

## The state of copyright activism

by Siva Vaidhyanathan

### Abstract

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One of the great hopes I had while I researched and wrote *Copyrights and copywrongs* (New York: New York University Press, 2001), a cultural history of American copyright, during the late 1990s was that copyright debates might puncture the bubble of public consciousness and become important global policy questions. My wish has come true. Since 1998 questions about whether the United States has constructed an equitable or effective copyright system frequently appear on the pages of daily newspapers. Activist movements for both stronger and looser copyright systems have grown in volume and furor. And the U.S. Supreme Court ruled in early 2003 that the foundations of American copyright, as expressed in the Constitution, are barely relevant in an age in which both media companies and clever consumers enjoy unprecedented power over the use of works.

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## Introduction

In 1998 the U.S. Congress radically revised American copyright laws without much public scrutiny or protest. Copyright was too arcane, too technical, too boring, to break through the headlines about political sex scandals and celebrity murder trials. With the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act the United States abandoned 200 years of moderate, successful copyright traditions. Copyright used to balance the public's interests and private needs. Now it only serves large, established copyright holders. Yet while Congress was considering these radical changes, newspapers rarely paid attention to the changes. Only in recent years, with the accumulation of horror stories about copyright abuses and bullying, have we seen sufficient attention paid. As a result, we are finally seeing critical mass of public interest activism.

Between the spring of 2001 and the winter of 2003 the following events kept copyright in the news:

- Eric Eldred, a World Wide Web publisher, found that his practice of publishing public domain works on the Internet is thwarted by Congress' radical extension of the duration of protection for works created in the 1930s and after. After both a district court and an appeals court ruled that Eldred's claim that the extension was unconstitutional (in violation of the requirement that copyright last "for limited times"), the Supreme Court considered the merits of his case in October 2002. Then, in January 2003, the Supreme Court ruled 7–2 to uphold the lower court ruling allowing the copyright term extension [1].
- The National Writers' Union, led by their president Jonathan Tasini, won a landmark case before the U.S. Supreme Court in 2001. The Court ruled that freelance writers who had not explicitly assigned their rights to electronic versions of their work were due compensation from major newspapers and magazines that had sold these rights to electronic databases such as Lexis/Nexis and ProQuest. This case somewhat redressed the balance between creator and publisher in the copyright system, although in most media and in most fields the creator still operates from a very weak bargaining position [2].
- In the summer of 2001, a federal court issued an injunction against the publication of a novel by Alice Randall called *The Wind Done Gone*. This new novel was a revision and retelling of Margaret Mitchell's *Gone With the Wind*, published

originally in 1935. Despite the fact that the original novel should have entered the public domain some time in the 1980s, Congress kept its copyright alive through retroactive copyright extension — the very issue the Supreme Court considered in the Eldred case. Appealing the injunction against the publication of *The Wind Done Gone*, lawyers for the publisher, Houghton Mifflin, argued that the new novel was a parody of the original, and thus the use of similar characters and events constituted "fair use." The appeals court agreed with the parody argument and allowed the novel to be published [3].

- Also in the summer of 2001, a federal court freed Martha Graham's legacy from the hands of Ronald Protas, ruling that Protas only controlled the rights to a single dance, "Seraphic Dialogue." In addition, a court ruled that Protas could not prevent the Martha Graham Dance Company from using its founder's name [4].
- The Federal Bureau of Investigation handcuffed Russian computer programmer Dmitry Sklyarov in the Las Vegas airport after he had given a presentation on the security vulnerabilities in Adobe Corporation's E-book Reader software. The company Sklyarov worked for in Moscow, Elcomsoft, soon faced federal criminal charges in the United States (even though the DMCA is only a United States law) after Sklyarov agreed to testify in exchange for immunity. First Sklyarov, and then Elcomsoft, were accused of violating the Digital Millennium Copyright Act by distributing a program that willfully violated the act by allowing readers to make private copies of e-books. In December 2002, a San Francisco jury found the company not guilty [5].
- The recording industry moved its attention from the distributors of peer-to-peer software to those actually offering copyrighted music files on those networks, filing civil suits against hundreds of individuals.

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## Political success, actual failure

Five years after the U.S. Congress passed the 1998 Digital Millennium Copyright Act (DMCA) and the Sonny Bono Copyright Term Extension Act, it should be clear that they were both tremendous mistakes and failures. They have done much harm and no good. The Internet is ripe with unauthorized digital content of all kinds. Peer-to-peer systems are fulfilling the role of a disorganized global digital library. And laws and technological locks have done little to change that. However, these laws have stifled legitimate and harmless users of digital materials, especially scholars, librarians, and researchers.

The DMCA has onerous provisions that go beyond enforcing electronic locks and gates. It has emerged as the law of choice for censoring criticism and commentary in the electronic environment. For example, let's pretend you have just published a harshly negative review of a book in your field. And in this review, you quoted short passages from the book, confident that the concept of "fair use" enables you to make such unwelcome use of copyrighted material for critical purposes.

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A week or so after the electronic version of your review appeared on the publication's Web site, the editors inform you that they are removing it because it violates the Digital Millennium Copyright Act. You are welcome to respond and make your case that the use of the copyrighted quotes fall under fair use, but the publication is under no obligation to accept your defense. In fact, in an all-too-common act of cowardice, the publication keeps the site dark rather than face the legal battle that might follow. So you respond by publishing the review on your own Web page. Soon you discover that all the major World Wide Web search engines have removed your site from their indexes, effectively stopping traffic to your site.

Copyright is not meant to allow such abusive and censorious actions. And what about that life-blood of journalists, educators, researchers, and critics: Fair use? Welcome to the new Millennium. Fair use, while not quite dead, is dying. And everyone who reads, writes, sings, researches, or teaches should be up in arms about it.

Consider the action that the Church of Scientology took in the summer of 2002 against the search engine Google.com. The Church of Scientology used a "notice and takedown" letter (authorized under the DMCA) to persuade Google.com to block links to a Norwegian site that includes some criticism of the wealthy cult [6].

Back in the twentieth century, if someone accused you of copyright infringement, you enjoyed that quaint and seemingly archaic notion of due process. You would be warned and perhaps sued. And if you wanted to defend yourself in court, you could appear at a hearing, present evidence and arguments, and have a judge render a ruling based on statute and precedent. We no longer have those rights in the digital world. The DMCA puts the burden of proof against an accusation of copyright infringement on the accused.

And it makes the owner of every Internet service provider, search engine, and content host an untrained copyright cop. The default action is censorship.

The conflict between Scientology and Google is just the latest in a string of DMCA-supported copyright abuse. Besides limiting due process and empowering private parties to enforce censorship through the "notice and takedown" provision, the Digital Millennium Copyright Act has another major provision that upends more than 200 years of democratic copyright law. It forbids the circumvention of electronic access controls that protect works — even those portions of works that might be in the public domain or subject to fair use. It puts the absolute power to regulate access to information in the hands of the companies that distribute the material.

More to the point of intellectual freedom, in the spring of 2001 the music industry prevented a computer scientist from presenting a scholarly paper at a conference because the paper dealt with encryption algorithms that the recording industry hoped to use to protect its digital content. The Recording Industry Association of America sent a "cease and desist" letter to Princeton professor Edward Felten, accusing him of violating the provision of the DMCA that makes it illegal to "make available" any technology that might be used to circumvent access controls to digital material. The Felten case is merely the best known of several efforts the content industries have made to prevent researchers from discussing certain technologies and algorithms.

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Among recent legislation, the DMCA is second only to the USA PATRIOT Act in terms of reckless, poorly thought-out, and censorious consequences. Yet back in 1998, when Congress passed the law, there was little public outcry, or interest for that matter. The news coverage about the bill referred to some harmless extension of "copyright to the digital world," as if that had not already happened. And those who raised concerns about the sweeping powers of the bill were unfairly dismissed as radicals who were against copyright in general.



## Effects on teaching and scholarship

We should all be concerned about the potential harm the anti-circumvention powers of the

Digital Millennium Copyright Act will have on education and scholarship in general. And we should be just as concerned about the effects that this emerging leak-proof, highly regulated electronic regime could have on American culture and deliberative democracy.

Today, most of the subjects of media studies research are widely accessible. A handful of works of film and early radio are even in the public domain. So scholars and teachers benefit from ample and easy sources. But that might change over the next few decades as more works — even those already in the public domain — become enclosed behind electronic locks and gates and delivered in streams of digital signals. The potential for abuse of this technology and of the legal power behind it is immense.

Please imagine my classroom 35 years from now. As I do every semester, I plan to show my class a film that explores conflicting values and loyalties during wartime: *Casablanca*. But some time during the 2020s, all the VHS players at New York University fell into disrepair. The library has the tape, but nothing to play it on. Kim's Video store on Bleecker Street is now a Starbucks. Blockbuster is now a hand-held device instead of a large store. The only means for showing this film to my class is to have it streamed in via a satellite feed into a video projector.

*Casablanca* would have entered the public domain the previous year (assuming Congress does not extend the term once again). But it remains well protected, "double-wrapped" by both by "click-wrap" contract and technological access controls.

The class settles down. On my palm computer, I call up the interface page for either Via-Disney-AOL-Warner-Mount or its competitor, MicroFox. I enter my "educator's code." I hit "play." Nothing happens. Once again, I must do my poor Bogart impression for the class in lieu of the film.

What happened? Perhaps there was some technical failure. Perhaps this was my second class of the day and the service blocks "fair users" from watching a film twice. Perhaps the NYU Library could not negotiate a contract renewal with the company and stay within its tight budget. Perhaps my "educator's code" revealed me to be the one who wrote that scathing review of the major summer blockbuster of 2034, *Battlefield Earth IX*. Perhaps the company identified me as someone who testified against the industry at Copyright Office hearings way back in May of 2000.

The Digital Millennium Copyright Act grants complete power to allow or deny access to a work with the producer or publisher of that work. The producer may prohibit access for those users who might have hostile intentions toward the work. This power could exclude critics and scholars. Most likely it would exclude parodists and satirists as well. The anti-circumvention provision shifts the burden of negotiating fair use from the user (and the courts in the case of likely infringement) to the producer. The producer has no

incentive to grant access to any user who might exploit the work for fair use — including scholarship, teaching, commentary, or parody. Under this regime, a user must agree to terms of a contract with a monopolistic provider before gaining access. One must apply to read, listen, or watch.

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## Opposition emerges and organizes

If the music and film industries continue to tighten the reins on use and access, they will strangle the public domain and the information commons. This trend presents a much greater threat to American culture than just a chilling effect on scholarship. Shrinking the information and cultural commons starves the public sphere of elements of discourse, the raw material for decision-making, creativity, and humor. Fortunately, there is growing outrage about these and other examples of copyright holders using their new legal powers to stifle criticism and undermine legitimate uses of their material. Loud protests have emerged from communities of software producers, artists, writers, librarians, and media activists. These activist organizations — such as the [Electronic Frontier Foundation](#), [digitalconsumer.org](#), and [publicknowledge.org](#) — are struggling to accurately define the "public interest" in copyright and debating how best to articulate the issues to a diverse public. They deserve our support.

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Public interest copyright activists are an ideologically diverse group. Many of us who fight for the "public interest" are classically liberal, civically republican, and philosophically pragmatic. We focus on restoring the balanced, humane principles that used to guide American copyright as recently as 1976. We frame our rhetoric in classically liberal terms. We emphasize individual freedom, a modest level of state intervention, and a flexible, adaptable regulatory system.

Some activists approach these issues from the perspective of religious freedom and conservative values. They want parents and teachers to have the rights and abilities to edit digital material they deem offensive, even if the DMCA prevents the use of the technologies required to alter the work. Other equally active critics of recent trends in copyright come from a Marxist perspective. They warn about the coming post-industrial infotainment-industrial complex and the ways it has enlisted the state in efforts to make

all information and culture tradable commodities. Still others espouse a form of information anarchy. According to the anarchistic vision, if we empower every user, limit the power of large corporations to regulate flows of information, and democratize information generally, we all soon would have the ability to both create and consume material with absolute liberty. The infotainment industries would wither without enforceable copyright protection. And we would just have to communally cope with the negative externalities of such a system — like the extinction of coyotes on Saturday morning cartoons and tigers on Wildlife Channel documentaries.

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## The brilliance of real copyright

All of these activists lament the erosion of the democratic safeguards that made American copyright such a brilliant and effective system and filled our libraries with books. Copyright can censor. It is a prohibition on what we may reproduce, quote, perform, and distribute. Through both statutes and the common law over the past 200 years, the copyright system developed four democratic safeguards that mitigated the potentially censorious power of its prohibitions:

- The principle of fair use — at its base a legal defense against an accusation of copyright infringement. If you are accused of infringing, you can make an argument that your use of the protected works is "fair" because of some combination of the following four factors: The nature of the original work is important to public discussions or concerns; the nature of your use of it is important because of teaching, research, or commentary; you did not use very much of the original work; your use did not significantly affect the market for the original work. In the public discourse about fair use, it has served as a term representing a collection of uses that consumers could consider "fair," such as recording television shows for later viewing, making cassette tape or MP3 mixes from compact discs, and limited copying for private, noncommercial sharing.
- The principle that after the "first sale" of a copyrighted item, the buyer could do whatever she wants with the item — such as making a hat, or a broach, or a pterodactyl — save publicly performing the work or distributing unauthorized copies of it for sale. The first sale doctrine is what makes the lending library possible.
- The concept that copyright protected specific expression of ideas, but not the ideas themselves. This is the least understood but perhaps most important tenet of

copyright. You can't copyright a fact or an idea. Because you can't, anyone may repeat your idea to criticize it or build on it. Journalism, along with many other forms of common expression, depends on this principle.

- The promise that copyright would only last — as the Constitution demands — "for limited times," thus constantly replenishing the public domain. The public domain allows for low-cost scholarship, research, and revision of formerly copyrighted works. The reason that bookstores are filled with high-quality yet affordable scholarly editions of Mark Twain's *Adventures of Huckleberry Finn* and John Stuart Mill's *On Liberty* is that they are in the public domain. The reason there is no annotated scholarly edition of Ralph Ellison's *Invisible Man* is that it is not.

Copyright, when well balanced, encourages the production and distribution of the raw material of democracy. It is supposed to be an economic incentive for the next producer, not a guarantee for the established. But after more than 200 years of legal evolution and technological revolution, copyright no longer offers strong democratic safeguards. It is out of balance. Each of these four safeguards is under attack by the copyright cartel.

So in general, active critics of the corrupted copyright system share an agenda that would restore those democratic safeguards. We have been fighting for a hacker magazine's (and thus everyone's) First Amendment right to describe certain illegal algorithms and create hyperlinks to other pages that describe or offer these algorithms. And we have been playing defense in the halls of the Capitol against legislation that would create new and dangerous property rights in facts and data and other, more odious legislation that would require all producers of electronic hardware and software to include anti-copying devices in their products.



## ***Eldred v. Ashcroft***

Even though the ruling in *Eldred v. Ashcroft* was a blow to efforts to immediately open up more democratic breathing space in copyright, the decision itself offers seeds that might grow into something good. Justice Stephen Breyer wrote in his dissent:

"It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who won existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public."

This is the key to any public interest movement: show that narrow special interests are getting away with everything and the public interest is suffering.

In her majority opinion, Justice Ruth Bader Ginsburg herself aided the public's rhetorical cause even while ruling against its interests. While dismissing the notion that excessive copyright expansion has severe First Amendment implications, she invoked two of the classic democratic safeguards of American copyright: The idea/expression dichotomy and fair use. Because of these two concepts, Ginsburg concluded, the court need not take the censorious power of copyright seriously.

Ginsburg's expression of faith in the power of the idea/expression dichotomy and fair use does not recognize that both these rights are under attack in Congress and lower courts. The motion picture, music, publishing, and software industries are trying to expand their control over the machines in your home to limit the uses you might make of material you have lawfully purchased. Ginsburg made one more statement that public interest advocates can take to heart and use for their purposes. While dismissing the petitioners' First Amendment concerns, she wrote,

"But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."

As a matter of fact, the 1998 Digital Millennium Copyright Act did just that. By outlawing technologies that could break through access controls around digital materials, Congress created a whole new technological regime and a new set of powers for copyright holders to use against scholars, librarians, students, and artists. This shift in the locus of enforcement from human relations to hard technology has certainly "altered the traditional contours of copyright protection." As Yale Law professor Jack Balkin has argued, these words could be used to render the most pernicious parts of the Digital Millennium Copyright Act unconstitutional.

By outlawing technologies that could break through access controls around digital materials, Congress created a whole new technological regime and a new set of powers for copyright holders to use against scholars, librarians, students, and artists.

In the wake of this decision, if Congress and later courts are going to take Ginsburg's words seriously, they must take fair use and the idea/expression dichotomy seriously. They cannot take them for granted, as so many have in recent years.

The *Eldred* decision, in the words of University of Buffalo law professor Shubha Gosh,

"deconstitutionalizes" copyright, pushing it farther into the realm of policy and power battles and away from the principles that have anchored the system for two centuries. That means public interest advocates and activists must take their battles to the public sphere and the halls of Congress. We can't appeal to the founders' wishes or republican ideals. We will have to make pragmatic arguments in clear language about the effects of excessive copyright on research, teaching, art, and journalism.

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## Building a better system

Republican principles guided American copyright for nearly 200 years. But in the 1990s the elder Bush and Clinton administrations championed efforts to undermine the democratic safeguards that used to be built into the copyright system. In addition to signing a 20-year term extension, the Clinton administration and Congress acted on behalf of global media companies to champion international treaties that extend the power of copyright holders globally. And, of course, Clinton pushed for and signed the DMCA.

So the danger is clear. But how should we build a coherent coalition of activists who can share a resonant message with a broad, diverse, and concerned public? The way we choose to discuss copyright issues in the public sphere has left substantive deliberation to a select group of trained experts. The public has as deep a stake in the outcomes of copyright debates as any lobbyist or plaintiff. But the common rhetoric about copyright obscures much of what is at stake. As we have seen in the past 20 years the public has had a great and growing stake in copyright issues. At one point, Napster had 77 million registered users, more than twice the number of users that American Online enjoys. That means there were 77 million potential infringers walking our streets. And there are few Americans who have not wondered about the intrusive power of that video mattress tag — the FBI warning at the start of every rented video tape.

But we can't have the conversation that would lead us to that best possible copyright system as long as we continue to work within the limited rhetorical frameworks that we have inherited. We make a grave mistake when we choose to engage in discussions of copyright along the terms of "property." Copyright is not "property" as commonly understood. It is a specific state-granted monopoly issued for particular policy reasons. While technically, such terms describe real property as well, the public understanding of property is more fundamental, more exclusive, more natural, and precedes specific policy choices the state may make about its regulation and dispensation. When we engage in "property talk," we can't compete with the content industries. It's impossible to have a clear and reasonable discussion about what sort of copyright system might be best for the

United States and the world as long as those who hold inordinate interest in copyright maximalization can cry "theft" at any mention of fair use or users' rights. This is the "property-talk trap": You can't argue for theft.

Two rhetorical strategies have emerged out of the concern about the "property-talk trap." Most prominent is "commons talk." A growing number of activists and law professors are pushing for an appreciation of the "information commons." Sparked by a brilliant paper by Duke law professor James Boyle — titled "A politics of intellectual property: Environmentalism for the Net?" [7] — this movement toward preservation and expansion of an information commons resembles the environmental movement 40 years ago. With some good luck and hard work, these activists hope to build a similar level of public concern and awareness about how information operates in society, and the need for it to be commonly owned and shared. The best defense of the information commons can be found in a new book by activist David Bollier called *Silent Theft: The Private Plunder of our Common Wealth* [8]. In this sober and lucid book, Bollier considers issues as wide ranging as private exploitation of federal pharmaceutical research funds, the commercialization of public space, and the enclosure of the "academic commons." It is essential reading for anyone concerned with the future of "the public" and its potential survival. In addition, Lawrence Lessig argues persuasively for a commons on several "layers" of communication in his important book *The Future of Ideas* [9].

The second rhetorical strategy involves focusing on uses and users of copyrighted material — everyone who reads, writes, watches, photographs, listens, and sings. This is a more pragmatic approach, intended to warn people that the harmless acts they have taken for granted for years, such as making a mixed tape or CD for a party or "time-shifting" television programs and skipping commercials, are threatened by these recent changes in law and technology. The new organization [digitalconsumer.org](http://digitalconsumer.org) has generated a "Consumer Technology Bill of Rights" that aims to make private, non-commercial uses positive rights instead of weak defenses to accusations of infringement. Basically, this level of activism is focused on promoting the "right to read."

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## Conclusion

It is our duty as writers, scholars, and educators to make it clear to our students, our peers, our congressional representatives, and the public that copyright is a bargain, a good deal for everyone, when all interests are considered. As both copyright producers and users, we in the academy are in a good position to outline the complexity and benefits of such a deal. And we are in a good position to highlight the abuses that copyright holders have

engaged in since 1998. We must be blunt about the current system's threats to free speech, intellectual freedom, and the free flow of information. We must be careful not to be trapped into nihilistic rhetoric about the "end of copyright." Copyright need not end if we can rehabilitate and re-humanize it. Our culture and democracy depend on it. 

## About the Author

Siva Vaidhyanathan is the Director of Communication Studies at New York University and the author of *Copyrights and copywrongs: The rise of intellectual property and how it threatens creativity* (New York: New York University Press, 2001). The revised paperback edition came out in 2003 and includes an afterword, on which this article is based. Vaidhyanathan is also the author of *The anarchist in the library* (New York: Basic Books, 2004).

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## Notes

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