Copyduty: Saving Fair Use in the Coming Era of "Privacation"

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> *We may well see the day when our students are taught not of "copyright" but of "copyduty" — the legal duty of copyright holders to assure public access. That, I believe, would be progress.* — Professor Larry Lessig [1]

Today, the Internet is a pirate's paradise, or at least it is perceived as such. The instant and practically costless copying and distribution the Net facilitates have made many creators, authors, and copyright-holders balk at digitizing and posting their ideas. In an effort to protect their work, publishers and other idea-peddlers have lobbied for stricter legal intellectual property [IP] protection. More important, they have scrambled to develop code solutions to the copying problem.

As a result, argues Mark Stefik, "technology is altering the balance again." [2] In the near future, trusted systems may provide IP owners with far more protection than the law currently does. "[S]ome legal scholars believe the change is so dramatic," says Stefik, "that publishers will be left with too much power, undercutting the rights and needs of consumers and librarians." [3] Intellectual property, despite Thomas Jefferson, may not necessarily be "incapable of confinement or exclusive appropriation." [4] Some fear that IP owners will keep their goods locked up well past the copyright lifespan, that fair use will become an empty privilege, and that even uncopyrightable works will be kept outside the public domain. The Internet could become the proprietor's paradise—not the pirate's—with even the fairest of users at the mercy of protective code. Those who celebrate the death of copyright may find themselves dancing upon the grave of fair use.

It is in this context that Lessig's "copyduty" notion comes into play. Those of Lessig's mindset [5] express concern that self-help run amok may upset the balance of copyright law. Far from an absolute right, copyright is merely a means to the end of a society rich with ideas and innovation. "The protection that the law allows is just enough to create an incentive to produce," says Lessig, "and is not so much as to produce a choke on future production." [6] Thus, the "copyduty" camp argues that copyright law—at least as it applies to Net-based IP—must undergo a fundamental transformation. In the traditional world of publication, copyright's role was to intervene on behalf of IP holders' rights. In the future, in the world of "privacation," it must step in to check proprietors' unlimited private power to ensure public access to creative works.

Such a change would not be minor. As it is now written and construed, Section 107 of the Copyright Act—the "fair use" provision—only *permits* alleged copyright infringers to make fair use copyrighted works; it does not entitle them to do so on demand. Procedurally, it serves as an affirmative defense, not an independent cause of action. In the language of legal realist forefather Wesley Hohfeld, fair use is a privilege, not a right. Copyduty, on the other hand, would make fair use a right, and, as its name implies, impose a duty upon IP holders to grant the public fair use upon request.

Yet how would such a regime be implemented and enforced? Are copyright-protective trusted systems to be selectively broken up by government power, or could private action, led by enterprising code-breakers, suffice? And what kinds of challenges—legal and logistical—would copyduty face? Despite the appeal of their rhetoric, Lessig and other friends of fair use offer no clear vision of the specifics of copyduty.

At risk of biting off more than it can chew, this paper seeks to sketch a picture of how such a system might be implemented. First, I address and attempt to dispense with the possible legal and political hurdles copyduty would face, including objections based on First and Fifth Amendment grounds. Second, I explore the feasibility of various copyduty enforcement mechanisms.

Throughout, the question "How is the Internet Different?" looms in the background. To attempt to answer this question, I will refer back from time to time to a simple cyberspace-versus-realspace analogy. While many cyber-pundits compare trusted systems to safes or lockboxes, I prefer a different, though far from perfect, comparison: fair use under copyduty would be like a public easement—say, a sidewalk. The trusted system, then, would be analogous to a fence.

Let me explain. Fair use is a limitation on a copyright holder's property interest; similarly, the concept of a public easement is a limitation upon a real (in both senses) property owner's interests. Like fair use, a sidewalk benefits the public at the cost of an individual owner's absolute dominion of her property. And just as a pedestrian could invoke the power of the government to prevent a landowner from blocking the sidewalk running through her front lawn, a fair user under copyduty could legally force an IP owner to grant access to her work. I ask the reader to keep this analogy in mind as the paper progresses.

I. Copyduty and the Constitution—Legal Challenges

Would Copyduty Amount to Compelled Speech or "Forced" Association?

Foes of copyduty might invoke the First Amendment doctrine of compelled speech or argue that copyduty violates an IP owner's freedom of association. By what right, the argument might go, does the government demand that I let anyone else quote *my* words, *my* ideas, *my* expressions?

In light of the First Amendment, an opponent of copyduty might argue, cracks appear in my simple fair-use-as-sidewalk analogy. Making a citizen give up exclusive control over part of her land is contentious enough; forcibly dislodging her words or expressions—for use by a total stranger or even a political rival—is completely unacceptable.

A relatively simple, though extreme, hypothetical would test even the most zealous copyduty advocate's dedication. Imagine that the NAACP posts a code-protected editorial on its website, and a white supremacist organization demands that the NAACP do its "copyduty" by allowing them to copy the piece and add their own comments in the margins and between the lines—arguably a fair use of the document. Surely society cannot ask the NAACP to associate itself with its mortal enemy.

But it is not such a simple case. First, no one reading the white supremacists' "annotated" version of the press release would confuse its message with the NAACP's. No one would think that the NAACP has suddenly endorsed or become affiliated with the hate group. In this regard, the most extreme cases might be the easiest ones; a trickier case would involve a copyist whose philosophy or identity closely resembles the IP owner's. Yet even this latter scenario would not prove too problematic, since the common law doctrines of misappropriation, false advertising, and unfair competition would likely prevent forced fair uses that bordered on "passing off" or other forms of consumer deception.

Second, the First Amendment argument could be flipped in copyduty's defense: the spirit of the First Amendment calls for the free flow of ideas, and the notions of "fair use" and "public domain"—concepts copyduty is designed to protect—are imbued with the same spirit of free information exchange. [7] From this angle, speech is not an individual's private property, but part of the public discourse. Remember that the ultimate aim of copyright, and the constitutional provision from which it stems, is not to protect individual IP owners, but "to Promote the Progress of Science and useful Arts." [8]

Copyduty, therefore, might be the Constitution's agent rather than its adversary. It could prove a useful tool in checking the power trusted systems grant IP owners, thereby helping to achieve the constitutional balance between rewarding authors and fostering a rich public exchange of ideas.

Would Enforcing Copyduty Amount to a Takings?

Copyduty might also face Fifth Amendment challenges based upon the doctrine of Takings. Opponents of copyduty might apply the phrase "Nor Shall Private Property Be Taken For Public Use Without Just Compensation" to the affirmative right of fair use. [9] After all, a fair use doctrine actively enforced by the government is a "public use"—as I have argued above—and copyrighted and encoded IP certainly appears to be private property. Recall the sidewalk analogy: if the government establishes a public easement across your front lawn, chances are high they will have to pay you for it. Likewise with copyduty, some might argue. And a regime in which every copyduty "Taking" were subject to litigation and constitutional scrutiny would likely be a prohibitively inefficient and expensive one.

Yet the Fifth Amendment challenge is not difficult to overcome. The key lies in the word "to take" and in the nature of intellectual property. Unlike real property, intellectual property can be "taken" and used without being diminished or affected. When the government lays a concrete strip across your front yard, you can no longer grow flowers in that area; when the government lets schoolteachers freely copy your web-based photographs, the images remain whole and unaltered for your use and enjoyment.

Furthermore, many of the factors weighed in a Takings analysis are already built into Section 107, the fair use statute. Where the Takings doctrine asks how strong and "public" the purpose of the regulation is, Part 1 of Section 107 calls upon courts to assess "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." [10] Where Takings analysis considers the type of property entitlement abridged and the degree to which the private property is quasi-public [11], Part 2 of Section 107 looks to "the nature of the copyrighted work." [12] Where Takings considers the net effect of a regulation upon the worth of an entire property, Part 3 of Section 107 weighs "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." [13] Where Takings asks how severe the adverse economic impact of the regulation, Part 4 of Section 107 considers "the effect of the use upon the potential market for or value of the copyrighted work." [14] Given these similarities—and since copyduty would be enforced only when a fair use was found—subjecting copyduty to a Takings analysis would be largely redundant.

Copyduty and the Right to Bear Arms?

If the reader will permit me to indulge a whim, I will now briefly consider a Second Amendment analogy to copyduty. In the

debate over the future of trusted systems, some commentators have articulated a concern that a purely private, self-help regime will result in "code wars" between hack-savvy fair users and code-happy IP owners. The escalation of technology envisioned is sometimes described as a kind of "arms race." Given this terminology, it is possible (though highly unlikely) that the rhetoric resembling that of the gun-control debate seeps into the trusted systems discourse.

Yet, considering the philosophical implications of the trusted systems issue, perhaps it is not too far-fetched an analogy. Like the NRA, the foes of copyduty and the champions of trusted systems do not fear private means of self-defense and are reluctant to hand the implements of power (guns, code) over to the government. Like gun-control advocates, the copyduty camp are loath to leave powerful weapons in private hands and prefer a policeman/copyduty-cop on every street corner to a gun/trusted system in every home(page).

Unlike guns, though, trusted systems can be narrowly customized to work only against certain trespassers, and are passive, defensive weapons—again, more akin to fences than firearms. [15]

II. But Is Government Intervention Necessary? Possible?

Having examined some possible constitutional objections to copyduty, I now turn to the more serious logistical challenges of instituting such a regime. Problems of enforcement on the Net are notorious. The speed and anonymity with which outlaws can operate—and the jurisdictional tangles associated with an international network—spell the end of traditional legal enforcement, or so goes conventional wisdom.

So would government-enforced fair use be a futile, albeit well intentioned, policy? Wouldn't a market solution be a more feasible alternative? Despite the chorus of support for such a position, I am skeptical that the problem will take care of itself without some form of government initiative.

Take John Perry Barlow's approach, perhaps best summarized in his essay "The Economy of Ideas" and in his recent "appearance" in the *Atlantic Monthly*'s "Roundtable on Intellectual Property." In Barlow's vision of the future of cyberspace, authors will make their works available for free, not out of fear of government sanction, but out of rational self-interest. Just as readers prefer bookstores (and their record-shop kin) that allow them to browse before buying, cyber-authors will gradually learn that the public will consume much more of their work if given free samples. What creators lose in sales revenue they will more than make up for in ticket sales for live performances, lectures, appearances, and even merchandising. The reports of the death of fair use are exaggerated, he claims: shrewd authors won't bind their ideas up with code, they will gladly distribute them to anyone willing to listen, knowing that they will be duly compensated—in fact, better compensated—through other channels.

Barlow, for years a lyricist for the Grateful Dead, is fond of celebrating the Dead's policy of allowing fans to record their concerts. "In regard to my own soft product, rock 'n' roll songs," Barlow writes, "there is no question that the band I write them for, the Grateful Dead, has increased its popularity enormously by giving them away." [16] And he argues that others do likewise: "Most of the folks who presently make their livings by their wits do so not under the protection of legally instantiated methods of 'owning' their own intelligence or expertise but rather by defining value on the basis of continued and deepening interaction with an audience or client base." [17]

Despite its appeal, this approach has several problems. First, Barlow's notion of voluntary fair use does not account for authors who are not also performers. This list would include the inarticulate poet, the reclusive novelist, the dead filmmaker (or her widower), and any painter or photographer without a taste for performance art. Second, and more important, Barlow's vision of voluntary sharing often describes good old-fashioned marketing, not fair use. As laid out under Section 107, fair use does not excuse infringers because it is ultimately in authors' economic interest to do so, but because some copying is simply too socially valuable to proscribe. Fair use is meant to apply in exactly those situations in which the copyright holder is *not* willing to allow access; given that it's an affirmative defense, fair use never arises unless an IP owner sues for copyright infringement. So the idea of *voluntary* fair use seems oxymoronic.

Others, including Tom Lipscomb of Center for a Digital Future, have suggested that market forces will eventually correct abusive trusted systems, forcing IP owners and trusted-system designers to compete to provide the "fairest" code. That is, trusted-systems programmers will offer electronic copyright protections that feature the same owners' rights and users' privileges (including fair use) established by copyright law because users will demand it.

This argument also fails on several levels. First, consumers of copyrighted expression have little consumer choice; they cannot "shop around" for similar ideas offered in friendlier trusted-systems packages, since anything too similar will likely be a copyright infringement of the original. Since copyright is essentially a limited monopoly, no perfect substitutes exist for

copyrighted works—almost by definition. [18]

Furthermore, the features of many trusted systems will often be invisible to the would-be fair user, and therefore quite difficult to bargain around or base comparisons on. In this sense, the various restrictions trusted systems could impose on a user resemble the fine print used in real-space contracts of adhesion—both are terms that bind without having been specifically agreed to. Indeed, such "clickwrap" agreements are perhaps even more oppressive than traditional adhesion contracts, since the former involve self-executing terms that may never be reviewed by a court. [19]

Finally, a fairly intuitive point, best articulated by Lessig: "Just as we would expect few to buy lock to their house that permits 'fair use' by neighbors, we should expect few to buy a lock for their intellectual property that would permit 'fair use' by others." [20] Only the most conscientious (or foolish) IP owners would demand that their trusted systems not offer greater protection than copyright law.

III. Implementing Copyduty: A Powerful Concept—but an Empty Right?

Given the shortcomings of the market-solution arguments, then, it seems plain that the notion that some form of government action to enforce copyduty might be, at the very least, worth considering. But how, precisely, would such a regime be implemented? For reasons explained below, my optimism about the possibility of a workable copyduty regime is measured. Consider the following options, discussed in increasing order of feasibility.

A. Contingent Copyright?

One possible means of enforcing copyduty would be to make copyright protection contingent upon compliance with copyduty. Under such a regime, copyright protection would depend on an IP owner's compliance with fair use as an affirmative right. Periodically, perhaps every year, the government could consider revoking or suspending an IP owner's copyright if thwarted fair users filed a certain number of complaints regarding the proprietor's overly protective trusted systems. Proprietors whose works were considered particularly valuable to the public discourse—for example, copyrighted works with significant educational uses—might be subjected to a stricter review process.

Yet the shortcomings of this proposal are plain. First, it would be an administrative nightmare, as most efforts at traditional regulation of the Internet tend to be. Governmental monitoring of myriad "outlaw" websites' practices would be costly, if not impossible. Even if a kind of quasi-private, Better Business Bureau for Copyright were established, it could not keep pace with the rapid growth of intellectual works on the web. Furthermore, revoking an IP owner's copyright protection might prove a toothless punishment in a world of trusted systems. If a proprietor can adequately secure her works through private means, what difference will it make if copyright protection is made unavailable? Who needs the constable when you have the perfect fence?

B. On-Line Library of Congress?

Another possibility would be to create an on-line Library of Congress, or at least a branch of the Library that housed virtual copies of all copyrighted works. Potential fair users who encountered overly exclusionary trusted systems could simply access the Library's web-based copy, much as any citizen can stroll into the actual Library to peruse the books on its shelves. To discourage pirates from taking advantage of this arrangement, the Library could protect its copies with its own trusted systems, specially tailored to prevent repeated copying, unrestricted distribution, or other "unfair" uses.

Yet such an approach would probably suffer from the same problems as the "contingent copyright" system described above. IP owners would simply refuse to file their works with the Library, thereby foregoing copyright protection, and take their chances with private means of protection. Even if proprietors cooperated with the filing system, the government would face an organizational problem unprecedented in the history of library science: maintaining web pages for every piece of Net-based IP in the United States.

C. Fair Use-Friendly Systems Backed by Uncle Sam:

A Government-Induced Network Effect?

A somewhat more promising (and decidedly more interesting) approach to copyduty enforcement would be a government initiative to promote the widespread use of a trusted system that offered the same protections as, but no more than, those provided by copyright law. The government might heavily subsidize a trusted system that offered adequate protection against wholesale copying but allowed the duplication of phrases or small portions of works, or granted educational institutions wider latitude in their uses of copyrighted materials. Once the public became "hooked" on this cheap, fair use-friendly system—and, crucially, once the network externalities of the widespread use of such a system set in—the government could recede from the market. This approach would limit governmental intrusion (as compared with options A

and B above) and greatly reduce administrative costs.

Yet this policy would have serious limitations as well. A fair use-friendly trusted system might not catch on as quickly or effectively as, say, the QWERTY keyboard, or Microsoft Windows, or other computer features or protocols that have become industry standards and have thus benefited from network effects. This is because the fair use-friendly trusted system, in comparison to more protective systems, would put its user at a distinct disadvantage for reasons *entirely separate from the network-effect variable*: it would provide less protection than the systems offered by the market. In comparison, different keyboard arrangements and other standardized features are fairly neutral technologies and do not, *in and of themselves*, significantly benefit or disadvantage users. [21]

In fact, there is no indication that trusted systems are susceptible to network externalities at all. Unlike the markets for operating systems or standardized protocols, the world of trusted systems involves two distinct—in fact, competing—market interests: those who use trusted systems and those who want to get around them. Unlike the telephone, or the common operating system, or the standardized protocol—all of which *facilitate* communication—trusted systems' principle goal is to *impede* interconnectivity, or at least to customize the terms on which it occurs. Thus, while there may be a benefit in using the same trusted system as other IP owners or paying consumers—in order to share IP securely with them—there is no advantage to using a trusted system that allows access by non-paying strangers. Again, recall Lessig's fair-use door lock comment [22], or my fair-use-as-public-easement analogy: [23] landowners will not invest in permeable fences with "friendly" locks, no matter how inexpensive or popular they are.

A. Legislating Code?

In a recent Note in the *Stanford Law Review*, Mark Gimbel makes brief mention of another method of enforcing copyduty: legislating code.

> One can just as easily use trusted systems to enforce the letter and the spirit of existing intellectual property law as to circumvent it.. . . If we believe fair use is an important privilege, we can prohibit the digital rights that might encumber it. In short, we can create a federal digital property rights language and give it the force of law. [24]

In a way, Gimbel's suggestion is a variant of option C—a form of government-sanctioned trusted system—though it relies on direct and sustained government action and enforcement. Where the induced network-effects approach is all carrot, Gimbel's approach seems to be pure stick. Though perhaps inelegant, legislating code seems much more certain to produce standardization and compliance than government subsidization.

At least upon first glance. Unfortunately, Gimbel does not elaborate upon his suggestion, leaving the details of implementation and spin-off constitutional issues "for another day." [25] Gimbel's note sets out appealing ideals yet stops short, understandably, of addressing the issue of *enforcement*, the specter that haunts Internet regulators. Even if Congress were to mandate use of fair use-friendly trusted systems, resistance would likely be considerable, and enforcement problematic, as usual.

Administrative costs of traditional means of enforcement might be prohibitively costly and slow. For example, if every instance of an IP user wielding overly protective code resulted in a lawsuit, courts' dockets would likely overflow with copyduty cases. Furthermore, the fast-changing nature of the web might create evidentiary problems, as IP owners could remove their works from the web by the time of trial, and could probably do so without a trace. [26]

Another problem with the traditional lawsuit as enforcement mechanism is that small-time plaintiffs—those with complaints about relatively "unimportant" IP lock-ups—will likely be discouraged by legal costs from bringing suit. That each of these minor infractions will go unremedied is not particularly troubling; that phenomenon is an unfortunate reality generic to every field of law. More worrisome is the practical effect it would have on IP in the aggregate. Unsophisticated players, everyday people—those who arguably benefit the most from IP—would be left without a practical means to participate in a semiotic democracy.

IV. Conclusion

Despite the shortcomings of the defenses of fair use I have suggested, copyduty may not be a lost cause. If friends of copyduty can convert active citizens to their camp, awareness will increase and, slowly, attitudes will change and demand that the law change with them. In this light, Gimbel's suggestion—perhaps if combined with option C, government-subsidized trusted systems—may not be as ineffectual as first thought. Rather than reflecting public opinion, legislation could shape it. Positive law could dictate normative trends: once the law formally acknowledges copyduty (and draws public attention to the issue), citizens may take note and adjust their opinions and practices accordingly.

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