The Rhetoric of Intellectual Property
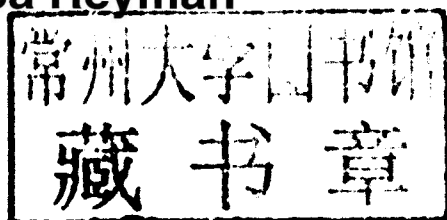
Copyright Law and the
Regulation of Digital Culture

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1 Copyright, Authorship, and the Internet

It has now been four decades since Joseph Licklider and Robert Taylor presented one of the earliest visions of what we now know as the Internet. In 1968 they coauthored "The Computer as a Communication Device," in which they predicted a global computer network of "distributed intellectual resources" (28) characterized by its accessibility by multiple users at disparate locations; its ability to help users share, manipulate, and locate data; as well as its facilitation of easy interactive communication among users. Licklider and Taylor's important work eventually contributed to the development of ARPANET, which later became the modern Internet. Their predictions, however, did not focus only on descriptions of human-computer interaction or the technical structure for sharing bits of information across a computer network. They were also interested in human-human interaction, the social dynamics of what they coined a networked "supercommunity." In the introduction to the essay, they made a provocative claim about networked communication:

> [T]o communicate is more than to send and to receive. Do two tape recorders communicate when they play to each other and record from each other? Not really—not in our sense. We believe that communicators have to do something nontrivial with the information they send and receive. And we believe that we are entering a technological age in which we will be able to interact with the richness of living information—not merely in the passive way that we have become accustomed to using books and libraries, but as active participants in an ongoing process, bringing something to it through our interaction with it, and not simply receiving something from it by our connection to it. (21)

In the years since, the suggestion that the Internet is a means for rich, active participation among computer users contributing toward "living information" has become an idealistic model rather than a representation of actual use. Indeed, we would do well to view this utopia with some skepticism, given the understanding that the Internet is not an inherently progressive

technology, in and of itself offering the promise of advances in intellectual and creative production.

There is much to be learned by examining the current state of the Internet and its role in cultural production in light of early predictions. Internet technologies carry with them certain social and cultural properties and are not free from the institutional structures that govern users' activities. The physical properties of the Internet have evolved in much the way Licklider and Taylor predicted: bits of information can now be shared across networks that connect with other networks of Internet users. However, the social dynamic is very different. Rather than forming a "supercommunity" of cooperative participants, the Internet in many ways consists of hierarchies of binary roles: producer-consumer, creator-user, writer-reader. The Internet is fraught with limitations imposed by legal structures that govern ownership of information, technical structures that limit how information can be accessed and used, and cultural norms that determine who can participate in creative and intellectual production and in what ways. Licklider and Taylor foresaw some limitations to their vision. At the time of their writing, they recognized a crucial challenge facing the development of the Internet: they asked, "[w]ill 'to be on-line' be a privilege or a right?" (41). While they predicted issues of access restrictions in terms of financial (cost of service) and technological (speed and reach) factors, we have since seen that limitations on activities often take the form of social and cultural norms, practices, and expectations. One such limitation is the increasingly restrictive application of copyright law in cyberspace. In recent years many activities previously taken for granted have become difficult or impossible because of copyright laws. Teachers face infringement notices when attempting to show class-related clips from DVDs to their students as a result of the anti-circumvention provisions in Digital Millennium Copyright Act (DMCA). Critics of strong yet controversial groups such as the Church of Scientology face censorship when copyright infringement claims are filed to prevent citations of key doctrinal content. Technology developers face legal action when developing peer-to-peer software that aids users in sharing files. And everyday Internet users face lawsuits from the Recording Industry Association of America (RIAA) for infringement when accessing and sharing online content. Media scholar Siva Vaidhyanathan calls examples like these copyright "horror stories" ("State of Copyright Activism"), and they have been growing in number in recent history.

OPEN ARCHITECTURE VS. CLOSED LAW

Since the advent of the Internet, we have witnessed a rising tension between the open architecture of the Internet and legal restrictions for online activities. Distributed file-sharing systems have forever changed the expectations of everyday users with regard to digital information. The Internet offers

much promise for cultural production in its offering of open access to information and the opportunity for user participation in creation and distribution of intellectual property. And with the introduction of Napster in 1999, peer-to-peer file-sharing technologies offered the types of online activities that took this open architecture a step further to break down the binary between sender and receiver in Internet communication. While in its early forms the Internet allowed interactions among users that were open and free in the sense that anyone with technological access could take part, the model of participation remained hierarchical in another sense, as it was based on a client-server structure. This client-server structure of Internet applications, such as Web browsers, is different from the client-client structure introduced by peer-to-peer technologies in terms of its technical workings. The client-server structure requires that an application, the "client," make a request to another application, the "server." The client waits for a reply from the server, which processes the request and returns the information to the client. Data are centralized, residing on servers that control which users will be granted access to the information. This structure creates an imbalanced relationship between the two participants in the interaction: a client relies on a server that has ultimate control over the exchange. The client-client structure, which is the basis for peer-to-peer file sharing, represents an alternative model of information exchange on the Internet. The client-client model allows each data host to act simultaneously as both a client and a server. Each has equivalent technical responsibilities and equal status in the interaction, and there is no centralized server that controls content. Further, as the number of clients in a client-client network increases, so does capacity on that network.

Internet communication scholars remind us that peer-to-peer file sharing is not a distinct, dramatically different concept but, rather, is one that was built on the existing ideology of the Internet. John Logie notes the continuity between existing Web applications and peer-to-peer file-sharing applications in an effort to show how the peer-to-peer file-sharing debate has implications for the future of the Internet. In fact, he asserts, *"the Internet itself is . . . a peer-to-peer network"* (*Peers, Pirates & Persuasion* 129, italics in original). Logie argues that, long before Napster, the level relationships among users that are created by peer-to-peer file exchanges were present on the Internet in different forms such as participation on Usenet groups, which lack a central server. Internet communication scholar Tarleton Gillespie likewise asks us to reconsider the history of peer-to-peer file sharing as a "dramatic new innovation." Instead, he argues that "[t]he applications that appeared and proliferated alongside Napster were not new; they merely expanded on the architecture of the Internet, building on the same logic as a host of applications that preceded them, and drawing on models of information distribution with a long, if often marginalized, history" (*Wired Shut* 44). Peer-to-peer file sharing, then, was not so much a revolutionary technological development as a

conceptual shift in the fundamental structure of existing content distribution models that relied on an imbalanced power differential between producers of content and consumers of content.

At the same time that peer-to-peer file-sharing technologies were being developed and made available, U.S. copyright law demonstrated a decided trend toward more restrictions over what Internet users were able to do with digital materials. The Digital Millennium Copyright Act (DMCA), codified in 1998, asserted new "anti-circumvention" provisions that made illegal any attempt to defeat anti-piracy protections added to copyrighted works and banned circumvention technologies used for that purpose. In 2003, the Supreme Court in *Eldred v. Ashcroft* upheld the constitutionality of the Sonny Bono Copyright Extension Act (1998), which extended copyright ownership an additional 20 years beyond the provisions of the 1976 Copright Act. More recently we have seen the content industries win cases against peer-to-peer file-sharing services (*A&M Records v. Napster*, 2001), file lawsuits against individual users of the networks, and challenge the legality of the technologies themselves (*MGM Studios v. Grokster*, 2005). And the legal battle continues with the ongoing development of new technologies of distribution, such as YouTube (*Viacom v. YouTube*, filed in 2007).

In conflict with recent legal history are many efforts by Internet users to resist increasingly restrictive copyright protections. Copyright activist groups (such as Public Knowledge, Creative Commons, and the Electronic Frontier Foundation), open access publishing initiatives (including the Public Library of Science and PubMed Central), and copyright scholars with public followings (like Lawrence Lessig and Siva Vaidhyanathan) have all sought in their own ways to resist new legal developments. These organized groups and individuals have reached audiences and garnered support through active online presences, public lectures and appearances, exposure through news media, and print publications. In addition, many individual citizens are resisting legal restrictions on the use of intellectual and creative products by simply not acknowledging them. The 2003 Pew Internet & American Life Project report "Music Downloading, File Sharing, and Copyright" indicates that two-thirds of Internet users in the U.S. who download digital music files say they "do not care" if the music is copyrighted. These activities, to various degrees, represent resistance to applications of copyright law that citizens believe curb the benefits of the open architecture of the Internet for the development, distribution, and use of intellectual and creative works.

As a result, a gap has emerged between the reality prescribed by the law and the social reality of Internet users' everyday lives. Recent interpretations and applications of copyright law are in direct conflict with widely accepted social beliefs and practices surrounding cultural production in a digital age. Court cases have become sites of conflict between more than two parties. They are also the battleground for competing value systems in our culture: one of control, which relies heavily on comparisons

of intellectual property to physical property and emphasizes ownership, theft, and piracy; and another the value of community participation, seen in the implementation of new concepts such as that of an intellectual "commons," which emphasizes exchange, collaboration, and responsibility to a public good. The question that arises in such courtrooms is, "does the free exchange of copyrighted works on digital networks represent an act of protest to an overly restrictive copyright regime, or is it simple opportunism?" To the content industries, the answer is obvious: "consumers want things for free." I believe the answer is not that simple. While the behavior of file sharers engaging in infringing activities, such as using digital networks to exchange copyrighted text, music, and movie files, may be not be a political act of protest in itself, the development and use of peer-to-peer technologies represents a conceptual challenge to a pre-Internet model of cultural production that relies on increasingly restrictive copyright law and its application in digital environments.

This book focuses on the tensions that are created by this conflict within the ongoing debate surrounding digital copyright law in the U.S. The high-profile public debate has its roots in the enduring legal battle surrounding peer-to-peer file sharing. The legal history of peer-to-peer file sharing can be traced back to 1999, when college student Shawn Fanning developed a technology called Napster, which was one of the first file-sharing applications released on the Internet. The service garnered a large following of music fans that liberally traded copyrighted music files on the network. The recording industry did not approve of such activity, and in 2001 a federal judge forced Napster to shut down (*A&M Records v. Napster*). (Napster has since relaunched under different ownership as a pay-per-use service.) Not long after the Napster decision, a second generation of peer-to-peer file-sharing technologies emerged to take Napster's place. In October 2001, the major music and movie companies sued developers of two of these new peer-to-peer file-sharing applications, Grokster and StreamCast Networks, for contributing to the "theft" of millions of copyrighted music and movie files.

In 2004, the Ninth Circuit Court of Appeals upheld a lower court ruling that file-sharing software could be used for legitimate purposes and was therefore protected under the 1984 *Sony-Betamax* ruling (*Sony v. Universal Studios*). The Supreme Court agreed to hear the case in December of 2004, and on June 27, 2005, the Court held that the developers of peer-to-peer file-sharing technologies are liable for inducing the infringing activities of their users. This ruling was, in effect, in favor of the content industries and soon motivated Grokster to shut down its peer-to-peer file-sharing services[1].

In the wake of the demise of these popular file-sharing services, users have found new ways to share content. At the time of this writing, music lovers continue to download music files through the use of torrents (a file created by a BitTorrent client) or mp3 blogs, and movie and television fans now regularly share videos online through services such as YouTube. And

the legal battle continues. Just four months prior to the *Grokster* ruling, the popular online video community YouTube, now with millions of members, was launched. In March of 2007, Viacom filed a $1 billion lawsuit against the video-sharing service YouTube for the more than 150,000 videos that are shared by YouTube users. According to the complaint filed in the U.S. District Court for the Southern District of New York, "YouTube has harnessed technology to willfully infringe copyrights on a huge scale," threatening not just Viacom but "the economic underpinnings of one of the most important sectors of the United States economy" (*Viacom International v. YouTube* Compl. para. 2). This case continues, but certainly will not end, the legal battle over copyright law and digital networks.

Seeking to establish where the line should be drawn between protecting copyright and encouraging innovation, the digital copyright debate reveals the tensions among several interested parties: artists and creators, users of copyrighted works (including students, researchers, and instructors), content industries, and technologists. A look at the history of copyright law in the U.S., as discussed more fully in Chapter 3, shows us that these tensions are not new. Technological development has both presented challenges to and opened new outlets for the creation and distribution of copyrighted works. From the Gutenberg printing press to the player piano to the Xerox machine to the VCR to the CD burner to the mp3 player, new technologies have upset the balance between copyright protection and innovation. What makes the current digital copyright debate significant, however, is that it is situated within a culture marked by increasingly centralized markets for content and a proliferation of legal restrictions for online activity that run counter to the values promised by new Internet technologies: active participation and sharing. As Lawrence Lessig cogently argues in *Free Culture*, "*Never in our history have fewer had a legal right to control more of the development of our culture than now*" (170, italics in original).

INTELLECTUAL PROPERTY IN RHETORIC AND WRITING STUDIES

The implications of this debate are great for rhetoric and writing studies. The field has had a long-standing interest in the relationship between authors (authors, artists, musicians, moviemakers, on the production side) and users (readers, listeners, viewers, on the consumption side), particularly as affected by digital communication technologies. While the Internet is a site for distribution of materials, it is also a site for the range of activities involved in cultural production, or the social processes through which a culture produces, circulates, and consumes creative and intellectual works. The Internet is different from pre-digital technologies used for cultural production (such as the printing press and the videorecorder) in that who can participate and in what ways is more open. The technical structure of the

Internet allows readers/users/consumers to move easily into the role of writers/creators/producers. It is this difference that makes a study of cultural production on the Internet of interest to rhetoric and writing-studies scholars. Discussions of copyright and its application to peer-to-peer file-sharing technologies may seem relatively uninteresting, as the digital copyright debate appears focused on distribution rather than production of information. And rhetoric and composition researchers may very likely not have an interest in the legal fate of a particular peer-to-peer file-sharing service or whether an Internet user can download Brittany Spears' latest album for free. However, copyright debates that address peer-to-peer file-sharing technologies are about more than a particular peer-to-peer file-sharing technology or a particular type of content. The debates have implications for the future of cultural production on the Internet. Analysis of the digital copyright debates reveals not only a clash between users who want to trade copyrighted music files and the RIAA, but also a clash between differing conceptual models for cultural production. Peer-to-peer file-sharing programs are more than a threat to the economic and legal structures for selling music; they are also a challenge to a cultural model for producing and distributing content that is based on exclusivity and centralized control by powerful content industries.

This point is often underemphasized in current scholarship in rhetoric and composition on intellectual property. Too often the academic debate about digital copyright fails on one of two fronts. First, scholars face the danger of conflating the issues of production and consumption, assuming that it is obvious why discussions about technologies that enable peer-to-peer file sharing, which appear primarily to distribute content, have relevance for writing, creativity, and production online. Or, on the other side, researchers fail to address intellectual property issues outside of the classroom, in the context of the important public debate about peer-to-peer file sharing, claiming that the subject falls outside of the realm of what we, as writing scholars, ought to be concerned about. This limited view of the relevance of the digital copyright debate is consistent with how the debate has been framed in public discourse. The content industries have successfully positioned the public debate as one about *distribution* of music and movie files, arguing that peer-to-peer file sharing on the Internet endangers the Internet as a distribution mechanism. The Internet envisioned by the content industry is a digital marketplace, very different from the rich center of participatory cultural production envisioned by writing studies scholars.

As my analysis will reveal, in the rhetoric of the digital copyright debate a binary is reinforced between distribution-production and consumer-creator in discussions about cultural production on the Internet. In fact, the role of the Internet user as creator is often absent or, at best, lacks agency in the debate. Arguments from representatives of the entertainment industry and from legal authorities often present a rather narrow emphasis on the consumption side of the copyright debate, focusing on users as consumers

of content products, without recognizing the dual roles that users play: as viewer/readers/consumers as well as writers/creators/producers. However, throughout this book I argue that distribution and production are interrelated concepts in the digital age and that the Internet functions as a site for both. By challenging the distribution-production binary in these rhetorical frameworks, we can see that these issues extend beyond a debate about music file sharing and into a larger debate about the future of cultural production on the Internet. In this way—by explicitly acknowledging that the digital copyright debate is about both distribution *and* production— rhetoric and composition scholars can take a positive step toward helping to clarify the relevance of intellectual property scholarship to our work.

The discourse of digital copyright law offers an ideal site for studying this conflict between models of cultural production, as it addresses these issues in the context of a high-profile public debate. The 2005 Supreme Court decision in *MGM Studios v. Grokster* and the ongoing legal battles that have extended even to college campuses have spurred the debate in recent years, representing the newest developments in a pattern of systematic change toward an imbalance of rights under the current property regime in copyright law. This book tells the story of the digital copyright debate from a rhetorical perspective. A closer look at the language of the debate offers insight into a larger struggle between the open architecture of the Internet and the closed architecture of recent copyright law. Within the debate, several rhetorical frameworks clash, including a discourse of property and control, relying heavily on comparisons of intellectual property to physical property and resting on a history of copyright law that is entrenched in property laws, and another a discourse of freedom and sharing, introducing new legal concepts such as that of an intellectual "commons," and emphasizing exchange, collaboration, and communal responsibility. As my analysis reveals, these frameworks rely on technological determinism, positioning digital technologies as either inherently progressive or destructive. Such frameworks fail to define the Internet in terms of its users, as a space for both production and consumption, as an interactive site of active and nontrivial participation in cultural production.

AUTHORSHIP AND THE RHETORIC OF COPYRIGHT

Rhetoric and composition scholars' interest in copyright, or what is often called "intellectual property studies," can be traced to the study of the concept of a proprietary owner of a work, or "authorship." Authorship has been questioned, challenged, and reconstructed in rhetoric and composition in response to changing understandings of the composing process, particularly as affected by the introduction of new technologies for reading and writing. Drawing on scholarship from the related fields of Internet communication, literary studies, and law, the growing area of research