



## Stanford Technology Law Review

*On April 20, 2002, Professor Lawrence Lessig of Stanford Law School, Laurence Pulgram of Fenwick & West, Scott Cooper of Proskauer Rose and Jeffrey Knowles of Coblenz, Patch, Duffy & Bass, LLP joined together to discuss current issues in digital rights management. The panel was moderated by Kent Walker of Liberate Technologies. For the convenience of STLR's audience, their conversation is summarized below.*

- ¶1 **Mr. Knowles** began the discussion by distinguishing new technologies from conduct. "Technology is neutral," he emphasized. Using Napster as an example, he asserted that companies had the ability to do more to prevent infringement. What it comes down to, he said, is that when a provider has an ongoing relationship with users, it can better protect the interests of copyright holders, by filtering content, for example. He emphasized the importance of economic incentives for artists to continue creating new works and warned that the Internet has the capacity to completely undermine the scheme to compensate artists for content. He was hopeful that a way to protect content not authorized for distribution yet still capable of advancing technology was possible.
- ¶2 **Mr. Pulgram** (who has represented Napster) challenged the technology-conduct distinction made by Mr. Knowles, saying "When you order someone to implement a new technology, you're no longer being neutral to technology at all. You're asking Napster to come up with a new system that is more successful at trying to prevent infringement." He added, "If we're going to have courts deciding what the technologies are, we are not neutral as to technology at all anymore." He discussed the challenges faced by makers of technology who attempt to police their products. He explained that even when Napster made a major effort to filter out unauthorized works, users would change file names, making automatic screening ineffective. While considering implementing a more sophisticated File I.D. alternative to get closer to 100% detection (as required by the court), Napster was limited by the short timeframe presented by the 9<sup>th</sup> Circuit. He disagreed with a suggestion proffered by **Mr. Walker**, the moderator, that Napster's apparent demise is evidence that Napster's content must have all been infringing, pointing to the difficult task of filtering. He offered Mariah Carey's song "Butterfly" as an example. In order to filter out that copyrighted song, the service would also have to remove 174 other songs entitled "Butterfly," including many in the public domain. Nonetheless, he expressed optimism that a new business model could ensure profits for content providers and improved access for consumers. In order to address the inherent risks of perfect digital copies, he endorsed the use of digital rights management. "For people to get paid doesn't mean you have to take the technology and squash it," he said.
- ¶3 **Mr. Cooper** expressed agreement with **Mr. Pulgram** but raised the issue of fairness. He said the real question is how to find "a way to encourage new technology for the delivery of that content in an efficient way and in a consumer friendly way that doesn't automatically start with the premise that we can borrow from or steal from the content owners in order to popularize that technology and monetize it for the creators of the technology," adding that "[t]here has to be more of a balance than we've seen so far." He disagrees with what he views as the prevalent practice of first taking content for free and then looking for a way to "wrap it" that recognizes the interests of copyright holders: "[w]e don't start with finding a way to 'wrap it' and then popularizing it." He believes this practice has created a defensive mentality on both sides of the debate. "We've lowered the intellectual level of the dialogue by raising the level of vilification," he said. Asked by **Mr. Walker** about the proposed "Hollings Bill" and its alternatives, he said "as we try to balance competing rights it's going to require some legislation. It's going to require education... and industry standard setting. Litigation is going to be a blunt instrument, only used at the lowest level."

- ¶4 **Professor Lessig** placed Mr. Cooper's concerns into a historical perspective. There is nothing new, he says, about companies neglecting to consider wrapping existing business models before innovating. Piano rolls "Napsterized" the sheet music industry, he said. He believes Congress must come in to re-strike a proper balance but complains that courts have "stepped in and enforced last generation's business models on this new technology, not allowing the law to adjust to the technology but forcing the technology to fit to last generation's law... We can argue about whether that is good or bad, but it is different. But I think, obviously, that it is bad." Responding to a comment by **Mr. Cooper** about the greater potential for harm through digital technology, Lessig said, "That is Valenti economics. I don't concede that the potential for harm is greater because the potential for benefit is greater to the extent that this facilitates broad spreading of content that increases demand...the potential benefit to the industry is high."
- ¶5 **Mr. Pulgram** offered an example of high benefits to consumers through products such personal video recorders (PVRs). He contrasted TiVo, owned mostly by the content industry to the more independent ReplayTV. TiVo doesn't include some of the features that Replay includes such as more memory, automatic commercial skipping, and the ability to send shows between users. He believes that ReplayTV offers an appropriate level of consumer choice, allowing them to do the same things they did in the past, but with more ease. "We are in a new world here", he said. "The industry is afraid," and now wants to enjoin ReplayTV's advanced features. He argued that regardless of the scope of copyright law, it does not provide content owners with a monopoly.
- ¶6 **Mr. Cooper** pointed out that despite comparisons to the Sony Betamax case, this digital copying has a greater effect on the exclusive rights of copyright owners. He disagreed with Mr. Lessig about role of courts, arguing that they need to be responsive to situations as they arise until Congress may make a determination. **Mr. Pulgram** disagreed, asking "Did the VCR free ride? It is the exact same thing!" Particularly where viewers already pay for cable television (or simply watch and record what is distributed over free public airways) he asserted, "This technology doesn't free ride. It provides you with what you paid for. This is your stuff. You bought it, you own it."
- ¶7 **Professor Lessig** reiterated that Sony Betamax held that when substantial changes in technology affect copyright, it is up to Congress to act. He pointed out that the expansion of copyright law which "might not have mattered before the Internet" must now be changed in light of such innovations in order to maintain a proper balance of rights.
- ¶8 **Mr. Pulgram** expressed additional concerns about the loss of rights, particularly where a distinction between products and services is created. He criticized the view that a producer's continued contact with users (e.g. ReplayTV's daily download of channel guides) should create new obligations to spy on such users. He explained that such contact does not mean that, for example, ReplayTV knows which users are paying subscribers of HBO, and argued that just because technology could provide such information does not mean the producer should bear the burden of redesigning their software to do so. He said that it is not appropriate for copyright to impose such a role on the makers of technology simply because of their continuing relationship with users.
- ¶9 **Mr. Cooper** argued that ReplayTV currently does more than simply download channel guides and said that there is "no question" that they would be able to collect more information about their users. He expressed concern that companies could design devices intended to infringe copyright and then "throw in" a non-infringing use in order to evade prosecution. "Do we want to legitimize this?" he asked, bemoaning a balance he views as unfairly in favor of technology interest.
- ¶10 **Professor Lessig** responded that presently, the burden required to monitor and control technology would be huge but may change in the future. Referring to the earlier keynote address by Steve Griffin of StreamCast (maker of Morpheus file-sharing software), he said that preexisting and

forthcoming content creates a "two-bucket problem," making a single solution impossible. He explained the need for different solutions looking forward and backwards in order to avoid creating "a system of monitoring and control that is completely anathema to traditions of privacy and innovation." He disagreed with the notion that duration of copyright is strongly connected to incentives to create, and argued that new technologies, rather than reducing income to artists, may increase demand. He expressed a belief that systems must be built to make sure that the right people are paid for content and, in doing so, producers need not "build a police state into every device."

- ¶11 **Mr. Knowles** disagreed that demands placed on producers would create a "police state," adding that Justice Patel gave a large window of time for changes to be made. He argued that "a one size fits all solution is not beneficial to either party" and expressed concerns about compulsory licensing. He pointed out the inequity of a system that may compensate past compositions at a lower level than those created after the technology is put in place.
- ¶12 **Mr. Cooper** disapproved of the assumption that technology would create more value for content creators. "I don't think its inherent that technology is going to create more value for the copyright owner," he said, adding "It should. I think that every time we open up a new channel of distribution there is a possibility that the content owners are going to be able to take some portion of the value that is created from that. But it is not necessarily true."
- ¶13 **Professor Lessig** pointed out the ambiguity between creators and owners of content and expressed a belief that content owners may lose as technology advances. Increased competition, he said, will likely reduce their ability to extract rents. He concluded that it "might be that existing dinosaurs fade into the past, but that is what competition is all about."
- ¶14 **Mr. Cooper** warned of an overly narrow focus on music industry when other media like film are very collaborative, making it difficult to identify a "creator." **Mr. Knowles** added that while music labels are easily targeted as "bad guys," the complicated mix of "good guys" including collaborators such as composers and songwriters may be under the greatest threat of losing their livelihoods. **Mr. Walker** argued that record labels do offer benefits, such as providing support to lesser-known artists.
- ¶15 **Mr. Pulgram** discussed the impact of technological change on an artist's incentives. "Orson Welles didn't anticipate video rental revenues when making Citizen Kane," he offered. Even if it means owners must come up with new ways to market content, he said, "we have to let the technology run." **Mr. Knowles** responded that without meaningful protection for copyright, efforts by owners to offer new distribution options (e.g. the PressPlay music subscription service) will be limited.

*[The panel then addressed questions from the audience.]*