

COPYRIGHT'S PUBLIC-PRIVATE DISTINCTION

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I'd like to focus my remarks on the question of user privacy. In her fascinating paper for this Symposium, Prof. Litman expresses a guarded optimism that in its forthcoming decision in *MGM v. Grokster*,¹ the Court will retain the staple article of commerce doctrine that it first articulated in *Sony*.² She opines, however, that the user privacy strand of the *Sony* decision is a lost cause. I don't believe that it's possible to retain the staple article of commerce doctrine while abandoning user privacy. At least in the realm of networked digital technologies, the two concepts are inextricably linked. To explain why, I'd like to begin by examining a concept that I'll call copyright's public-private distinction. This distinction does not concern the presence or absence of state action, but rather the presence or absence of conduct triggering legal accountability.

Copyright's public-private distinction used to be both clearly stated on the surface of the law and transparently visible in the law's operation. For users, public performances and displays incurred liability; private performances and displays did not.³ For copyright owners, publication without notice forfeited copyright; private distribution without notice did not.⁴ For both users and copyright owners, then, conduct in public was distinct from conduct in private, and conduct in public had legal consequences that did not attach to conduct in private. By necessary implication, some other kinds of user conduct in private also were sheltered by copyright's public-private distinction. Some of these kinds of conduct, such as private copying, were formally covered by section 106 of the copyright Act.⁵ But it wasn't necessary to formalize the

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¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004).

² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); see Jessica Litman, *The Sony Paradox*, 55 CASE WESTERN RESERVE L. REV. __, __ (2005) [CWLR please add].

³ See 17 U.S.C. § 106(4)-(5).

⁴ See 17 U.S.C. §§ 401-406 (1988); 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.02-04 (2004).

⁵ 17 U.S.C. § 106(1).

implication of a shelter for private copying, because nobody was interested in testing it. There was little interest in knowing much about ordinary users and no interest in suing them.

Much has changed. For copyright owners, the public-private distinction ceased to have any meaningful bite in 1989, when publication without notice ceased to matter.⁶ For copyright owners, conduct in public no longer has potentially drastic legal consequences. For users, the result has been different. Increasingly, for users, it seems that the law no longer recognizes conduct in private. According to the current Register of Copyrights, digital communications networks and technologies “seamlessly” transform acts of private copying into acts of public distribution – acts, that is, in public, with public consequences.⁷ This view finds support in the views of some prominent academic commentators, most notably Stanford’s Paul Goldstein, who argued in 1994 that the death of copyright’s public-private distinction would be necessary to the success of copyright in the digital age.⁸

For Internet users suspected of infringing copyrights, the consequences of conduct in public also have changed. Conduct in public now triggers private justice. The private justice process begins with streamlined procedures for exposing users’ identities. For material posted on the web, these procedures are automatic and entirely extrajudicial.⁹ For users of peer-to-peer (P2P) file-sharing networks, judges are involved, but have acquiesced in the development of a streamlined protocol for processing so-called *John Doe* subpoena requests. This protocol originally evolved as a relatively evenhanded balancing test for evaluating corporate defamation suits against anonymous online whistleblowers.¹⁰ In the P2P context, however, the test guarantees virtually automatic disclosure of users’ identities. Courts have concluded that the countervailing interests most likely to be raised by users – noninfringement, fair use, privacy, and freedom of expression – either need not be considered or need not be taken seriously.¹¹ Once disclosure has been obtained, the private justice process then funnels the information to private settlement service centers tasked with making users an offer they can’t refuse: a quick and relatively painless alternative to public exposure in federal court followed by what telephone

⁶ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § _____, 102 Stat. 2853, _____ (1988), *codified as amended at* 17 U.S.C. §§ 401-406. [need pincites]

⁷ Marybeth Peters, *Copyright Enters the Public Domain*, ___ J. COPYRIGHT SOC’Y 701, 708 (2004). [need volume number]

⁸ PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (1994)

⁹ See 17 U.S.C. § 512(h).

¹⁰ See, e.g., *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. 2001); see generally David Sobel, *The Process that “John Doe” is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3 (2000) (discussing the legitimate interests of whistleblowers in anonymity and the importance of incorporating procedural protections into the “John Doe” subpoena process).

¹¹ See, e.g., *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

operatives describe as automatic infringement liability, a damaged credit rating, diminished employment prospects, and other sorts of public humiliation.¹²

This result – a world in which all conduct is public and most justice is private – is one with which most thoughtful commentators do not seem entirely comfortable. And yet we are reluctant to scrutinize it in any serious way, and to parse the necessary implications of our discomfort for the content of copyright law in the digital age.

According to the Register of Copyrights, these discomfiting implications can be avoided by redrawing the boundaries of secondary liability doctrines to take the pressure off of users.¹³ She does not argue that the law should foreclose liability for private copying. Instead, she urges rights-holders, whose public conduct no longer seems subject to much in the way of legal control, to adopt voluntary norms of self-restraint.¹⁴ This approach does not seriously examine copyright's evolving public-private distinction so much as it purports to offer a sustainable strategy for ignoring it.

Users, moreover, do not get away altogether scot-free under the Register's proposal. Appropriate norms to govern the public conduct of users must be publicly inculcated through a combination of persuasion and fear, which means that judiciously targeted lawsuits against users still have a role to play.¹⁵ This week's news supplied an illustration of how the process might work. The wire services reported the first prison sentence imposed on an undergraduate P2P user, a student at the University of Arizona.¹⁶ The court ordered that after completing a three-month prison term, the student take a copyright law class at the university's law school. One of my students was sitting in my office when the e-mail bearing this news arrived, and responded: "He has to take copyright? Is that like AA or something?" My student's comment neatly encapsulates the penitential dimension of the publicness that envelops ordinary users. In this world, those of us who teach copyright can look forward to a new role as twelve-step facilitators for the public expiation of information crimes – an honor that thus far has eluded comparable course offerings in criminal law, securities law, and federal income taxation, to name just a few of the more likely candidates.

¹² See Nick Mamatas, *Meet John Doe: The RIAA Runs Its Lawsuits as a Volume Business, and Sometimes Downloaders Just Gotta Settle*, VILLAGE VOICE, Mar. 7, 2005, at ____, <<http://www.villagevoice.com/music/0510.mamatas.61813.22.html>>; Andrew Tran, *Woman Silenced by Music Mafia*, DAILY TEXAN, Feb. 4, 2005, <<http://www.dailytexanonline.com/news/2005/02/04/Opinion/Woman.Silenced.By.Music.Mafia-852298.shtml>>.

¹³ See Peters, *supra* note __, at 718.

¹⁴ See *id.* at 714.

¹⁵ See *id.* at 719-22.

¹⁶ See Beth DeFalco, *Teen Convicted Under Internet Piracy Law: Arizona Student Believed to Be First Prosecuted Under State Law for Internet Piracy*, ABC NEWS, Mar. 7, 2005, <<http://abcnews.go.com/Technology/wireStory?id=559753>>.

Professors Mark Lemley and Tony Reese reach precisely the opposite conclusion from Register Peters. They argue that the law should establish efficient procedures for suing users – publicly – both to render justice public and to take the pressure off of secondary liability doctrines.¹⁷ Even they, however, remain unwilling to confront the problem of public conduct by the ordinary user. They self-consciously avoid this problem by specifying that the system they propose would target only the extraordinary user – the chronic uploader whose conduct, by hypothesis, enables ordinary users to engage in acts less self-evidently culpable.¹⁸ We might say, then, that at least indirectly, Professors Lemley and Reese seek to preserve copyright’s public-private distinction by redrawing it. But the private side of the distinction remains unexamined, and their proposal still abandons the ordinary user to private justice.

As a preliminary matter, the notion that one can avoid examining copyright’s evolving public-private distinction by adopting a strategy that trades equipment manufacturers and users off against one other, in whichever fashion, ignores the political reality on the ground. The RIAA doesn’t want to sue one or the other. It wants to sue both, and it isn’t interested in pursuing the socially efficient remedy except insofar as a new procedural scheme might reduce the operating costs of its ongoing private justice program.

More fundamentally, however, neither of these approaches will address rising levels of discomfort with a world of all-public conduct and mostly private justice. To resolve that problem, we need a theory of the ordinary user: a theory of what conduct is private.

Here I come, finally, to Professor Litman’s paper. I do not think that we can be confident of retaining the staple article of commerce doctrine in any meaningful form without a theory of the ordinary user. In other words, I do not think that the staple article of commerce doctrine and the question of user privacy can be separated either practically or analytically. From a practical standpoint, the strategy of pursuing equipment manufacturers and the strategy of pursuing users necessarily go hand in hand. Analytically, the fate of secondary liability claims increasingly seems to turn on equipment manufacturers’ decisions about whether and how to enable privacy for, and collection information about, their customers. This intermingling manifests in two distinct but related ways.

First, precise information about users and their activities is increasingly critical to the outcome of indirect infringement lawsuits, and vice versa. The P2P file-sharing cases clearly illustrate this, but I’d also like to draw your attention to two disputes that have thus far received comparatively little publicity. The first is the lawsuit by the motion picture industry against SonicBlue, which had designed a digital video recorder, the ReplayTV, that enabled automated commercial-skipping and a limited amount of networked P2P file-sharing. The plaintiffs convinced a magistrate judge to grant a discovery order requiring SonicBlue to generate a database of what ReplayTV users had downloaded and shared, so the database could be used in substantiating the secondary liability claims. This order was overturned by the district court, but

¹⁷ Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004).

¹⁸ See *id.* at 1399-1401, 1413.

not because the court thought the information wasn't relevant. The court simply thought that principles of discovery law impose no duty to create information that doesn't already exist.¹⁹ The second dispute is really a large number of lawsuits filed by DirecTV against users who purchased smart card equipment from third-party manufacturers. These lawsuits were filed after raids on the manufacturers and seizure of their sales records, which contained the information about user identities and purchases necessary to enable the individual suits.²⁰

Second, it is increasingly clear that the way to avoid both an indirect infringement lawsuit is to build in knowledge and control in the first place. In the P2P file-sharing cases, one key point on which the Seventh Circuit and the Ninth Circuit differ is how much knowledge and control will suffice.²¹ But the shadow of potential indirect infringement liability extends far beyond P2P. Again, the digital video recorder market illustrates the extent of the effect. Partly because of the expenses it had incurred in fighting to preserve user privacy, SonicBlue filed for bankruptcy rather than continue to litigate the merits of the secondary liability claims. Afterward, the ReplayTV business was purchased by a Japanese consumer electronics company, which then agreed to make the design changes demanded by the industry plaintiffs.²² The manufacturers of the leading digital video recorder, the TiVo, made design changes desired by television networks and advertisers and have successfully avoided suit, at least so far.²³

Together, the P2P, ReplayTV, and DirecTV disputes demonstrate that in ways both procedural and evidentiary, the questions of secondary liability and user privacy are inextricably intertwined. Giving up on user privacy while holding firm for the staple article of commerce doctrine isn't realistic and isn't even theoretically possible, given what the inquiry into indirect liability inevitably entails.

¹⁹ *Paramount Pictures Corp. v. ReplayTV*, No. CV 01-9358 FMC, 2002 WL 32151632, at *2-*3 (C.D. Cal. May 30, 2002).

²⁰ *See, e.g., DirecTV v. Treworgy*, 373 F.3d 1124 (11th Cir. 2004); *see generally* <<http://www.directvdefense.org/hunt/>> (describing the DirecTV litigation campaign and responses to the campaign).

²¹ *Compare Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004) ("As the district court correctly observed, . . . 'Plaintiffs' notices of infringing conduct are irrelevant,' because 'they arrive when Defendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement' of specific copyrighted content."), *cert. granted*, 125 S. Ct. 626 (2004), *with In re Aimster Copyright Litigation*, 334 F.3d 643, 653 (7th Cir. 2003) ("[I]f the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses."), *cert. denied sub nom. Deep v. Recording Industry Ass'n of Am.*, 124 S. Ct. 1069 (2004).

²² *See* Eric A. Taub, *ReplayTV's New Owners Drop Features That Riled Hollywood*, N.Y. TIMES, Jul. 21, 2003, at C3.

²³ *See* Gina Piccalo, *TiVo Will No Longer Skip Past Advertisers*, L.A. Times, Nov. 17, 2004, at ____, <<http://www.latimes.com/business/la-et-tivo17nov17,0,3236496.story>>. [need pincite to print edition]

Instead, confronting copyright's public-private distinction may offer the best defense of the staple article of commerce doctrine, because it challenges the framing of the secondary liability problem as primarily one of widespread public illegality. The framing of the secondary liability problem offered by the petitioners in *Grokster* rests on a series of equivalencies that lead inexorably to a mandate to design in knowledge and control: All users are P2P users, all P2P users are infringers, all user conduct is illegal (public) conduct, and illegal conduct is definitionally incapable of supporting privacy claims or free speech claims. It is these equivalencies that must be challenged.

I've written a lot about affirmative theories of user privacy elsewhere.²⁴ Here, I'll briefly note that such a theory includes two essential strands:

First and more obviously, user privacy has an informational dimension. Collection of information about what we see, hear, and read threatens to produce a chilling effect on intellectual exploration, and also provides entree for manipulation of the marketplace of ideas.²⁵ But a purely informational conception of user privacy won't do anything to counter top-down design mandates aimed at building in control: at rendering private conduct public in the de facto as well the de jure sense. It also won't hold up against more narrowly targeted discovery orders that might issue in a world where information about user activities is of critical importance to the success of secondary liability claims.

Thus we also need to take seriously a second type of privacy interest, which is premised on the asserted legality of some uses of copyrighted material that take place in private spaces. Articulation of this interest might begin by recognizing the specific values that freedom to copy serves.²⁶ Alternatively, it might begin by elaborating the more general, constitutive value of breathing space for intellectual consumption, exploration, and development.²⁷

A fully-articulated theory of the ordinary user is a subject for another day; my purpose here is more modest. One need not subscribe to the broadest possible vision of constitutive privacy to see the thickening web of connections between user privacy and secondary liability,

²⁴ See Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003); Julie E. Cohen, *Overcoming Privacy: Does Copyright Trump Privacy?*, 2003 U. ILL. J.L. & TECH. POL'Y 375 (2003); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); see also Julie E. Cohen *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029 (2001); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000).

²⁵ See Cohen, *Examined Lives*, *supra* note ___, at 1423-28; Cohen, *Read Anonymously*, *supra* note ___, at 1003-19.

²⁶ See, e.g., Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245 (2001); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

²⁷ See Cohen, *DRM and Privacy*, *supra* note ___, at 576-88.

nor to appreciate the role that an affirmative theory of the ordinary user might play both doctrinally and strategically. For both third-party innovators and those who seek to hold them legally accountable, world in which not all users are infringers and not all user conduct is public is very different from a world in which neither of those things is true. The future of the staple article of commerce doctrine in the courts and in Congress may hinge on which world is chosen.