

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Bibs & Blather

Porter, Not Potter

Plotnik Plotkin Potter Porter: Hello, my name is Wlat Carwfrod and my fingers don't always work right. In discussing Joseph Esposito's sneering article (*Cites & Insights* 4:11, p. 13), I included "George Potter" in a short list of thoughtful OA advocates whom I felt Esposito was indirectly slandering with his "Change One Thing worldview" claim.

For all I know, George Potter may be a thoughtful advocate of OA whose advocacy I just haven't encountered. I meant George *Porter* of Caltech (a long-time OA supporter; also, for what it's worth, one of the first to pay attention to *Cites & Insights*) and I did get his name right five pages earlier, commenting on his *STLQ* postings. With any luck, George and I will both be speaking on OA-related issues at this year's Charleston Conference. I clearly owe him a drink following the talks.

Who Cares About Copyright?

I'm seeing readership figures again—and they suggest "you" (in the vaguest sense of that term) are a lot more interested in scholarly access than in copyright. Maybe that's reasonable. The extended copyright coverage here may seem abstract in library terms, where OA, censorware and related issues are fairly obviously central to the future of libraries.

I'm not going to do an essay on why the copyright coverage matters—not in this issue, which already has more copyright material than I'd like. I am thinking about the "fourfold nature" of copyright aspects covered in *C&I* and whether it might make sense to split coverage into four overlapping parts. An essay on that fourfold nature—and why librarians should care—may emerge in a future issue.

Monetizing Update

Now that the academic year has started and I assume most of you are back, and I once more have access to indications of readership, a brief update may be in order:

- If I look at the lowest levels of 2004 unique downloads, assume no pass-along readership, and squint just a little, I can say that readership contribution has (barely) reached the 1% level—thus clearing my "lower bar," the point below which I would be depressed about having asked for donations. Ten percent is a long way away.
- New donations are, of course, welcome, if you feel that what you've received over the past 54 issues has been worth it to you. Don't feel any obligation: There isn't any. If you've already donated, my thanks; you've done your part.
- Sponsorship is still a possibility. When there's firm news on that front, you'll hear about it (quickly if you have *C&I* Updates in your aggregator or if you've subscribed to the *C&I* Alerts Topica list).

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- The chances of *Cites & Insights* going away (barring family, work, or health difficulties) were never high and are probably dropping. The tactic I suggested in a *LISNews* journal entry—reading old *Cites & Insights* issues several months after they appeared, so I could get some of the "delayed gratification" you get from traditional publishing—works pretty well. I cringe at the typos that are present in almost every issue, but some of the writing isn't awful. That increases the pleasure of doing this. For those who don't read my *LISNews* journal, I apologize here as well for the worse-than-usual editing and error correction in the Broadcast Flag issue.
- Then there are the print-on-demand book possibilities, either cumulated *C&I* volumes with better indexes or thematic collections from *C&I* or elsewhere. Here, I am disap-

pointed: The community has responded with an even bigger yawn than anticipated. If even ten or twenty people say that they or their libraries might be interested, I'd probably give this a try—but there haven't been *five* positive responses. I'm not into pure vanity publishing. (Impure, yes; pure, no.)

If you or your library is at all interested in the PoD possibility, **let me know**. If you're inclined to contribute something based on what you've gained from *C&I* to date, feel free (but unpressured).

It continues to be the case that one way to help *C&I* is to encourage others to read it (if you think they'd appreciate it), and another way might be to see that it's referenced in online catalogs or online journal directories—in those libraries where such inclusion is appropriate. I believe that it's appropriate *at least* in institutions with library schools, but what do I know?

Finally, one new possibility, also mentioned in a LISNews journal entry. Would you or others in your organization be interested in contributing program/conference reports to an expanded *Cites & Insights*? I really do miss the old *LITA Newsletter*, maybe enough to try to replace one of the functions that I expanded when I was editor—and across all of librarianship, not just LITA. Drop me email if you find this intriguing.

Perspective

Wikipedia and Worth

Late summer saw a whole bunch of foofaraw about wikis and specifically Wikipedia. After one columnist suggested Wikipedia as a resource for computer history, other writers assaulted Wikipedia as worthless trash; at least one librarian made noises about the difference between online junk and authoritative sources; some wiki advocates pontificated about the awesome error correcting capabilities of community-based collaborative media. Alex Halavais of the School of Informatics at Buffalo University made 13 changes in the English language Wikipedia, “anticipating that most would remain intact and he'd have to remove them in two weeks.” Presumably, if that had happened, there would have been evidence that the ease of modifying Wikipedia makes it suspect as a resource.

Long-time readers may be aware that I haven't found wikis suitable for my own needs—and that I once, more than two years, concurred with a published “pan” of Wikipedia. My offhand comment at the time called it “one of those grotesque ‘let's all make an encyclopedia’ efforts...that help some of us appreciate professional efforts.” That was a cheap

shot, although based on what I remember of Wikipedia from early 2002, I'm not going to apologize for it.

So what happened this time? Am I going to rant about the uselessness of Wikipedia and why only Authoritative Sources (those blessed by/part of traditional media) should be used? Read on.

The Halavais Test

Some people assaulted Halavais for his deliberate vandalism of Wikipedia. I won't get into that discussion, although the fact that Halavais fully intended to remove the changes counts for quite a bit.

More significantly, all the changes were identified and removed within a couple of hours. Halavais reported this and found himself “impressed.” Vandalism may be less of a problem than some might have thought—if it's readily detectable vandalism, e.g., simple graffitiquesque changes or changing facts that can be readily verified by a Wikipedia contributor or editor. (Another tester made a series of more subtle changes and says none of them were corrected over the test period.)

One Wikipedia technical team member noted “some of the hurdles a vandal has to deal with”: a “Recent Changes Patrol,” personal watchlists that inform contributors of changes made to articles they've registered interests in, the ease of tracking all edits from a given IP address when one edit has been identified as vandalism, “the people” and the enormous rate of Wikipedia edits, and tools for dealing with persistent vandals. It's an interesting list (frassle.rura.org, August 30, 2004). I could take issue with part of one paragraph, following the note that there were almost a million edits in June 2004:

The articles are being improved at a tremendous rate and even obscure changes are likely to be noticed within weeks or months, with the time depending on just how obscure the article is. Obscure is potentially harmful to fewer people and perhaps more likely to be seen by those who have knowledge of the topic sufficient to spot clear mistakes.

“Improved” is a value judgment not automatically implicit in a fast rate of change. Maybe all those edits are improvements; maybe not. My real problem is with the idea that errors (deliberate or otherwise) in obscure topics are less important. I think it's the other way around. Obscure topics can't be verified as readily against other sources. If Wikipedia had 1869 as the end of the Civil War, it would be an obvious and readily-verifiable error. If Wikipedia asserted that HTTP GET should *never* be used for URLs in excess of 256 characters (as opposed to the reality, that a fairly old RFC notes that some old servers may not handle very long HTTP GETs properly), a user might not have an easy way to double-check.

The Halavais test is an interesting datum. The Wikipedia community can spot changes in existing articles fairly rapidly and has good tools to deal with troublemakers. Does that make Wikipedia a trusted source? Of course not—but, for me at least, it reduces one cause of angst about taking Wikipedia data at face value.

Other Commentaries

I haven't collected the full range of comments on Wikipedia, the offending newspaper article(s), and the Halavais test. I did note two interesting commentaries (one of them *not* about Wikipedia as such), one by Ed Felten at *Freedom to Tinker*, one by David Mattison (a wiki user) posted on Web4Lib.

Ed Felten notes the two sides—"Critics say that Wikipedia can't be trusted because any fool can edit it, and because nobody is being paid to do quality control. Advocates say that Wikipedia allows domain experts to write entries, and that quality control is good because anybody who spots an error can correct it"—and goes on to note that much of the debate ignores the best evidence: The actual content of Wikipedia.

Felten took a look at its entries on "things I know very well: Princeton University, Princeton Township, myself, virtual memory, public-key cryptography, and the Microsoft antitrust case." His findings? The first two entries were excellent. The entry on Edward Felten was "accurate, but might be criticized for its choice of what to emphasize." (They also had his birth date as uncertain, which he corrected.) The technical entries "were certainly accurate, which is a real achievement" and were both backed with the kind of detailed information that wouldn't be feasible in a traditional encyclopedia—but neither did a great job making the concepts accessible to non-experts. As he notes, that's a quibble.

Unfortunately, the article on the Microsoft case was "riddled with errors"—factual errors, mischaracterization, terminology errors. His conclusion?

Until I read the Microsoft-case page, I was ready to declare Wikipedia a clear success. Now I'm not so sure. Yes, that page will improve over time; but new pages will be added. If the present state of Wikipedia is any indication, most of them will be very good; but a few will lead high-school report writers astray.

Comments asked about possible heuristic indicators for estimating likely accuracy and offered plausible reasons ("gravitational pull of content") that some articles may be oddly focused. (Entries are written to "scratch an itch," and it's likely that one entry will generate related entries.)

David Mattison addressed the overall issue of whether a wiki is appropriate for scholarly commu-

nication. His answer: "Banks are probably not appropriate for keeping money and valuables because they get robbed." Thus, many banks and wikis have gatekeeping and security protocols to keep the valuable cash and data from being tampered with—but wikis *can* operate with totally open-door policies. "It's the very nature...of this ideal type of wiki that makes some of us nervous and thrills others for various reasons, not all of them socially acceptable."

Mattison goes on to say that a wiki can be highly appropriate for scholarly communication if all the scholars trust one another, are collaborating on something, and use appropriate security and rollback mechanisms. These concluding paragraphs firmly separate Mattison from extreme "the community is always right" advocates:

Wikis are just another tool in what I, borrowing from others, call the Collaborative Web: technology and applications that let individuals work together or independently directly through the Web browser without a gatekeeper (e.g., a Webmaster) standing in the way.

The question of whether what emerges from that collaboration is authoritative or scholarly depends on other factors often above and beyond the collaborative process itself.

That doesn't address Wikipedia directly, to be sure; neither is it intended to. I find nothing in Mattison's post to disagree with. Wikis *do* add another interesting tool that can be used for good or bad. The fact that I haven't found wikis useful (as a participant) *to date* is just that: A fact with no broader significance, similar to my lack of a personal weblog.

Later—after I wrote the first draft of this perspective—Ed Felten added two more comments, and I did my own testing. Felten's first comment (September 7) was a "Wikipedia vs. *Britannica* smack-down" in which he looked at the same seven topics in the *Britannica*. Wikipedia did a little better on Princeton University and Township and a lot better on Edward Felten and virtual memory (neither of which has articles in *Britannica*); public-key cryptography is a tossup—but, while *Britannica*'s coverage of the Microsoft antitrust case is minimal, at least it's not wrong. His overall verdict:

Wikipedia's advantage is in having more, longer, and more current entries. If it weren't for the Microsoft-case entry, Wikipedia would have been the winner hands down. *Britannica*'s advantage is in having lower variance in the quality of its entries.

The comments on that post are almost as interesting as the post itself. Scott Preece notes that the crown jewels of the *Britannica* are its long essays, not its short entries. Another poster asserted that Wikipedia is a "revolution" that will "outstrip all other encyclopaedic forms soon" simply because it grows so fast—to which another, suggesting a scientific survey,

noted that quantity does not automatically lead to quality. And Eric Burns offered a good comment to the effect that most of the test cases are biased toward Wikipedia by their nature; “It is not unlike comparing the Catholic Encyclopedia with Britannica, and choosing a statistical universe that is 80% theological as its basis.” Burns does believe Wikipedia “will one day eclipse Britannica.”

Felten’s September 8 post questions the claim that constant and rapid change leads to continuous improvement in entries, so that in the long run Wikipedia becomes better than conventional encyclopedias. He suggests that, as entries mature, the quality will level off, with additional changes “executing a quality-neutral random walk.” He suggests a similar story for Wikipedia as a whole and asks whether enough effort will be spent to reach a quality plateau—and what that plateau should be.

Perspective

Wikipedia is certainly not worthless. Wikipedia is also not automatically better than a traditional encyclopedia because of the community of writers. I would tend to use Wikipedia entries as starting points, to be used on a “Trust but verify” basis. But isn’t “trust but verify” the base heuristic for almost all resources, traditional or new?

My assumption is that lots of specialists have contributed good work to Wikipedia, particularly in areas related to the web and digital resources. My assumption is also that some Wikipedia content is faulty, biased or wildly incomplete. In the latter case, I’d make the same assumption about a traditional encyclopedia, up to and including *Britannica*. Personally, I doubt Wikipedia will “eclipse” traditional encyclopedias (note that *Britannica* is once more available in print form), just as I doubt that weblogs will replace newspapers or that econtent will sweep away print media. Another comparison may be apt: While *Encarta* may have doomed *Funk & Wagnall’s* (and incorporated it at one point), it hasn’t doomed *Britannica*—or vice-versa. Different forms, different media serve different people with different needs.

I did my own tests—only of Wikipedia, and if I was going to compare it with a traditional encyclopedia I’d probably use *Encarta* or its ilk. My results were mixed. Some entries were very good and reflected considerable expertise (I was particularly impressed by the network of entries on lossy compression technologies), while some were dry as dust and gave no flavor of the subject they dealt with. I didn’t catch obvious errors, but I wasn’t really looking.

What is an authoritative resource? How about articles in refereed STM journals? Are they auto-

matically trustworthy because they’ve been through that rigorous peer review process? Not really, as candid observers within the field will tell you. Very few observers argue with the cynic’s view of peer review as it applies to authors with an axe to grind: Peer review doesn’t determine *whether* an article will be published, only *where* it will be published.

There was a dustup on the SPARC Open Access Forum about quality and inclusion in indexes. Implicit in the dustup—which I won’t review since it’s pretty specialized—is the notion that a great many peer-reviewed journals are full of crap. Sometimes that’s implicit (to a knowledgeable observer) from the name of the journal. Sometimes you need to be aware of the standards of the field to know which journals are, in the words of one observer, essentially vanity presses.

This is a tangent, but I sometimes wonder about the dissociation of article and journal that appears in online aggregation and OAI. Specialists will have their own mental lists of first rank, second rank but trustworthy, and FoC [see previous paragraph] journals; they’ll use those mental filters to judge the worth of new articles. But what about non-specialists? Are those filters readily available? Who will tell a person looking for health guidance which peer-reviewed journals to avoid at all costs?

I think there is a connection to Wikipedia. Alternative publishing does not imply lack of worth. Traditional publishing isn’t an automatic indication of worth or veracity. If the key is “trust but verify,” we need better ways to verify likely worth and probity. I assume today’s librarians are finding such ways, and finding ways to communicate those methods to the rest of us. At least I hope so.

Copyright Currents

Most copyright-related chatter the past three months concerns the proposed INDUCE Act, later renamed IICA (Intentional Inducements of Copyright Infringements Act of 2004), an Orrin Hatch special that’s also been called “the second coming of CBDTPA” or “Hollings revisited.” I cover that (as briefly as possible!) in a separate PERSPECTIVE. Meanwhile, as always, a lot more has been happening even as most legislation on both sides of the copyright wars remains bogged down. There’s been action on two fronts that bypass the legislature in the interests of tightening copyright—that is, FCC rulemakings and World Intellectual Property Organization treaty proposals. I won’t be commenting on the WIPO activity. It may be important, but I couldn’t make sense of the third-hand informal

commentary that I found. The courts have also been active, with a bit of good news for those who regard innovation as threatened by extreme copyright.

As usual, topics appear in no particular order, but items typically appear chronologically within a topical cluster.

Database Protection

The mid-June copyright special (4:8) included a section on HR 3261 (the Database and Collections of Information Misappropriations Act) and what was wrong with it from a balanced-copyright perspective. The section ended with an *ALAWON* report on a hearing on 3261 that also noted the introduction of a new bill, HR 3872, the Consumer Access to Information Act of 2004. HR 3872 is related to the earlier HR 1858 (so many bills...); notably, its sponsors include Boucher and Eshoo (VA and CA respectively), two Congressfolk with some apparent respect for balanced copyright.

As with most proposed legislation, you can find the bill readily enough, and this one's only four double-spaced pages. I'll quote the key definitional section in its entirety and summarize the limitations and remedies.

Section 1. Short Title. This Act may be cited as the "Consumer Access to Information Act of 2004".

Sec. 2. Misappropriation of a Database.

(a) MISAPPROPRIATION PROHIBITED.—The misappropriation of a database is an unfair method of competition and an unfair or deceptive act or practice in commerce under section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)).

(b) DEFINITION.—For purposes of subsection (a), the term "misappropriation of a database" means that—

(1) a person (referred to in this section as the "first person") generates or collects the information in the database at some cost or expense;

(2) the value of the information is highly time-sensitive;

(3) another person's (referred to in this section as the "other person") use of the information constitutes free-riding on the first person's costly efforts to generate or collect it;

(4) the other person's use of the information is in direct competition with a product or service offered by the first person; and

(5) the ability of other parties to free-ride on the efforts of the first person would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

Service providers would be held harmless. It would be enforced by the FTC: It does not allow for private suits. It would not affect SEC operations or security

transactions and quotations. It's not a copyright bill as such: It would not provide copyright protection to facts within a database, but would provide a different form of protection.

It seems to be a better bill than HR 3261 but still appears to solve a problem that may not exist. Maybe *ALAWON*'s take on it (as I read the article) is the right one: If it helps to keep *any* bill in this area from passing, it's a good thing.

DMCRA

According to a June 17, 2004 *Wired News* story (by Michael Grebb), Rick Boucher had 19 cosponsors for HR107 (DMCRA) as of that date, including Joe Barton, chair of the House Commerce Committee. "It's unlikely the bill will become law this year, but its proponents see the backing as a good sign." The article goes on to say "DMCA has...evoked buyer's remorse in many lawmakers," and one can only hope that's true.

Grebb quotes EFF's Fred Von Lohmann: "The DMCA has supplanted the balance of the Copyright Act over the last century"—and MPAA's David Green: "The DMCA retains fair use. It doesn't change fair use in any way."

Rather, he said, the DMCA simply bars circumvention of copy-protection schemes. He also said fair use has never allowed people to make full backup copies of movies anyway—a notion that many HR107 supporters dispute.

Green's comment is pure sophistry, since giving copy protection the force of law has the *effect* of negating fair use even though it may not change the law's wording—and copy protection as practiced on DVDs, for example, not only prevents full copies but prevents the excerpting fair use supports. The *Wired News* story was one of the last mentions of 321 Studios, whose chief executive said the company could only last a few weeks given legal bills of \$850,000 per month. It went out of business shortly thereafter.

Later in June, a bunch of technology companies and ISPs formed the Personal Technology Freedom Coalition to support DMCRA.

Finally—for now—two Judiciary Committee leaders issued an outraged statement that made it clear where their sympathies lie:

We strongly oppose the substance of H.R. 107. This legislation would eviscerate a key provision of [DMCA], which is successfully protecting copyrighted works and providing consumers access to more digital content than ever before. In fact, a DVD player is now as common a household item as the VCR was 15 years ago precisely because of [DMCA]. H.R. 107 would undo a law that is working and destroy the careful balance in copyright law between consumers' rights and intellectual property rights.

The statement went on to object to a “power grab” by the Commerce Committee.

Do consumers have “access to more digital content” now than they did prior to 1996? Well, sure; how could it be otherwise? Did DVD players succeed *precisely* because of DMCA? Only if you believe studios would have refused to issue DVDs in the absence of the draconian legislation and that DMCA somehow caused technology companies to compete for DVD player sales so heavily that prices plummeted. Does DMCA represent a “careful balance”? To James Sensenbrenner, John Conyers, and Lamar Smith, apparently so. To the rest of the world, maybe not: Big Media still wants technology locked down even further, and a lot of the rest of us have seen just how unbalanced DMCA is in practice. It sounds as though the only prospect for getting DMCRA onto the House floor is a “power grab” by some other committee.

MGM v. Grokster

That’s shorthand for three consolidated cases involving rightsholders (MPAA members, RIAA members, songwriters and music publishers) as plaintiffs and distributors of peer-to-peer network software (Grokster, Streamcast [Gnutella], and sometimes Sharman Networks and LEF Interactive) as defendants. It’s usually called “the Grokster case.” An appeal from the U.S. District Court for the Central District of California was heard on February 3, 2004 by a three-judge panel of the Ninth Circuit Court of Appeals; Judge Sidney R. Thomas issued the resulting opinion on August 19, 2004. The document runs 26 PDF pages, but the first nine list the plaintiffs, defendants, and lawyers.

This appeal presents the question of whether distributors of peer-to-peer file-sharing computer networking software may be held contributorily or vicariously liable for copyright infringements by users. Under the circumstances presented by this case, we conclude that the defendants are not liable for contributory and vicarious copyright infringement and affirm the district court’s partial grant of summary judgment.

That’s the finding—hardly worth more than a footnote, since it’s likely to be appealed to the Supreme Court. Think of it as an affirmation of the Betamax doctrine. But there’s much more here; the opinion is a well-written essay making important points. Here’s the first paragraph of the background:

From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation. This appeal is the latest reprise of that recurring conflict, and one of a continuing series of lawsuits between the recording industry and distributors of file-sharing computer software.

The background commentary goes on to explain the differences between Grokster and its ilk (decentralized P2P) and Napster (centralized P2P), offering a footnote that seems needlessly humble (“This is an extremely simplistic overview of peer-to-peer file-sharing networks”—it may be simplified, but it’s clear and covers the needed aspects). In commenting on the lawsuit’s assertion on uses of P2P networks, Thomas offers careful wording: “The Copyright Owners *allege* that over 90% of the files exchanged through use of the ‘peer-to-peer’ file-sharing software offered by the Software Distributors involves copyrighted material, 70% of which is owned by the Copyright Owners.” [Emphasis added.] Note that “involves copyrighted material” absolutely does not mean that sharing the file means infringing copyright, but that’s probably irrelevant.

The analysis begins thusly—and it’s useful to note that the defendants did not argue that P2P users had never engaged in direct infringement:

The question of direct copyright infringement is not at issue in this case. Rather, the Copyright Owners contend that the Software Distributors are liable for the copyright infringement of the software users. The Copyright Owners rely on the two recognized theories of secondary copyright liability: contributory copyright infringement and vicarious copyright infringement... We agree with the district court’s well reasoned analysis that the Software Distributors’ current activities do not give rise to liability under either theory.

Contributory copyright infringement requires direct infringement by a primary infringer, *knowledge* of the infringement by the contributory party, and *material contribution* to the infringement. Immediately after stating those three elements, the opinion brings in the Betamax case.

In *Sony-Betamax*, the Supreme Court held that the sale of video tape recorders could not give rise to contributory infringement liability even though the defendant knew the machines were being used to commit infringement. In analyzing the contours of contributory copyright infringement, the Supreme Court drew on the “staple article of commerce” doctrine from patent law... Under that doctrine, it would be sufficient to defeat a claim of contributory copyright infringement if the defendant showed that the product was “capable of substantial” or “commercially significant noninfringing uses.”

Once it was shown that Betamax recorders were *capable* of significant noninfringing uses, the fact that Sony knew (or should have known) the recorders *could* be used for copyright infringement could not lead to a claim of contributory copyright infringement. That isn’t saying most uses are noninfringing, only that there’s substantial noninfringing use.

In a previous case (Napster I), this court held that, given substantial noninfringing use, a copyright

owner had to show that the defendant had reasonable knowledge of *specific* infringing usage. Given Napster's centralized index architecture, it was possible to make such a showing by providing Napster with specific file names representing copyright files not legally available for sharing.

In this case, "the district court found it undisputed that the software distributed by each defendant was capable of substantial noninfringing use... There is no genuine issue of material fact as to noninfringing use." The opinion mentions not only distribution of public domain works and cases where there's clear permission to distribute, but also the specific and charming case of Wilco,

whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked widespread interest and, as a result, Wilco received another recording contract.

That same paragraph mentions Project Gutenberg and public domain films in the Prelinger Archive.

Plaintiffs did not contradict these declarations—but argued, "evidence establishes that the vast majority of the software use is for copyright infringement." At this point, you may say "So?" So, in effect, does the opinion: "This argument misapprehends the *Sony* standard as construed in *Napster I*, which emphasized that in order for limitations imposed by *Sony* to apply, a product need only be *capable* of substantial noninfringing uses." [Emphases in original.] (A footnote points out that, even if noninfringing use is only at the 10% level claimed by the plaintiffs, that's still "a minimum of hundreds of thousands of legitimate file exchanges.")

Does this case meet the *Napster I* standard? No. Neither StreamCast nor Grokster maintains any central index or maintains control over index files. The distributors do not and cannot know what files are being shared.

Material contribution? Not really. Napster was found to materially contribute to infringement because of its integration and failure to cancel infringing messages after knowing that they represented infringing files. Grokster and StreamCast don't provide the "site and facilities" for infringement or otherwise materially contribute to infringement. Plaintiffs provided no evidence of any other sort of material contribution.

So much for contributory infringement: By eliminating the centralized indexes and building architectures with "numerous other uses" that don't infringe copyright, the defendants are off the hook. What about vicarious contribution? That requires,

in addition to the usual direct infringement, "a direct financial benefit to the defendant" and "the right and ability to supervise the infringers."

Napster *claimed* the ability to supervise, since it expressly reserved the right to block access. StreamCast doesn't even maintain license agreements—and although Grokster nominally reserves a termination right, it lacks registration and log-in, so "even Grokster has no ability to actually terminate access to filesharing functions, absent a mandatory software upgrade to all users that the particular user refuses, or IP address-blocking attempts."

Copyright owners apparently contended that Grokster and StreamCast had the right and ability because "the software itself could be altered to prevent users from sharing copyrighted files." While the assertion is questionable (the only alteration that would uniformly work would be one that rejects all file sharing, which would make the products useless), it's also beside the point. Since Grokster and StreamCast hadn't already been found liable for vicarious copyright infringement, they aren't required to establish new policing powers.

Then there's the "blind eye" theory: "Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability." The opinion notes, "there is no separate 'blind eye' theory or element of vicarious liability that exists independently of the traditional elements of liability." (Since Grokster and StreamCast don't monitor traffic, "detectable acts of infringement" is an oxymoron: The software distributors cannot detect such acts.)

I'll end excerpts with part of the second and third paragraphs from the final section, before notes that changes in copyright should be left to Congress:

The Copyright Owners urge a re-examination of the law in the light of what they believe to be proper public policy, expanding exponentially the reach of the doctrine of contributory and vicarious copyright infringement. Not only would such a renovation conflict with binding precedent, it would be unwise. Doubtless, taking that step would satisfy the Copyright Owners' immediate economic aims. However, it would also alter general copyright law in profound ways with unknown ultimate consequences outside the present context.

Further, as we have observed, we live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation... The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interest, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories

for the purpose of addressing specific market abuses, despite their apparent present magnitude.

A fine opinion, well-stated and declining to throttle technological innovation on behalf of extreme copyright. A number of commentaries have already appeared. Fred Von Lohmann of EFF summarized key points. Tim Wu, guest blogger on the Lessig Blog on August 19, offered seven reasons he believes the Supreme Court will agree to hear the case. Two have to do with disagreements between different circuit courts; two note that the Court has tended to hear similar cases (Sony Betamax, the piano roll case, etc.) and that it's vaguely aware of "some far-out stuff" in the field of computer law. Then there are the last three:

5. Law clerks use P2P technology to plan basketball games
6. JJs. Stevens and Breyer deeply dig this stuff
7. The Court loves to be the center of attention, and this would make it so.

Wu also analyzed the opinion (you'll find the two-page analysis and 15 comments—which I didn't read—in Lessig's archives). He notes that the opinion turns on facts—that is, the clear capability of P2P for non-infringing use and the lack of "site and facilities" in *Grokster et al.* He points out—which I'd missed—that Thomas "writes in Silicon Valley language rather than Hollywood." The words "piracy" and "stealing" do not appear in the opinion, and he particularly notes the second and third sentence in the last paragraph quoted above. He does believe there are weaknesses in the opinion, specifically its failure to address the "blind eye" issue.

For the moment, the sale and design of P2P technology is legal—in California, at least. Several analyses point to the Induce/IICA act, whose sponsors are likely to be energized by this decision. ("It's up to Congress? OK, *we'll* outlaw that devil P2P.") More to come, probably. Meanwhile, a decision that was a pleasure to read (as a document, that is: I've never used P2P software and don't plan to start).

DRM

Cory Doctorow of EFF spoke to Microsoft's Research Group on June 17; the text of that speech, explicitly placed in the public domain (by a Creative Commons license), is at craphound.com/msftdrm.txt

He was there to convince the Microsoft folks:

- "1. That DRM systems don't work
- "2. That DRM systems are bad for society
- "3. That DRM systems are bad for business
- "4. That DRM systems are bad for artists
- "5. That DRM is a bad business-move for MSFT."

It's an informal speech with a fair amount of history and argumentation. You may find it interesting reading. I believe he makes a good case in most areas—but then, I'm one of those who call the field "digital restrictions management" rather than "digital rights management."

In a couple of cases, I would take issue with specifics. It's not clear that "MP3 is outcompeting the CD"—CD sales are back on the rise. He dismisses screen resolution as an issue for ebooks (calling it "bollocks") and similarly dismisses the look and feel of books as an issue. He argues that "every one of you...read more and more words off of more and more screens every day...you've also been reading fewer words off of fewer pages as time went by." He goes on, "People read words off of screens for every hour that they can find." He seems to buy into media replacement—and his claim of the *good* thing about ebooks is what makes them so difficult from a marketplace view: "Ebooks are good at being everywhere in the world at the same time *for free* in a form that is so malleable that you can just pastebomb it into your IM session or turn it into a page-a-day mailing list." Which means what incentives for authors and publishers? (Doctorow is also given to "in" neologisms like "pastebomb" and "g0nez0red.")

"New technology always gives us more art with a wider reach: that's what tech is *for*." Nice, simple, and wrong: "New technology" doesn't *always* do anything! In fact, DRM is a set of new technologies—just not very enticing new technologies.

Doctorow assails the DRM attached to iTunes and Microsoft's WMA, and wants Microsoft to build a player that "plays anything I throw at it." Fine. I agree. Then he says:

Yes, this would violate copyright law as it stands, but Microsoft has been making tools of piracy that change copyright law for decades now. Outlook, Exchange and MSN are tools that abet widescale digital infringement.

A universal player would only "violate copyright law as it stands" if it subverted DRM: that would violate DMCA. Otherwise, the player would be as innocent as a VCR: Since it would be capable of substantial non-infringing purposes, the fact that you could play illegally copied files on it would certainly not be a violation. The "tools of piracy" claim is also nonsense, as far as I'm concerned. Essentially, Doctorow is pretending to be a strong-copyright fanatic in order to build a straw man.

Too bad, because despite this and a number of other annoying comments and questionable assertions, it's a good talk, raising good points. **Recommended** with caveats.

A June 18 Ed Felten posting at *Freedom to Tinker* notes the curiosity that a pseudo-CD "protected" by

SunnComm's lame "anti-copying" technology was topping the charts at that point. He notes, "the technology presents absolutely no barrier to copying on some PCs; on the remaining PCs, it can be defeated by holding down the Shift key when inserting the CD." Sunncomm says the sales demonstrate "consumer acceptance of their technology." Felten notes consumer reviews at Amazon: consumers found the "protection" problematic but very easy to get around. Felten closes, "Needless to say, the SunnComm technology has not kept the songs on this album off of the filesharing systems."

July 6, Felten posted a comment about an elaborate DRM scheme that the MPAA is considering so that they can keep distributing "screener" copies of new movies to Academy Award voters. The studios would give each voter a special DVD player. Each copy of a video would be encrypted so it would only play on a particular person's DVD—and the video would also be watermarked to identify each copy. He notes that this must mean stronger encryption than CSS, and that the watermark might not need to be very sophisticated: "Last year, a simple, weak watermark was sufficient to catch a guy who distributed copies of Academy screener videos on the net." He also notes that the scheme wouldn't work *at all* for consumer DVDs—and that a voter could still capture, redigitize, and distribute the analog output from a player (which might leave the voter culpable through watermark identification).

Ernest Miller commented on this same proposal at his "The importance of..." weblog. Thanks to Corante's sophisticated (if unintentional) anti-print technology, I only have the first portion of his commentary. (How *do* weblog programs manage to make printing so difficult—or, as in this case, apparently work just fine, but truncate the printout? And why?) Anyway, Miller's sardonic posting applauds these efforts: "It may not keep their films from getting onto the internet, but it demonstrates that they aren't hypocrites." Some of his other reasons to applaud the move:

It is a tacit acknowledgment that movie industry insiders are a significant part of the online movie infringement problem.

It treats Academy members the same as consumers, like criminals.

Academy viewers will have to deal with the prohibitions on sharing that Hollywood wants to impose on consumers generally. Even Valenti bragged that he (and many others) would let friends and family borrow screeners...

All of this is perhaps peripheral to library concerns—unless and until some copyright-crazed company proposes making DVDs that, once played on a given player, can never be played on any other player.

That would be like making downloadable ebooks that were tied to a single reading device...oh wait, that was Gemstar's bright idea, wasn't it?

Broadcast Flag(s)

So far, there's no sign that either a court or Congress is ready to step in and block the FCC's outrageous power grab, the Broadcast Flag: A rulemaking that appears to give the FCC authority over the design of any technological device that can receive *or copy* high-definition digital television broadcasts. Meanwhile, Big Media is never satisfied. Now they want a broadcast flag for digital radio—and, really, for *all* transmitted media.

Gigi B. Sohn discusses this at Public Knowledge (www.publicknowledge.org) under the heading "Gigi B. Sohn says our right to record wanes as the music industry jumps on the content protection bandwagon." Before discussing the new dangers she summarizes how the Broadcast Flag was adopted:

Hollywood argued that the "broadcast flag" scheme is necessary to protect their copyright material, and that without those protections, the media companies wouldn't put any good content over the air. It was a shakedown of the FCC in order to get mandatory copy protection, and the FCC gave in.

"Shakedown." What a forthright word. It wasn't a quid pro quo: The FCC received no promises that the broadcast flag *would* result in "good content" appearing on the airwaves. But that's another issue. "Hollywood's success in obtaining copy-protection regulations for digital television encouraged the record companies to seek something even more extreme for digital radio."

According to Sohn, it first appeared that the FCC agreed with participants at a January meeting—there was no need for content controls for the new in-band digital radio. Three months later, however, the commission issued a Notice of Inquiry to determine whether content controls on digital radio service are needed. That doesn't mean a rulemaking is imminent, but no inquiry should be needed. "The arguments presented by the recording industry at the January meeting of the FCC had all been thoroughly discredited... There are neither pressing technological issues nor spectrum-related issues that require the commission's immediate action to protect digital radio content." She notes that the issue hasn't even come up in the UK, where digital radio is already in operation. So why is there a proposal?

Quite simply, the answer is that the music industry sees in digital radio an opportunity to do just what Hollywood has succeed in doing with digital television: using the nervousness about a digital transition as an opportunity to impose controls over content use that have never before existed. And the record companies are seeking even more control over their

offerings than the movie and television companies have sought over television, with studios willing to allow a small degree of home recording. But if the music industry has its way, you won't even be able to record content at home without paying for the privilege.

She concludes that Big Media really does want to get paid every time you watch or listen to anything. The paper closes, "The digital revolution was supposed to be about liberating consumers and citizens. We can't let it become an excuse for constraining consumers to spend every last cent."

I'm no great fan of "digital revolution" promises, and never saw any reason to believe digital media would be liberating—but, at the very least, digital media should not remove the fair use rights and other reasonable allowances that consumers have with analog media.

While I haven't seen RIAA's comments to the FCC (or any of the other June comments), I have seen Disney's August 2 comments. They're chilling. Disney supports a "content protection mechanism" and, naturally, raises the threat that allowing "abuse" of digital radio (that is, home copying) could "threaten the long term viability of free, over-the-air broadcasting or at least force a reduction in the quality of programming provided by broadcasters." A threat to *reduce the quality* of broadcast radio: That's pretty damning. Just how low could they go? Here's the truly chilling part:

In addition, to the extent the Commission considers such a content protection mechanism, it also should consider whether to extend that mechanism to all music distribution platforms, including satellite digital audio radio service, the Internet and broadcast radio service.

Lock them all down: That's Disney's answer and I'm fairly sure RIAA would agree.

EFF and the Free Expression Policy Project (FEPP) submitted a 14-page reply comment on August 2 as well. That comment deconstructs the apparent RIAA justifications piece by piece and is, I believe, impressive and convincing. Of course, I'm one of those who thought we had the right to record broadcast radio (and TV) and that, ever since cheap cassette recorders became available, we've been able to do so without much difficulty. Somehow, radio and the music industry have survived all that taping. But, of course, with digital everything's different.

Summarizing the EFF/FEPP response, "In attempting to justify its request, the RIAA misstates the relevant copyright law principles governing non-commercial home recording, misdescribes the capabilities of iBiquity's IBOC radio technology, and resorts to unsupported speculation in predicting that the 'sky surely will be falling soon.'"

Specifics? For one, current copyright policy does not allow for mandates solely intended to preserve an existing business model: That's been clear in *Sony* and any number of other decisions. "The primary goal of copyright has always been to benefit the public." (Would that this were so in practice, but it's a nice claim to make.) Congress has avoided enshrining any particular entertainment industry model in copyright law, and policy has never favored regulatory intrusion into device design questions.

Beyond that, Congress *specifically* approved non-commercial home recording, particularly in the AHRA (the home recording act, which provides for royalties on digital recording devices in return for legitimizing such devices and expressly *forbidding* copyright infringement suits for home recording using AHRA-compliant devices). The RIAA apparently now claims that the AHRA doesn't really apply to digital recorders for various bizarre reasons that aren't in the legislation (e.g., newer recorders don't use tape). This is a long, detailed discussion that seems to affirm that Congress explicitly allows digital recording of broadcast media. Beyond that, there's nothing that suggests that Congress would delegate its powers to the FCC in this area, *particularly* since Congress has already acted.

The RIAA tries to claim that digital broadcasts need special protection because they're so high quality. (They're digital: They must be perfect.) This is a crock, pure and simple, even though EFF may go a bit too far in making its case. To wit, when EFF has done field recordings of digital and analog broadcast signals recorded simultaneously, from the same broadcaster, the two can't reliably be distinguished on the basis of sound quality. I can believe that, since the maximum data rate for the new digital radio service is 96kbps, at best FM quality and nowhere near CD quality. Then the RIAA goes way too far, asserting that the new service will provide better quality recordings than current P2P downloads. Apparently, quite a few P2P files are MP3 encoded at 192k, which *is* near-CD quality. EFF found no significant difference between 192k MP3 versions of the songs in question and the digital or analog radio broadcasts. That surprises me: 192k MP3 *should* be audibly better than any 96k encoding, unless the music in question simply didn't require much fidelity. ("Significant" is one of those lovely words—differences that I consider significant may not strike you as noticeable, and vice-versa.)

In another claim, RIAA is once again hoist by its own petard. They claim digital radio is different because it comes with metadata on artists and titles, making it easy to disaggregate a recorded broadcast into a set of song files. But RIAA has been touting the ability of fingerprinting technologies such as Au-

dible Magic to accurately identify songs through their acoustic properties. If they're right, then you can provide the metadata in any case. Oops. (The commentary also points out that some FM broadcasts also include metadata, as do most Internet broadcasts and cable music services.) Finally, EFF and FEPP argue that the FCC lacks jurisdiction to impose the new content protection regulations.

I haven't heard much more. EFF's Fred von Lohmann posted an item on Deep Links on August 6, "Nose. Camel. Tent." That item cites RIAA's urge, notes that nobody even *has* an HD radio yet, so who cares, and cites the same Disney sentence I quoted earlier. "Got that? Disney wants the FCC to regulate all devices capable of recording from *any* audio broadcasting medium or *from the Internet*. FM radio, XM, Sirius, Streamripper, Total Recorder, you're all in the crosshairs. It's the Hollings bill all over again.

So it is—which is why I'm providing some informal coverage here.

There are signs that Canada plans to "import" the broadcast flag, again with a July 2005 date. If true, that's sad: One always hopes for more good sense from our northern neighbors.

Miscellaneous Short Items

I was shocked and disappointed some time back when a freelance contributor to *National Geographic Magazine* won a suit claiming that inclusion of that contributor's work in the CD-ROM collection of the magazine wasn't legitimate. This wasn't *Tasini*; the CD-ROM collection represented scanned pages and was no more a new product than a microfilmed copy would be. Other freelancers went after National Geographic in *Faulkner v National Geographic Society*—and this time, the society won. The original decision came out before *Tasini*; this court concluded that *Tasini* established a standard for "entirely different works" that was not met by the CD-ROM collection. It may be too late for the victory to matter much, given the state of title CD-ROMs, but it's still a good decision.

- Speaking of good decisions, a Federal Circuit court has upheld a lower court decision that *slightly* restricts the absurd overuse of DMCA. Namely, Chamberlain (the garage door opener company) can't use DMCA to stop Skylink from making universal remote controls that operate Chamberlain openers. The finding doesn't limit DMCA all that much, but at least it asserts that tools whose *only* significant uses are noninfringing can't violate DMCA and that courts should balance Congress' desire to uphold extreme copyright with user rights such as fair use—

and in this case, that balance was easy. Edward W. Felten offered perhaps the best of many "blogosphere" commentaries on his decision in a September 2 *Freedom to Tinker* post, wherein he also concludes that Congress didn't really know what it intended when it passed DMCA:

Many lawmakers have expressed surprise at some of the implications of the DMCA. Many seemed unaware that they were burdening research or altering the outlines of the Sony rule (and clearly some alteration in Sony took place). Many seemed to think, at the time, that the DMCA posed no threat to fair use. Partly this was caused by misunderstanding of the technology, and partly it was due to the tendency to write legislation by taking a weighted average of the positions of interest groups, rather than trying to construct a logically consistent statutory structure.

- Looking to digitize a book published between 1923 and 1963? Wondering whether it's under copyright? If it was published before 1923 it should be in the public domain; if it was published after 1963, it's almost certainly protected. But if it was published between 1923 and 1963 and copyright wasn't renewed, it's in the public domain. There's now a search engine to check copyright renewal records for books: www.scils.rutgers.edu/~lesk/copyrenew.html. That site includes a brief explanation and a search box. A nice new service for using (albeit not building) the public domain.
- What if you want a sanitized version of a movie and don't believe your DVD is clean enough for your family? Some manufacturers are ready to sell you DVD players with built-in optional filters (with subscriptions for upgrades) that skip over the nasty stuff in recognized pictures or maybe bleep out bad words. The MPAA doesn't like this idea and some Hollywood folk were ready to claim that such alteration would be copyright infringement. Enter the Family Movie Act, introduced on June 16: "To provide that making limited portions of audio or video content of motion pictures imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture for private home viewing, and the use of technology therefor, is not an infringement of copyright or of any right under the Trademark Act of 1946." There's not a lot more to the act than turning that clause into modifications to the copyright and trademark law—but there is one requirement (to protect against trademark suits) that's worth

citing: “Such manufacturer shall ensure that the technology provides a clear and conspicuous notice that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture.” You know the notice you see before almost every movie on an airplane and most recent movies on TV—and, before DVD, the notice about screen format that you saw on most videos? Such a notice would have to come from the player itself, letting the viewer know that the picture has been modified. My take on this, with all my concern for artistic integrity and the like? I think it’s a reasonable law. Once you’ve legally acquired a *copy* of a mass-produced creation, you should be able to view or listen to part or all of it as you wish, and getting someone’s help in choosing “the good parts” should be legitimate—as long as you know it’s happening.

- Lawrence Lessig has an interesting way to keep his A-list blog lively when he’s busy doing other things: Guest bloggers. Judge Richard Posner was guest-blogging the week of August 23, 2004, and (among other things) posted some fascinating discussions concerning fair use. He proposes one interesting extension of fair use: “We argue that it should be considered fair use to copy an old work if the copyright owner hasn’t taken reasonable steps to provide notice of his continued rights, as by entering his name and address in a copyright registry.” It’s a variant of the Eldred Act/Public Domain Enhancement Act, and interesting to consider. You’ll find this and subsequent discussions of Fair Use in the Lessig blog archives (www.lessig.org/blog/archives, beginning August 23 and continuing at least through August 25). He also discusses the “systematic overclaiming of copyright” going on today and suggests the idea that copyright overclaiming—e.g., the title-verso statements that “no part of this book” may be copied for any reason, which is a flat denial of fair use—be deemed a form of copyright *misuse*, which could result in forfeiting the copyright. Fascinating stuff.

Copyright Issues in Digital Media

This major paper (37+x pages), issued in August 2004, is from the Congressional Budget Office. It views copyright through the narrow lens of economics, where “efficient” and “equity” have different meanings than in broader society. That considerable

caveat offered, it’s an interesting treatment of the issues around potential copyright legislation.

The paper doesn’t make explicit policy recommendations, “in keeping with CBO’s mandate to provide objective, impartial analysis.” Is the analysis impartial? I think it is, once you accept that only economic factors are considered.

I made quite a few marks as I read through the paper. I’m not sure that detailing those quibbles would serve anyone. In the preface, I was disturbed by the frequent use of “property rights” in conjunction with copyright issues—but the paper itself does make some of the significant distinctions between property rights and copyright. The whole discussion of “differential pricing” (charging what individual portions of the market will bear—e.g., charging more for a regular CD than for a copy-protected pseudo-CD) gives me the willies, but it’s fundamental to any market-based discussion of copyright.

Treat “inefficiency” with the respect it deserves: Economic inefficiency may be fundamental to societal equity at times. Be aware that this is a cold-blooded report, as may be appropriate. A footnote suggests that “individual privacy may one day become less a right than a commodity,” as we give up privacy to gain access to copyrighted materials, without any suggestion that this may be a horrendous choice that favors economics over basic rights.

You have to credit the authors with noting copyright is granted “for only a limited time” and following that with the current “limited” terms, keeping an apparent straight face in the process. Calling lifetime plus 70 years “limited” takeschutzpah; doing so without noting the ease with which Congress can make that lifetime plus 90, or 110, or 130 years (and, similarly, extending works for hire from 95 to 115, 135, or 155 years) is truly audacious.

I’m not putting the report down. There’s a lot of clear discussion here—including a *very* clear statement that AHRA “explicitly granted consumers an exemption from copyright infringement for their use of either an approved digital audio recording device or analog equipment to make personal copies of musical recordings,” a fact worth repeating in the face of RIAA’s demands for new broadcast flags.

There are even places where the authors admit that economics can’t measure everything:

Relatively little is known about what motivates people to engage in creative activity and how those influences differ from the perhaps more pecuniary motivations of those who acquire the copyright to creative works for purposes of reproduction and distribution. In other words, economic theory has not yet specified a “creative production function.”

Yet? Oh well, at least there’s the recognition that economics does *not* explain creativity.

I'm not sure whether to recommend this paper. I found it informative and thoughtful, even as I was distressed by the narrowness of the perspective. (I really do miss the Congressional Technology Office, which seemed to produce much broader papers. Maybe that's why it's gone.) You may also find the paper worthwhile.

Offtopic Perspective

The Rest of the DoubleDoubles

Remember STAYING ON THE TREADMILL (4:6)? I discussed the problem of sticking with exercise as part of a busy day (particularly when you're lazy) and my solution: Old movies watched 20 minutes at a time. My set of old movies was an odd pseudo-freebie from *InsideDVD* as it merged with *Total Movie & Entertainment*: The "DoubleDouble Feature Pack," a box containing 10 double-fold sleeves, each double-fold sleeves containing two double-sided DVDs (with one exception), each side containing one movie (with one exception). Forty movies in all. I included brief reviews of the first 18 movies.

A week ago (as I write this), I finished the last of the DoubleDoubles. Here are brief notes on the remaining 22 movies in the DoubleDouble Feature Pack, which really should show up on EBay one of these days. The headings are the titles assigned to each sleeve—and in the first case, I'd already discussed three of the four movies. Since most of these movies have missing frames, I'll indicate the *actual* time in [square brackets] whenever it's more than a minute different from the time shown at IMDB.

Famous Directors, Cult Classics

Beat the Devil, 1953, B&W, John Huston (dir.), Truman Capote (screenplay), Humphrey Bogart, Jennifer Jones, Gina Lollobrigida, Robert Morley, Peter Lorre, 1:40.

Decent print and a good movie, although I thought the acting was better than the tenuous plot.

Famous Stars, Cult Classics

Suddenly, 1954, B&W, Lewis Allen (dir.), Frank Sinatra, Sterling Hayden, James Gleason, 1:15.

Frank Sinatra as a would-be presidential assassin. So-so print but an interesting performance in a mostly-talk, fairly subtle little movie. I might watch it again.

Angel and the Badman, 1947, B&W, James Edward Grant (dir.), John Wayne, Gail Russell, Harry Carey, 1:40.

Lots of noise and scratches on the print, but the movie's good enough to watch through the print

problems. John Wayne as a fast shooter "badman" who winds up injured in a Quaker household—and manages to resolve a number of situations through his reputation, without ever firing a shot. I've never been much of a John Wayne fan, but he does a fine job in this movie, which has been called his most romantic Western.

One-Eyed Jacks, 1961, Color, widescreen, Marlon Brando (dir.), Marlon Brando, Karl Malden, Katy Jurado, Slim Pickens, 2:21.

The only widescreen DVD in the set (although possibly not as wide as the original), and a long, color movie that's almost certainly in copyright, it's also a good print with few glitches. A fairly young Marlon Brando only nibbles on the scenery—but then, he was directing himself. Not great, not bad.

Boy in the Plastic Bubble, 1976, Color, made for TV. Randal Kleiser (dir.), John Travolta, Glynnis O'Connor, Robert Reed, Diana Hyland, Ralph Bellamy, Buzz Aldrin, 1:40 [1:32].

This is an Aaron Spelling production: A TV movie with a *very* young John Travolta. I'm not sure where the 8 minutes went (or if the IMDB info is correct); it seems to be a good print, possibly supplied directly by Spelling. I'd have to say Robert Reed, Glynnis O'Connor, Diana Hyland, and Ralph Bellamy all out-act Travolta, who seems unformed as an actor at this point. As TV movies go, it's mediocre but watchable.

Noir & Mystery

Cause for Alarm!, 1951, B&W, Tay Garnett (dir.), Loretta Young, Barry Sullivan, 1:14.

Good print, decent psychological drama, Loretta Young does a good job. Not a great movie, but worth watching.

Sabotage, 1936, B&W, Alfred Hitchcock (dir.), Sylvia Sidney, Oskar Homolka, John Loder, 1:16.

Oskar Homolka as a movie theater owner and saboteur. The print is middling, sometimes almost too dark to watch, with some noise. The movie? It's Hitchcock, but not great Hitchcock. There's an oddity here: The box lists "DOA" in this slot, as does the DoubleDouble pack, outside and inside—but the disc says "Sabotage," and that's the movie. "DOA" might have been more interesting.

Sherlock Holmes & the Woman in Green, 1945, B&W, Roy William Neill (dir.), Basil Rathbone as Sherlock Holmes, Nigel Bruce as Dr. Watson, Lionel Atwill as Prof. Moriarty, 1:07.

The *real* title is *The Woman in Green* (and that's what the movie itself shows), but apparently U.S. audiences needed to be told up front that this was another Rathbones/Bruce Holmes movie. Predictable style, decent (certainly not flawless) print, plot no sillier than most of the minor Holmes stories.

Sherlock Holmes & The Secret Weapon, 1942, B&W, same director and key cast as above, 1:08.

Another Holmes, this time with a direct war theme. Mediocre print, but the movie's still watchable.

Note that both of these movies feature the evil Prof. Moriarty as well.

Overlooked Horror

White Zombie, 1932, B&W, Victor Halperin (dir.), Bela Lugosi, Madge Bellamy, Joseph Cawthorn, 1:07 [1:05].

The soundtrack on the print is so noisy and the visual so flawed that it's hard to get to the picture—and I'm not sure it's worth the effort. The title says it all, with Bela Lugosi as the zombie master (those eyes!). Not bad enough to be camp, not good enough to be worthwhile.

Carnival of Souls, 1962, B&W, Herk Harvey (dir.), Candace Hilligoss, Frances Feist, and other big names, 1:24

Apparently there's another seven minutes of film that's been lost. That's too bad. Despite the no-name cast, it's a surprisingly good offbeat horror film, where the horror is almost entirely psychological. The print's not great. The most distracting elements for me were scenes where the heroine is practicing organ: There's no coordination whatsoever between the organ playing on the soundtrack and the apparent patty cake she's playing on the keyboards. Otherwise—well, this one surprised me.

I Bury the Living, 1958, B&W, Albert Band (dir.), Richard Boone, Theodore Bikel, 1:16.

Richard Boone is in line to oversee the local cemetery. Theodore Bikel is the strange, retirement-ready, caretaker/headstone carver/jack-of-all-funerals (with a heavy accent, Scottish perhaps?). There's a big map with white pins for plots that have been sold, black pins when they're occupied. Boone accidentally puts in a couple of black pins for new plots—and the plot-buyers die! He changes more pins, and death follows! Now, if Boone was at all suitable for this part and the whole thing wasn't so heavy-handed, it might be an interesting little drama. As it is, even if the print wasn't as damaged as it is, it's just bad.

God Told Me To, 1976, Color, Larry Cohen (dir.), Tony Lo Bianco, Deborah Raffin, Sandy Dennis, Sylvia Sydney, 1:31 [1:29].

The title's quite literal: A bunch of bizarre killings, and in each case the killer says "God told me to" just before dying. So there's God, or an alien as God, and Tony Lo Bianco with his troubled personal relations who's on the case, and...well, how many aliens are there? Pretty good print, pretty incoherent picture. This might have been a TV movie; it would be mediocre among such pseudo-flicks.

Roger Corman 101

Little Shop of Horrors, 1960, B&W, Roger Corman (dir.), Jack Nicholson (in a tiny role), 1:10. [1:12!]

A mediocre print of a movie whose cult status escapes me. Presumably shot in a day or so with no budget, which shows on screen. If you love it, look for a restored print: This ain't it. (Jack Nicholson is something like 12th in a list of no-name actors.)

A Bucket of Blood, 1959, B&W, Roger Corman (dir.), no notable cast, 1:06 [1:04].

No, I'm sorry, but I do have limits. Fifteen minutes into this piece of beatnik-era "horror," and I used the poor quality of the print as an excuse not to tolerate the rest of the movie. (I'm no great Roger Corman fan either...)

The Terror, 1963, Color, Roger Corman (and Francis Ford Coppola and Jack Nicholson and two others) (dirs.), Boris Karloff, Jack Nicholson, 1:21 [1:19].

If you read the IMDB trivia notes, this should be the worst of the Corman lot—shot in four days, with five directors—but I was pleasantly surprised. The print is noisy and scratched, but a young Jack Nicholson does a fairly effective job opposite a reasonably dignified Boris Karloff. It's certainly not a horrific movie, and "the terror" is deep in the plot, not spilling its guts out. Not a great movie by any means, but decent. ("Francis Coppola" is credited as Associate Producer; he didn't use "Ford" in his Corman days.)

Dementia 13, 1963, B&W, Francis Coppola (dir.), 1:15

The backstory on this one's also interesting (and there's no "Ford" on the directing credit here either): supposedly, Corman let Coppola film this movie *around* the shooting schedule for a Corman flick. It's an odd one, with a family castle and family full of secrets, drownings, incoherent plot turns...well, the print's so-so, and I can't imagine ever returning to this. "13" doesn't appear to have anything to do with the plot line; the makers found that some other film was named *Dementia*, so they added "13."

Schlock Hysteria

Giant Gila Monster, 1959, B&W, Ray Kellogg (dir.), 1:14.

How do you make an impressive giant gila monster on a no-budget film? You do good close-up photography of a gila monster, add a matchstick bridge and wholly unconvincing toy cars as needed, and use cutting so viewers can *almost* believe they see the gila monster and the "actors" in the same frames. The story's heart-warming: Earnest young man who's trying to keep his teen-punk pals in line and is disdained by the Rich Snob in Town saves the day, writes and plays amateur Rock & Roll that catches on, and all that. Mediocre print, which is more than you can say for the movie.

Killer Shrews, 1959, B&W, Ray Kellogg (dir.), Gordon McLendon, 1:09.

This one, apparently filmed as a deliberate double bill with the preceding, adds a little more plot: Scientists gone bad experimenting with genetic modifications, remote island to keep their smaller-but-longer-lived shrews isolated (and, of course, the accidentally-escaped 100-pound shrews that need to eat three times their weight every day), scientist's daughter who, under these remote conditions, is not only flawlessly dressed but a hot number. Mediocre print, thrill-a-minute plotting (OK, four thrills in 70 minutes), and the hokiest and least likely escape se-

quence I've ever seen (overturned supply barrels roped together with the three survivors nudging their way down to the ocean, with nothing exposed so the violently-fatal shrew saliva can't reach them). Now that's flick-making!

Assassin of Youth, 1937, B&W, Elmer Clifton (dir.), 1:20 [1:13].

The movie is such gross "drugsploitation" that it's hard to remember much about the print. There's a plot of sorts, but it's mostly the horrors of marijuana—except that, in this case, the truly bad effects seem to come from some powder that the pusher spikes drinks with. A classic propaganda flick.

Reefer Madness, 1938, B&W, Louis J. Gasnier (dir.), 1:07 [1:04].

Did you know marijuana is far more dangerous than heroin? That it leads to acts of shocking violence and total mental breakdown? This piece of excrement was part of the successful effort to give the DEA power over marijuana even though it was (at the time, at least) almost never part of interstate commerce. Add to that scourge that joints apparently look exactly the same as cigarettes (and, of course, *everybody* smoked in 1937-38), that just one puff leads to insane laughter and crazy dancing, and you have...well, a truly awful flick.

Brain That Wouldn't Die, 1962, B&W, Joseph Green (dir.), 1:22.

No, uh-uh, sorry: I just wasn't willing to watch this dreck. The print wasn't too bad in the first 20 minutes, but my brain started hurting. "Let me die," the bodyless heroine said, so I let the movie die. Shlock is a kind word.

Overall Notes

Looking at my comments and reactions, I see a bell-shaped curve. Based on the first two and last three packs, I wouldn't recommend this set to anyone: The gems (*Cyrano de Bergerac*) and reasonably worthwhile balances of movie and print quality (*Battleship Potemkin*, *The General*, *A Farewell to Arms*, *Carnival of Souls*, *The Terror*) total six out of 20 movies, with the rest running from mediocre to unwatchable.

But the central five packs have much to recommend them. I've improved my knowledge of American classic film by seeing the films in "Famous Directors, Cult Classics" and "Famous Stars, Cult Classics"—and seven of those eight films were well worth watching. The "Comedy & Romance," "Crime," and "Noir & Mystery" packs weren't up to that level, but still worth watching.

If someone offered me \$50 for the whole set, I'd probably take it—the chances of re-viewing more than one or two of these are fairly slender, given the other movies on hand (and our library's growing collection of DVDs). There are a few here worth revisiting. If you can get a set for \$25 or less, you might find it worthwhile.

With one or two exceptions, these appear to be taken from whatever prints they could put their hands on, with varying degrees of damage. A bunch of these movies—possibly most of them—are now in the public domain; for the rest, presumably the studios either figured there was no real DVD market for them or planned to do restored DVDs with extra features. For that matter, if a studio was planning a set of restored Rathbone/Bruce "Sherlock Holmes" DVDs (such sets have appeared), licensing three of them, unrestored, for this freebie set is one way to entice possible buyers.

Treeline: A Different Game?

Treeline's MoviePacks or MegaPacks may fall in a slightly different category than the freebies I've been watching. While a lot of the movies in the "Family Classics" 50-pack are public domain with so-so prints, there seem to be cases where more recent movies were available from near-perfect sources.

The "50-Movie All Stars Collection" I mentioned briefly last issue is a special case. It's all color, seems to have stereo sound in most cases, really does have major stars in every single movie, and consists of movies from the 70s, 80s, and 90s, which means they're *all* under copyright. It's not just one star per flick: For example, the fourth movie stars Martin Sheen, Trevor Howard, and Cyril Cusack, with a slightly later one featuring Leslie Ann Warren, Rip Torn, Richard Masur, and Ron Silver.

How is this possible for a \$30-\$35 set of 50 movies? I missed one word in the Overstock description and it's right there on the back of the box as well: "Fifty of the most star-filled movies ever made for TV!" Yep—these are *all* TV movies.

That may explain why they could license so many recent color pictures with major stars, but it may also be a reason to consider buying the set for your own interest or possible public library use. Very few TV movies wind up released on DVDs—but the best TV movies are good movies, maybe not "A features" but frequently solid "B"s.

I may have notes on the Treeline packs as I watch them. I may not. It's fun to go entirely off-topic once in a while.

Interesting & Peculiar Products

Today's Best Digital SLR?

I note breakthroughs in digital cameras from time to time (even as we purchased a wonderful little *film* Nikon late last year, when my wife's zoom camera broke down). According to *PC Magazine*, Canon's Digital Rebel (the first digital SLR under \$1,000)

has been bested. The new Nikon D70 goes for \$999 (body), but for an extra \$301 they throw in a solid 4x optical zoom lens, f3.5 to f4.5 and with the 35mm equivalent of 27 to 105mm. It's a 6 megapixel camera with a full range of professional features and it's extremely fast for a digital: 0.4 seconds to boot up, no shutter lag, and it can take a burst of 8 frames in one second or keep shooting 3 frames per second until you run out of memory. Not only does it rate better than the Rebel, *PC Magazine* gives it the nod over the \$2,000 (body) Olympus E-1, their previous Editors' Choice as a digital SLR.

Dual-Layer Recordable DVD

I noted two issues ago that this was on its way; the July 2004 *PC Magazine* includes a full-page review of Sony's \$199 DRU-700A, the first drive on the market to support dual-layer DVD+R DL discs. It's a strong review, earning the unit an Editors' Choice. An upgraded Nero digital media suite comes with the drive and supports dual-layer recording. Among other uses, dual-layer recordable DVDs mean that low-budget filmmakers can prepare full preview versions of their works. As for replicating Hollywood movies, that does require apparently illegal software (and 321 Studios has now gone out of business). One interesting facet of dual-layer recording: Burning time is independent of the amount of source material, because you need to *completely* burn both layers of a dual-layer disc for it to work at all. That took about 40 minutes on the Sony. (Since then, several other dual-layer DVD burners have emerged, most of them—like the Sony—also supporting all forms of writable DVD except DVD-RAM.)

Archos AV400 Pocket Video Recorder

I ran an item on the AV320 in February: \$600, 20GB, 3.8" color screen, "up to 40 hours" of MPEG4 video, and the apparent ability to copy commercial movies onto its hard disk. A *Wired News* rave review for a newer line offers more details. The AV400 line is significantly smaller but a little taller (4.9x3.1x0.8" as compared to 4.5x3.75x1.25") and lighter (9.9oz. compared to 12.6oz), still a trifle bigger than the iPod. But it's not a competitor to the iPod. It includes a 3.5" display specified here as 320x240 and it plays a variety of media formats (and can serve as a portable disk drive). The 20GB AV420 goes for \$550 (and *now* they claim "up to 80 hours" of video at an even more degraded bitrate); you can get an 80GB unit for a stiff \$800. There's now a docking cradle, software, and remote control so you can use the AV400 directly as a video recorder (there's no video tuner in the device). This item doesn't include the claim in an earlier article

that the unit can copy commercial movies; "record programs off...any device that pushes video out through a standard video cable" could imply that, *if* Archos is taking the risk of ignoring Macrovision. An interesting device, all in all, although I wonder about the claim that it's "definitely better for watching movies than the headrest monitors on airlines." Are those screens really that small and low-rez?

Microsoft Portable Media Center

The idea is, roughly, what the Archos AV400 does, although not quite. As Jim Louderback describes it in a discussion at ExtremeTech, "Another dumb idea from Microsoft," "Imagine an iPod on steroids with a color LCD screen spanning most of one side of the unit, capable of playing video, photos, and music." Creative and Samsung should both be shipping such units by now. So why's Louderback—a typically technophilic PC journalist—not enthralled?

"The [3.8"] screen is just too darn small. Even relatively-simple shows like *Letterman* will look terrible... I've carried around a bunch of portable DVD players with screens measuring from less than five inches to upwards of ten. When it comes to video...bigger is always better."

Louderback considers other problems more fundamental. For one thing, getting a show onto the PMC to watch on your commute (hopefully on mass transit!) is no piece of cake. The PMC can't record directly from TV; it has to be transcoded from video recorded on a PC first. That's assuming your PC is one of the 7% equipped to record video, of course.

Let's say you do get video on the device. How do you watch it? With portable DVD players, that's not hard: They open like notebooks, so you set them on "your knees, seat-back tray or bar-top." The Creative DMC, at least, is too rounded to stand on its own at all: it "wobbles like a woozy drunk on the far side of the Cuervo worm." So you sit there holding the chunky box in your hand, in a fairly constant position. "You've heard of carpal tunnel syndrome? I predict a rash of carpal media syndrome among those too brainless to follow my advice and avoid the PMC."

Then there's the price: \$500 for a 20GB version—double the price of a 20GB hard-drive MP3 player *or* a portable DVD player with a 7" screen. He suggests that, if you really need video on the go, you buy a DVD recorder—and either slip a recorded DVD into a portable player or, better yet, "pass on the portable hardware altogether and just play the DVD on your notebook!"

Finally, if you're devoted to having a small video box, he recommends the Archos devices, which *can* record directly from TV.

Ambient Devices

It comes from “research conducted at MIT,” according to the July/August 2004 *EContent* story, so it would be presumptuous of me to call this developing family of products peculiar. The idea is to make “everyday items” into “glanceable objects” so as to offer “seamless integration of only the most pertinent information into people’s lives.”

For example? The \$149 Stock Orb is a frosted glass sphere that changes color based on the value of a stock you’re following—or any other content that can be tracked by value ranges. The \$179 Weather Forecast Beacon is an elongated cube, again of handblown frosted glass. Same idea: Somehow the color tells you what you need to know, sparing you all those annoying numbers and letters.

Here’s one I’m *sure* everyone will want, given the state of email: the Ambient Pinwheel, “which begins to spin once an email has been received and continues to increase in speed with each new message.”

Sima GoDVD!

This sounds a lot like the device being used in a booth at ALA to make DVD-to-DVD or VHS-to-DVD copies. It’s a \$130 box that “enhances” analog video so you can convert it to digital form to burn to DVD. (I’m working from a September 2004 *Sound & Vision* writeup.) Unmentioned in the owner’s manual, one effect of that “enhancement” is to undo Macrovision: Presumably, you’d be able to copy a commercial videocassette to DVD with this device (or a DVD to a DVD, albeit with the loss of all special features, scene breaks, everything but the video and audio streams degraded through digital:analog and analog:digital conversions).

Macrovision isn’t happy. Its president, Bill Krepick, suggests that GoDVD! violates DMCA—but that’s the wrong law. GoDVD! operates entirely in the analog domain, and VHS is an analog medium, so DMCA simply doesn’t apply. Krepick goes further: “We have control over the patents of any device that defeats our technology. And we didn’t license these guys.” Sima says it’s researched the issue and is convinced GoDVD! is legal. Time (and lawsuits?) will tell. Note that, as with many fair-use devices, GoDVD!’s fairly useless for piracy: It only works in real time and it doesn’t have component jacks (S-video’s the best you can do).

Copyright Perspective

IICA: Inducing to Infringe

The big legislative issue at the moment is the INDUCE act, which became IICA, which may become

something else entirely. Introduced by Senator Orrin Hatch (R-UT), a published songwriter, the act is yet another overreaching effort that could prevent many new technological developments. It’s also one of those cases where what the proponents say doesn’t match the language of the act—and as we know from DMCA, “legislative intent” rarely does much to narrow the reach of a bad law.

I’m going to keep these comments as brief as possible, which isn’t easy—for example, I’d like to toss in more than a thousand words just on Orrin Hatch’s incredible statement introducing IICA.

The Proposal

The first version, INDUCE, rang alarm bells with its name alone: Inducement Devolves into Unlawful Child Exploitation Act. There must be a whole squadron of congressional staffers whose job it is to come up with bizarre acronyms for bad legislation. This one, instead of throwing in the usual “porn” scare tactic, uses “child exploitation”—and we *must protect the children*. INDUCE would amend copyright law to say that anyone who “induces” copyright infringement is also an infringer—and “induce” was defined to mean “intentionally aids, abets, *counsels*, or procures.” As Susan Crawford says (in a June 16 post), this language means you wouldn’t even be able to hire a lawyer if you were doing something “risky”—the lawyer would be open to infringement charges. Others pointed out that *reviewing* software that could be used to infringe could lead to charges under this act. As EFF noted, “A journalist or website publisher might be liable for simply posting information about where infringement tools might be found or how to use them.” Worse yet, Hatch wanted to fast-track the legislation without hearings.

By June 22, the name had changed and so had the language. S.2560 is now IICA, the Inducing Infringement of Copyrights Act of 2004. “Child exploitation” isn’t in the name—and “counsel” isn’t in the language. That language is short enough to quote in its entirety (other than overhead sections):

Section 501 of title 17, United States Code, is amended by adding at the end the following:

“(g) (1) In this subsection, the term ‘intentionally induces’ means intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability.

“(2) Whoever intentionally induces any violation identified in subsection (a) shall be liable as an infringer.

“(3) Nothing in this subsection shall enlarge or diminish the doctrines of vicarious and contributory liability for copyright infringement or require any court to unjustly withhold or impose any secondary liability for copyright infringement.”

Section 501 is the Copyright Act and “violation” is infringement of copyright. Given the placement, this language would open those who “induce” to both civil suits by any copyright holder or intermediary, or criminal suits based on sufficiently large infringements.

Hatch’s Statement of June 22

Hatch wants to keep the focus on children. The second sentence in his statement: “This Act will confirm that creative artists can sue corporations that profit by encouraging children, teenagers and others to commit illegal or criminal acts of copyright infringement.” He goes on to repeat “children” seven times in the brief second paragraph, noting how “illegal and immoral” it is to induce or encourage children to commit crimes and comparing the villains of *Oliver Twist* and (!) *Chitty-Chitty Bang-Bang* with “some corporations” who profit by “inducing children to steal” with “false promises of ‘free music.’”

Hatch claims to be after P2P distributors. He claims that half of P2P users are children, that P2P networks routinely violate criminal laws and distribute pornography, that if courts understood “balance” they would find Grokster and the like guilty despite all precedent to the contrary, and that decentralized P2P systems are “inefficient” compared to centralized indexes, used only and deliberately to induce infringement while avoiding liability. (Hatch is apparently a world-class software expert as well as a songwriter. Who knew?)

Hatch notes that Criminal Code rules for secondary liability don’t let you off the hook because of non-criminal uses: So much for the Sony doctrine. “Those who induce others to commit crimes cannot avoid prison by showing that some of them resisted.” Hatch claims that the new bill would “simply import and adapt the Patent Act’s concept of ‘active inducement,’” but observers who understand the Patent Act say this isn’t what it does.

Hatch speaks of nothing but children, pornography, piracy, and P2P networks—but you may note that nothing in the act’s language narrows it to P2P. I will sadly note at this point that Barbara Boxer, *who should know better*, is a cosponsor. As usual, extreme copyright is a bipartisan effort.

Reactions to Hatch’s Statement and IICA Itself

Public Knowledge issued a press release on June 23 noting that the “reasonable person” standard is lower than the intent standard usually applied to

contributory or vicarious infringement and that the bill is overbroad. In the words of Gigi B. Sohn, “Since the line between infringement and lawful use in copyright law depends on the specific situation and facts, someone might ‘aid or abet’ conduct he thought was lawful but that later proves to be infringement.” Mike Godwin claimed the bill would discourage or outlaw future technologies with substantial non-infringing uses: “No one will invest in, or invent new innovative technologies if the mere fact that they can be used unlawfully is enough to make both the investors and the inventors liable.” Later, Public Knowledge posted a brief analysis of IICA, noting that “this response to Grokster sweeps far more broadly than its sponsors recognize or admit” and that the use of “intentional” in the bill’s title is misleading: “The bill expressly allows courts to find ‘intent’ based on what a ‘reasonable person’ would be expected to know, rather than on what the defendant actually knew or should have known.” The analysis concludes:

This bill, if enacted into law, puts technology creators and users on notice that they may face liability even if they neither intended to cause copyright infringement nor had reason to know about actual infringement. It’s also broadly written enough to put those who invest in such technologies on notice that they might face liability too (not to mention losing their investments if the technologies they invest in are declared illegal).

A *Wired News* story by Joanna Glasner (June 24) notes Hatch’s role in a series of bills “favorable to the music and motion picture industries” and quotes EFF’s Fred von Lohmann: “If this bill were law, I could easily imagine suing Apple the very next day for inducing infringement for selling iPods.” It quotes Gigi Sohn as believing IICA would gut the Sony doctrine—and Will Rodger of the Computer and Communications Industry Association on the vagueness of the standard for inducement: “As we read it, reporters who wrote about peer-to-peer file-trading networks could be charged with inducing infringement. Their definition of inducement seems to cover almost anything.”

Susan Crawford (in a June 25 post, while Hatch was still trying to fast-track IICA) looked at three arguments against IICA and plausible counterarguments, mostly suggesting that “we slow things down, have some hearings, and try to get to the bottom of what’s going on.” To the charge that IICA will cripple the development of new technology she notes RIAA’s argument that it was *meant* to be narrowly tailored to address companies that build technology focused on illegal file sharing—but, of course, that “narrow tailoring” isn’t in the text of the bill in any way, shape or form. Noting the argument that the bill broadens secondary liability in unpredictable

ways, she offers the counterargument that it's an incremental change. To the "guts Sony" argument she offers the claim that (g)(3) "saves" *Sony*—but also notes that DMCA states that fair use isn't affected, although anti-circumvention rules make fair use impossible.

Eliot Van Buskirk offered a July 7 essay at CNET Reviews, "Allow me to induce myself." He offers a parallel to speeding tickets, noting that although there's almost nowhere in the U.S. that you can legally drive faster than 75, carmakers don't install electronic speed enforcers. If you get caught speeding, it's between you and the highway patrol: "The police can't automatically collect money from Volvo every time your station wagon hits 71mph." What if—before you were caught speeding—"the highway patrol preemptively brought lawsuits against every entity responsible for your driving too fast. Volvo, your tire manufacturer, the movie *Speed*, the ad firm who made the car look fast, and even NASCAR could be sued for 'inducing' you to speed." Ludicrous? Not necessarily, based on IICA's standard. EFF *did* draft a mock complaint suing not only Apple for the iPod but Toshiba for manufacturing the iPod's hard drive and CNET for Van Buskirk's iPod review, "in which I explain how to use the iPod to transfer music between two computers." Inducers, one and all! As he notes, Universal sued Sony to kill off VCRs—and, showing its reluctance for lawsuits, the RIAA sued Diamond to shut down the Rio and other MP3 players. He ends with a silly syllogism that concludes Orrin Hatch should be the first person sued if the bill passes.

Lawrence Lessig also discussed some background to IICA (which he still called the Induce Act in a July 7 post); you might find that post and the lengthy comment by Andrew Greenberg worth reading, but I won't summarize them here, except to say that it was becoming obvious to a number of people that IICA would enable copyright holders to keep suing companies for each work potentially copied using their technology, and that the low standard would almost certainly require a jury trial in each and every case.

On July 15, EFFector issued an action alert noting that IICA was now off the fast track and that a hearing was scheduled for July 22. The alert noted that the RIAA had turned up its rhetoric, with president Mitch Bainwol calling IICA "a moral behavioral test that targets the bad guys" and asserting that critics were missing the point.

Finally, the day before that hearing, Les Vadasz, a retired Intel VP who testified against CBDTPA at an earlier hearing, wrote a *Wall Street Journal* op-ed about IICA. Noting that "rationality prevailed" in the case of the Hollings bill, which never moved

forward, he calls IICA a "bill with similar goals" and quotes President Reagan, "Here we go again."

Sen. Hatch and others argue that the bill will protect kids from porn and punish those who "intentionally induce" piracy. In reality it will do neither. But it will do serious harm to innovation.

Senate Hearings, July 23, 2004

In a preview to the hearing, Declan McCullagh reported that Marybeth Peters (U.S. Register of Copyrights) would announce her support for IICA and would say that the Sony doctrine "should be replaced by a more flexible rule that is more meaningful in the technological age." He also noted that 40 trade associations and advocacy groups sent a July 6 letter to senators noting the chilling effect on innovation. Regarding Peters' comment, Fred von Lohmann noted, "The Copyright Office tends to view copyright law through the narrow lens of what does it mean for copyright owners."

The written statements from that hearing are available; as is typical for one of the hearings, they're fascinating—but I'll leave them for you to read. (The versions I found are a little hard to read, as footnotes are interspersed with body text—and in some cases, formatting errors make reading *really* tough.)

Very briefly, Hatch talks about the "large, for-profit global piracy rings," says that P2P users are "mostly kids," claims the bill was crafted with the help of "leading technology companies," and seems to say the bill is narrowly tailored to P2P issues. Hatch avers that "I do not intend to allow S. 2560 to be misused against legitimate distributors of copying devices," and we all know from DMCA what legislative intent is worth. Sen. Patrick Leahy offers a shorter statement, threatening or promising "we will make sure our commitment results in law." Leahy asserts new technologies mean "our artists lose the rights to their own works." He says S.2560 *precisely* penalizes "those who intentionally *cause* copyright infringement," a remarkable reading of the bill's language.

Mitch Bainwol of RIAA proceeds from the RIAA's usual position: Customers are all thieves. It "defies logic and common sense" that filesharing may increase CD sales: "If one can get something for free, without consequence, buying it becomes less attractive." Naturally, Bainwol ignores *current* CD sales figures (which aren't dropping) and makes a big deal of the fact that the top ten hits sold fewer units in 2003 than in 2000—not considering the possibility that the ten hottest CDs of 2003 were crappier than the ten hottest of 2000. He moans that music industry jobs are down by about one-third (I've noted previously that at least one RIAA member

proudly noted its sharply reduced job force along with stable sales and increased profits), and “families have suffered.” And, of course, P2P networks are “havens for pornographers.” Here’s an interesting claim: “No objective review of these services can possibly conclude that they have any pretense of legitimacy”—apparently there are *no* legal uses of P2P! He claims IICA sets “an extremely high standard” and later seems to say that iTunes and competitors aren’t in business: “These new offerings cannot survive in competition with illicit businesses.” Has someone told Apple—and Real, and WalMart, and MusicMatch and now Microsoft—that their downloading services can’t survive?

Andrew Greenberg of IEEE-USA offers a nuanced discussion of copyright and balance. IEEE is concerned about the language of IICA, says there is no silver bullet, and notes the dangers of giving copyright owners control over industries and technology with which they have no particular expertise. Greenberg says the Sony test has worked well. He notes that the Patent Law’s “inducement” clause looks to the conduct of a defendant, requires *active* inducement, and is far narrower than the IICA clause. He notes that IICA would apply to all copyrighted works and all technologies capable of manipulating, controlling and displaying content. IEEE doesn’t want changes in copyright to inhibit research and novel technologies before their worth can be demonstrated—and wants tests to be “simple, clear, predictable and objective”—adjectives that don’t apply to IICA’s language. He offers a proposed substitute, which may also be worth quoting in full—after the “by adding at the end of Section 501 of title 17”:

(g)(1) Inducement of Infringement. Whoever actively and knowingly induces infringement of a copyrighted work by another with the specific and actual intent to cause the infringing acts shall be liable as an infringer.

(2) Contribution to an Infringement. Whoever knowingly and materially contributes to the infringement of a copyrighted work by another shall be liable as an infringer.

(3) Vicarious Infringement. Whoever has the right and ability to supervise an activity resulting in a direct infringement and has a direct financial interest in such activity and infringement shall be liable as an infringer.

(4) Limitations on Secondary Liability.

(A) manufacture, distribution, marketing, operation, sale, servicing, or other use of embodiments of an otherwise lawful technology by lawful means, with or without the knowledge that an unaffiliated third party will infringe, cannot constitute inducement of infringement under Subsection g(1) in the absence of

any additional active steps taken to encourage direct infringement.

(B) manufacture, distribution, marketing, operation, sale, servicing or other use of embodiments of an otherwise lawful technology capable of a substantial noninfringing use cannot constitute contribution to an infringement under Subsection (g)(2) or vicarious infringement under Subsection (g)(3).

(5) Damages for violations of section (g)(1) of this section shall be limited to an injunction against inducement, and actual damages for infringement of a work for which the defendant had specific and actual knowledge the work would be infringed.

Robert Holleyman of the Business Software Alliance was supposed to be a supporter of IICA—but that’s not how his testimony reads. He says the marketplace is the best way to address harm done by illicit P2P networks: “Consumers will embrace appealing legal alternatives that offer a rich and varied array of content.” He’s in favor of DRM, but that’s a different fight. “We know it is not your intent...to put at risk” legitimate computer functions or the makers of products with those functions, but that’s what’s likely from IICA. In the end, Holleyman calls for five areas of change: A clear affirmation of the Sony doctrine; an inducement standard requiring “conscious, recurring, persistent and deliberate acts demonstrated to have caused another person to commit infringement”; explicit statement that knowledge of actual or potential infringement does not demonstrate intent to induce such infringement; no liability for advertising or product support; and mechanisms to deter frivolous or harassing lawsuits.

In the past...bad actors have used the postal system, telephones, automobiles, and other avenues of commerce for their own illicit ends. Now, they are also using computers, software and the Internet. Just as past solutions focused on these bad actors, and did not outlaw overnight delivery, cars, or telephones, today’s solutions must leave intact the important contributions computing technologies make to our daily lives, and allow these technologies to make even greater contributions in the future.

Kevin McGuinness of NetCoalition emphasizes that IICA is too broad; would have severe repercussions on Internet companies, products and services; jeopardize the introduction of new technologies; and would trigger a flood of litigation. He also offers five principles for a “balanced and effective” solution: Using the Sony doctrine as a premise; targeting unlawful uses and behavior, not the technology; providing a “bright line between lawful and unlawful conduct”; incorporating current case law into new concepts; and ensuring that advertising and product reviews could not be considered inducements. McGuinness notes that entertainment industry briefs in the Grokster case called for cost-benefit analysis: If there are substantial infringing uses, a

provider must show it would be *disproportionately costly* to eliminate those uses—regardless of noninfringing uses. That would, he says, “cripple the Internet industry,” and that seems reasonable. There’s more—including a note that the Grokster court found *no evidence* of direct inducement: advertisements encouraging users to trade copyright works, emails instructing users how to break copyright laws. Thus, while IICA goes far beyond what might be needed to make P2P networks liable, it also appears to fail to make them liable.

Marybeth Peters, Register of Copyrights, calls P2P “the most important issue facing our copyright system today” and says there should be no question that such services should be liable. She calls the Grokster decision an “unnecessarily cramped view of existing secondary liability doctrines” and says, “There is no dispute that the use of these services [Grokster and Streamcast] constitutes copyright infringement.” That’s right: Peters *dismisses* any non-infringing use of P2P networks. She appears to like IICA as written. She notes KaZaa’s suggestion that users “share large and interesting files” and reads this as encouraging users “to make available popular copyrighted work.” She seems to label Fred von Lohmann as an “attorney for [P2P] services.” And, sure enough, she disses Sony:

If the Sony precedent continues to be an impediment to obtaining effective relief against those who profit by providing the means to engage in mass infringement, it should be replaced by a more flexible rule that is more meaningful in the technological age, but that still vindicates the Court’s goal to balance effective “and not merely symbolic” protection of copyright with the rights of others to engage in substantially unrelated areas of commerce.

Note that wording carefully: Not “noninfringing uses” but “substantially unrelated areas of commerce.” Peters appears willing to sacrifice quite a bit to favor copyright holders; but then, that (apparently) is her job.

Finally, Gary Shapiro of the Consumer Electronics Association (and the Home Recording Rights Coalition) takes the view you’d expect from CEA and HRRC. The test for inducement in IICA is “hopelessly subjective” and would be “potentially ruinous to innovation and investment.” The new cause for action “verges perilously on punishing speech.” It’s hard to read it as anything other than “a frontal attack on the holding of the Supreme Court in the Betamax case”—and statements to the contrary offer no reassurance, particularly given the record. MPAA drove Replay into bankruptcy through copyright litigation over features such as large storage capacity and the ability to organize recordings into coherent collections. MPAA claimed the right to “determine the degree of air time a par-

ticular program receives” and asserted that home digital recording would usurp that right. Neither MPAA nor RIAA has ever agreed that Sony Betamax was decided properly. “Citing the MPAA and the RIAA as the guides and protectors of the Betamax doctrine would be akin to appointing Fagin as Oliver Twist’s personal protector. In fact it would be worse: Fagin sought to exploit Oliver, not to kill him.” There’s a lot more here and it’s pretty damning.

Reactions and Don’t Induce

A new INDUCE Act blog (techlawadvisor.com/induce/) includes a July 22 posting that, based on the comments, says the hearing “did not turn out as badly as it could have; in fact it went very well for those opposed to the introduction of the INDUCE Act.” Nearly every witness came out against IICA, and the conclusion was that “everyone needs to go back to the drawing board and redraft the law.”

Seth Finkelstein headed his comments “Copyright is broken and nobody knows how to fix it”—noting that it’s not an especially original insight. Not to get too reflexive, but he notes my latest copyright special and this comment: “I believe in balanced copyright. If that sometimes results in coverage that seems to say ‘a curse on both your houses,’ that’s because sometimes neither extreme makes much sense.” I must have struck a nerve:

I kept thinking about this. Because, **copyright abstractly makes no sense**. By this, I don’t mean something silly, not property-is-theft. Rather, I mean something deep, that the technological change has completely disrupted the extremely complex set of functional compromises that made copyright work **in practice** (for example, formerly being almost entirely a restriction on businesses, but now turning into a control on users and technology development).

He follows that with a note that too much of the discussion on IICA “basically boils down to posturing,” and that maybe we should all start by taking a loyalty oath that we believe in copyright. But what does that mean today?

For me, the most chilling moment of the hearing was when Hatch outright said, “Something has to be done here.” The problem is that there may be no equitable solution which *both* preserves openness and *current* industry profits. Repeating that these both should be served, doesn’t make it so. We have improvement in the ability to exchange information again colliding with a social regime which says information must be controlled....

Nobody has the answer. Sorry, I sure don’t.

An August 26 *Wired News* story notes some reactions to the hearings and some things that might happen. It also notes the Don’t Induce Act, one coalition’s alternative wording for IICA. The coalition has its

own acronym specialists: The name stands for “Discouraging Online Networked Trafficking Inducement Act of 2004.” It’s a much longer proposal, too long to offer here. Basic elements:

- It focuses on computer programs “specifically designed for individuals to engage in the indiscriminate, mass infringing distribution to the public...”—it’s a narrow remedy.
- Intent requires that the *predominant* use of the program is mass, indiscriminate infringing; that the commercial viability of the software depends on such infringing; and that the creator of the software has undertaken “conscious, recurring, persistent, and deliberate acts” to encourage mass, indiscriminate infringing redistribution.
- You can’t show infringement merely based on knowledge of the use of a program; you can’t target anyone who’s not a distributor of such a program—such as investors and those providing ads or customer support; navigation, recording, and other similar functions of consumer electronics and technology products and services aren’t infringing; and email doesn’t constitute mass, indiscriminate distribution.
- Remedies are limited to injunctions against intentional commercial activity and *actual* damages for infringement of which the defendant had specific and actual knowledge.
- Successful defendants in civil suits may recover attorney’s fees and triple monetary sanctions, to discourage baseless lawsuits.
- The Sony (Betamax) precedent is explicitly included.

The Copyright Office Draft

Susan Crawford and Ernest Miller both pointed to (and commented on) a “discussion draft” to replace IICA, issued by the Copyright Office on September 2. It’s a considerably longer bill. “Induces” is defined as “to commit one or more affirmative, overt act that are reasonably expected to cause or persuade another person or persons to commit any infringement...” “Overt acts” may include distributing technology that *automatically* causes the user to infringe without making a specific decision; actively interfering with copyright holders’ efforts to detect infringing efforts; offering an incentive to infringe; failing to take “reasonably available corrective measures” to prevent ongoing infringement from overt acts; distributing a technology as part of an enterprise that substantially relies on infringing acts of others for its revenues or viability.

“Overt act” specifically doesn’t include distributing a “dissemination technology” capable of substantial noninfringing uses “so long as that technology is not designed to be used for infringing purposes,” distributing technologies that incorporate “reasonably effective measures” to halt infringement; advertising or marketing that doesn’t specifically encourage infringement; providing information on the use of a technology when that information doesn’t encourage infringement; reviews and commentary; providing products or services to a technology distributor. “Dissemination technology” is defined very broadly.

A section says courts “should attempt...to minimize the potential burden” of litigation by allowing summary judgment and awarding fees and costs as appropriate.

Is this better? Is it good enough?

Susan Crawford doesn’t think so: “If anything, it signals a hardening of position... any technology that makes infringement possible...can be reached under the draft, and the Sony/Betamax rule is dead.” I didn’t read it that way, but unlike Ms. Crawford, IANAL. She wonders why the Copyright Office “(clearly not neutral on the subject)” is writing draft legislation.

Ernest Miller thought the bill was better—but not a lot. “Instead of ludicrously overbroad, this proposal is only excessively overbroad.” But as he analyzes the draft, it doesn’t sound much better. As he notes, gun manufacturers probably “reasonably expect” that their products might be used to commit crimes (as might crowbar manufacturers), but they’re not held liable on that basis. His final comment: “Overall, this bill will still be a terrible burden on creativity and innovation. It is improvement in the sense that innovation will be permitted a lingering death instead of immediate execution.”

What’s next? Who knows? With any luck, no action this term—but that’s not assured.

Trends & Quick Takes

Purchasing Trends in ARL Libraries

The June 2004 *ARL Bimonthly Report* (#234) includes “Serials trends reflected in the ARL statistics 2002-03” by Martha Kyriallidou, director of ARL’s statistics & measurement program. A few points may be worth noting (the report itself isn’t that long—but be aware that key elements are in tables that don’t automatically reach a print copy). Kyriallidou makes some 17-year comparisons between 1986 and 2003:

- Serial unit costs (the average cost *per serial*) in ARL libraries increased 215% (from \$89.77 to \$283), while monographs and books rose 82% (from \$28 to \$52) and the Consumer Price Index rose 68%. ARL library expenditures rose 128% during that same period.
- In the past few years, the *rate* of serial unit cost increases has slowed—from 10.2% in 1995 to 7% in 2003.
- In 1968, on average, ARL libraries spent 73% as much on monographs as on serials (\$1.1 million compared to \$1.5 million).
- In 2003, on average, ARL libraries spent 34% as much on monographs as on serials (\$1.8 million compared to \$5.3 million).
- Serials acquired by ARL libraries jumped significantly in recent years, probably as a result of Big Deals and other full-text aggregations: The average was 18,142 in 2003 compared to 15,919 in 1986.
- For those who say ARL libraries have given up on books and print, the truth's not quite so simple: The average number of books purchased in 2003 is about the same as in 1986 (32,600), after years of being lower.
- ARL libraries get a *lot* more “nonpurchased serial subscriptions” now than they did in 1986: An average of 8,873 as compared to 3,319 in 1986. Thus, *total* serials in ARL libraries have risen substantially.

Should ARL libraries be buying more books than they are buying? Possibly—but at least the real numbers are no longer falling. (If you're complaining that “average ARL library” is a meaningless concept in a population as wide-ranging as ARL's membership, you're right; that's why I tried to follow Kyrillidou's care in saying “on average, ARL libraries did” rather than “the average ARL library did” whatever.)

Negative Results

The controversy arises first in medicine and related fields but goes much further: What happens when research yields negative results? If you've done research, you know the usual answer: Nothing at all—the project shuts down with no findings submitted for publication and as little publicity as possible.

In the humanities and social sciences, maybe that's OK. I'm guessing most journals in librarianship wouldn't be interested in scholarly papers indicating that careful study of factors in a situation showed no correlation. I've seen a few papers that could be read that way, but the authors manage to couch the findings in language that makes the results *appear* positive. Actually, a negative result could

be significant if the study covers factors that are commonly assumed to be correlated. And in the social sciences, one negative result never really shuts down research possibilities; times change, as do study populations.

I know that, back when I was more active in library automation, some of us lamented the lack of reports and articles on experiments and projects that failed. We knew why there were few such reports: “How we did it *bad*” is no fun to write! In technology as well as science, however, there is much to learn from failed experiments and projects—if the stories are honestly told.

In medicine, but also in physics, chemistry, and most hard sciences, negative results *do* matter. For most sciences, publication of a negative result can save time for other researchers: “We went down this blind alley, so you don't have to.” With medicine, the stakes are higher: Life, death and health. Unfortunately, when medical research is sponsored by companies with stakes in the outcome, there's a correspondingly high stake in ignoring or suppressing negative results.

It's hit the news from a couple of directions. The editors of a dozen high-profile medical journals are pushing for a standard that *requires* that all medical trials be registered, with positive *and negative* results reported—and backing that up with the threat of boycotting articles on medical trials not on the registry. At the same time, I see reports that the FDA may have suppressed negative results relating to antidepressants prescribed for juveniles—and in our local paper, the situation was described in a way that layfolk can understand and that neither sensationalized nor minimized the problem.

There are, in fact, journals dedicated to negative results. I've seen web sites for two, both open access. The *Journal of Negative Results* (ISSN 1459-4625) provides “an online medium for the publication of peer-reviewed, sound scientific work in ecology and evolutionary biology that may otherwise remain unknown.” Work to be published includes studies that “1) test novel or established hypotheses/theories that yield negative or dissenting results, or 2) replicate work published previously (in either cognate or different systems). Short notes on studies in which the data are biologically interesting but lack statistical power are also welcome.” The journal is at www.jrn-eeb.org.

The second, *Journal of Articles in Support of the Null Hypothesis*, appears to specialize in psychology:

In the past other journals and reviewers have exhibited a bias against articles that did not reject the null hypothesis. We seek to change that by offering an outlet for experiments that do not reach the traditional significance levels ($p < .05$). Thus, reducing

the file drawer problem, and reducing the bias in psychological literature. Without such a resource researchers could be wasting their time examining empirical questions that have already been examined.

This journal is at www.jasnh.com.

Are there others out there? *JASNH* has published seven issues in three years (with a total of 12 articles); *JNR* seems to be a newcomer. It's an interesting if difficult subset of the literature.

Quicker Takes

I stopped commenting on John C. Dvorak's *PC Magazine* columns some time ago, but sometimes it's impossible to resist. His July 2004 column, "The dead-media bogeyman," offers excruciatingly bad advice. He doesn't think digital photographs will end up on dead media—but that's not the main problem. He asserts that CD and DVD standards "will probably have playability for a hundred years or longer." A few paragraphs later, he lengthens that: "The CD/DVD formats look stable on into the future, with so much gear that it is highly unlikely they will become dead media before the year 2200. And if they do die, *you can be certain* that *all* the data will be moved forward onto something better." [Emphases added.] "Be moved" without any conscious action, apparently. And, he says, "people back up their photos mostly onto CDs and DVDs, and they do it redundantly." I'm sure you and everybody you know does redundant backups regularly of everything on your computer, right? And, you know, nothing better's ever going to replace CD and DVD, so they'll be around for *two more centuries*. (I'm sure that at least 100 million PCs were sold with 5.25" diskette drives, so we can be certain you'll never have trouble reading such a diskette. Right?)

- How much PC can you buy for \$300? If you're willing to buy from WalMart (I will not set foot inside that store), more than you might expect—but probably a lot less than you want. The Microtel SYSWM8001 runs a 1.6GHz AMD Duron, includes 128MB SDRAM, a CD-ROM drive (no burner), a 40GB hard disk, and integrated graphics and audio with no-name speakers. You don't get a display for that price, of course. Software? Well, it runs the Sun Java Desktop System on top of SUSE Linux; printer compatibility is "limited," but you do get StarOffice 7 and Mozilla 1.4.
- PDAs aren't doing well in general, and Sony's giving up the ghost: It's halted production of Cliés in the U.S. for the rest of the year.
- Maybe PDAs will disappear into cell phones as people learn to squint at the tiny screens

and tap tap tap at the keyboards; several companies now offer teeny-tiny hard disks, and some analysts expect to see them in cell phones in the near future. So two-inch screens are the future?

- According to Nielsen/NetRatings, broadband internet connections outnumbered dial-up connections for American home users in July 2004, the first time that's been the case. Supposedly, 63 million web users connected via broadband in July as compared to 61.3 million via dialup. Overall internet penetration has leveled off. Marc Ryan of Nielsen/NetRatings put an odd spin on it, or established himself as one of those short-term prophets almost certain to be right: "We expect to see this aggressive growth rate continue through next year when the majority of Internet users will be accessing the Internet via a broadband connection." Well, yes, if a majority is *already* using a broadband connection, then "aggressive growth" should assure that a majority use broadband by the end of 2005.
- Are micropayments finally poised for the big time? That's what BitPass believes, based on the success of iTunes and other music-download systems. According to a September 7 news.com article, TowerGroup claims that there were more than \$2 billion in micropayments in 2003—and they project that to grow to \$11.5 billion by 2009. As Buzz Lightyear would say...

The Details

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