Wild, Wild Web

Most important new information technologies threaten—or at least seem to threaten—established interests, laws, and customs. In fact, the degree to which such technologies are likely to become useful and ubiquitous can often be measured by the amount of fear, anxiety, and disturbance they inspire. This is particularly true in the realm of intellectual property, especially copyright laws, which give authors and publishers the right to limit how certain information and material can be used.

Remember when cheap videocassette recorders first appeared en masse about a decade or two ago? Movie companies rushed to the courts to prevent the distribution of the machines and blank videotapes, claiming their copyrights would be infringed right and left—a concern that seemed to make a lot of sense at the time. Who, they fervently argued, would pay for a movie if they could get it for free?

In cyberspace, copyright infringement is only a click away. Commonsense guidelines to intellectual property in unsettled territory.

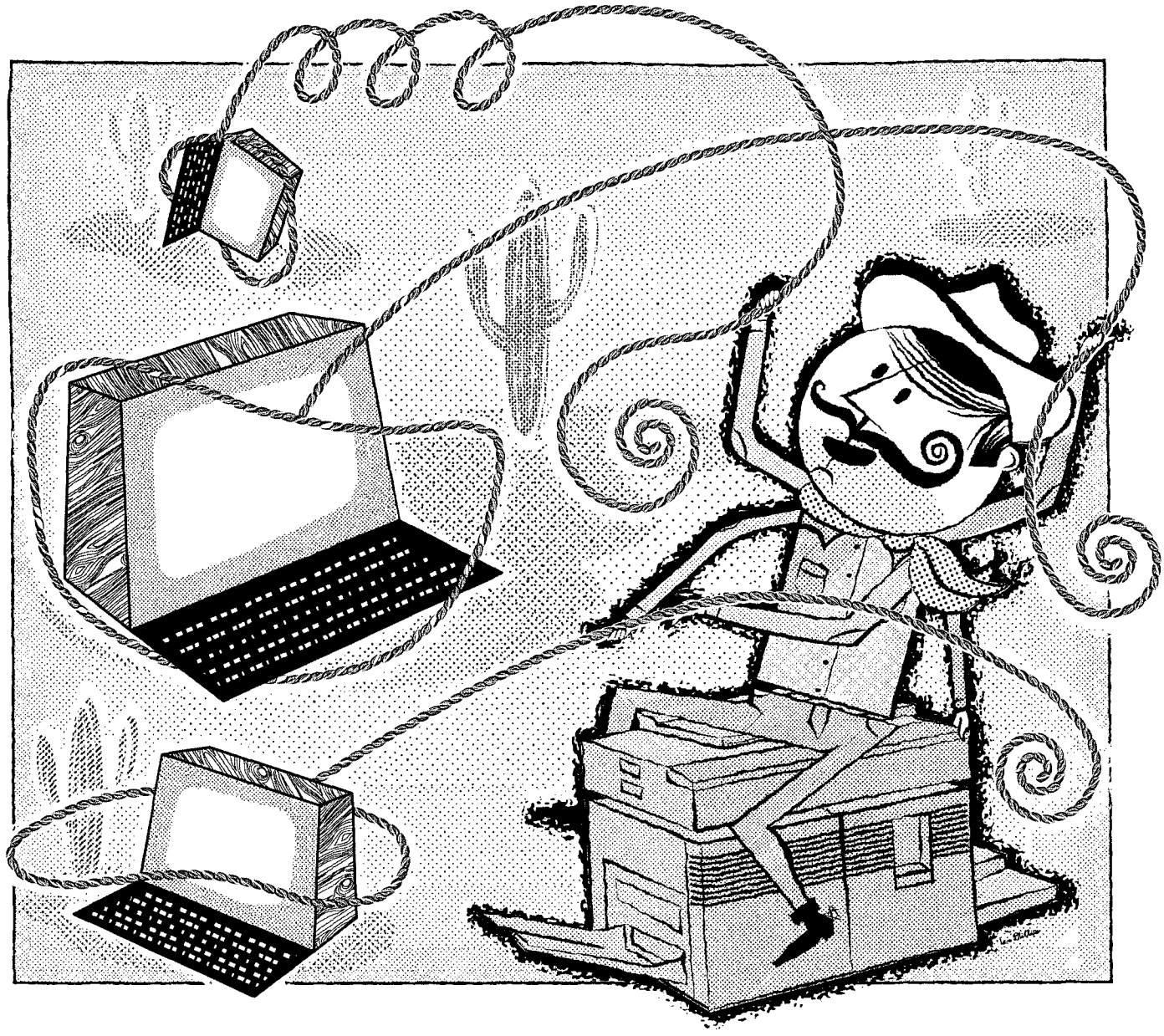
By Mike Godwin

The movie companies' nightmare never came to pass, but that hasn't stopped the movie execs from looking at the growth of the Internet with fear and trembling. That's because the Internet is perhaps best understood, technically speaking, as a global collection of copying machines that allows people to duplicate and broadcast all sorts of information with unprecedented ease. As the Internet becomes more and more important to our daily lives, it's easy to see why software makers, book publishers, and others who benefit from copyright protections are in a panic: People can now make an unlimited number of perfect copies of computer programs, books, and other materials and almost effortlessly distribute them around the planet. It's not surprising that an industry trade group like the Software Publishers Association launched copyright lawsuits against Internet service providers that hadn't actually facilitated or benefited from pirating copyrighted materials. The SPA hoped the cases, all ultimately settled at little cost to the defendants, would send a message to service providers everywhere and, more important, set Internet industry standards that would tilt the balance of legal duties in favor of copyright holders.

The tension between the almost frictionless information flow of the Internet and the desire of copyright holders to control the use and abuse of protected materials is exacerbated by our country's longstanding debate over the policy rationale for copyright law. The U.S. Constitution provides in Article I, Section 8 that "Congress shall have Power ...to Promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." But when Congress initially exercised that power—the first Copyright Act was passed in 1790—it remained unsettled whether Congress's primary role in setting up an intellectual property framework was to protect authors or to serve the public. That question should have been finally resolved in 1834 when, in *Wheaton v. Peters*, the Supreme Court articulated the philosophy behind American copyright law that has persisted up to the present day. But copyright holders continually recast the law in terms of protection of their own property rights.

The Court in *Wheaton* decided that the purpose of the Copyright Act was *not* primarily to enrich authors and publishers but to "promote science and useful arts," as specified in Article I. This is the case that copyright scholars normally cite when they talk about the theoretical underpinnings of copyright in the United States, and implicit in its holdings is that the needs and concerns of the general public in an open society are paramount. Copyright law must be understood, therefore, as a means to an end (educating and enriching the public) and not as an end in itself (protecting the interests of copyright holders).

That said, it is no easy trick to apply such a principle to



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the real world—especially since everyone involved recognizes that one major way copyright laws benefit the general public is by giving copyright holders exclusive rights over their work for a specific period of time—currently the life of the author plus 50 years. (As this goes to press, Congress is debating adding 20 years to the term of copyright protection.) The assumption is that those rights provide strong incentives for people to create new and valuable works; weaken those protections and people have less incentive to write new stuff.

But the problems with traditional copyright multiply in cyberspace, and not simply because of the ease with which people can copy and distribute materials. In cyberspace the potential conflict between intellectual property rights and civil liberties becomes unavoidable because both economic and speech issues are rightly seen as questions about "information." So while it may be true that the Net, as Villanova University law professor Henry Perritt has commented, "can realize its potential only if it protects private property and makes it possible to offer something for sale or license," the Net's potential is more than simply economic—it's democratic, too. Its great potential to educate and enrich the public can be fulfilled only if the greatest number of voices are given an opportunity to speak and be heard. And, quite often, saying what needs to be said *requires* that speakers make unlicensed use of someone else's copyrighted work. This is why Congress provided for the limited right of anyone to make unlicensed "fair use" of others' copyrighted material (see section 107 of the Copyright Act). We're building new societies in cyberspace, and every new society must figure out what balances to strike between the economic rights of some individuals and the civil liberties of others.

As a copyright holder myself, I can sympathize with the people who are worried about the Internet's effect on intellectual property rights—as I said before, the Internet is, in a very real sense, a huge copying machine. Its very method of propagating content is copying "packets" of information from node to node across the globe. And this fact perpetually scares copyright holders, trademark holders, database companies, and companies with trade secrets. The information revolution can be a pretty frightening thing indeed when one has relied heavily on—and even invested in—one's ability to control the circulation of information.

It may well be that the potential economic threat to copyright holders requires some tinkering with our intellectual property framework. Certainly it would seem unfair if a competitor to West Publishing, a company whose whole revenue-generating enterprise centers on the recording and publication of court decisions, simply copied the fruits of West's labor and started up its own legal database services. But intellectual property holders have faced this kind of challenge before. What's more, it's often the case that the interests of copyright holders and others dovetail in mutually beneficial ways. Since VCRs have become a mainstay of American consumer electronics, the video market has generated huge financial rewards for the movie industry. Indeed, the video market now brings in more income for studios than theatrical releases.

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VCRs teach another lesson when it comes to dealing with new technologies: The best guide to the way the law should work is to study the past and present, not to attempt to predict every possible future. As Justice Oliver Wendell Holmes said long ago, "The life of the law has not been logic; it has been experience." When a new media technology emerges, the best thing to do is to wait and see what problems actually emerge, not panic about what *could* happen. Once we understand the actual risks, we can legislate accordingly and with full regard to the competing interests at stake.

As that process gets under way—as the Internet becomes increasingly central to how we do business and how we live life—it's worth reexamining today's copyright statutory scheme, which is laid out in Title 17 of the United States Code. The last major revision of the Copyright Act took place in 1976, but the fundamental approach to copyright law in this country can be found in a passage from the legislative report on the Copyright Act of 1909: "In enacting a copyright law Congress must consider... two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."

The reexamination of these two questions is an ongoing process, and the tensions behind these two sets of interests can lead to some fractious confrontations—ask the folks at C2NET, the Berkeley service provider that was sued for contributory copyright infringement claims in 1996 by the Software Publishers Association even though there was zero evidence that the company had even come close to infringement, contributory or otherwise. In the spirit of helping you speak freely on the Net while avoiding similar confrontations, my research assistant, Tess Koleczek, and I have distilled commonsense guidelines we call "A Good Citizen's Guide to Copyright on the Web (Or, How to Link Friendly and Influence People)," version 1.6. The philosophy behind these guidelines is not to tell you what you can get away with but to encourage you to treat copyright holders in the online world as friends and co-participants in this great social experiment we call the Internet rather than adversaries. The guide is designed to explain what we think it takes to make someone a good neighbor when dealing with other people's copyright interests in cyberspace.

You may already have a pretty good idea of the ways you can use the World Wide Web to benefit your business or enhance your personal enjoyment of the Internet. You may even already know something about how powerful and flexible the Web can be when it comes to capturing material off the Web and reshaping it for your own use. But when you're staring all that exciting potential in the face, you may find it easy to forget something very important: Just because new tools empower you to use the Web in creative new ways, it doesn't mean you should be using it in ways that hurt other people's rights and interests. And it especially doesn't mean you automatically have a legal right to do anything you want with the material you access.

Of course, we can't be your lawyers for you, so you shouldn't take what we're about to tell you as the legal advice that will help you out of your particular fix. But we can help you be aware of how to avoid some common pitfalls in copyright law by offering the following guidelines, which we've tried to translate into ordinary human-speak. We'd like it if you followed these rules, not only because they'll help you keep out of legal trouble, but also because it would help show the world that the Internet and Web-exploiting software can be used wisely and responsibly. We can't guarantee that these rules will keep all trouble from your doorstep, of course. But we're hoping that if we can start a general movement to treat copyrights with a little bit of extra niceness, the Web and the Net will be better places for us all. So peruse the following guidelines, and think about the ways you can be a "friendly linker."

1) Linking to other sites, even without express permission, is generally OK. But it is important to distinguish *linking* to a Web site from making a copy. Absent some explicit restriction on the part of the copyright holder, you can link to his or her page, and you have an implied license to make the copies that are made automatically when your browser or other software contacts the site. Making additional copies beyond that, however, is generally *verboten*, absent permission from the person

who holds the relevant copyrights. (See below for some exceptions.)

If you do happen to receive a request from the copyright holder of the page asking you to "unlink" from the site, it is generally good "netiquette" to respect that request, whatever the reason for it, and remove any link. But this needn't be a hard-and-fast rule. For example, your link to a political opponent's page may be used to illustrate a particular criticism: If you are pro-choice, you might want to link to an anti-abortion page (or vice versa) in order to make your point. Such criticisms, even with the attendant links, and absent any defamatory or libelous remarks, are generally OK.

2) Don't try to pass off someone else's material as your own. It doesn't matter whether you're linking or just plain copying—copyright law is all about making sure the person who holds the copyright for a particular work has the primary control over it and gets the primary benefit from it.

3) When in doubt, ask permission. If you would like to use someone's material, the most logical step is to ask—but be sure that the person from whom you are obtaining permission is authorized to give it.

4) Don't just *assume* that reusing material is OK. It is rarely a bad idea to ask permission to use material in order to avoid any potential problems down the road, especially if the material you are copying to your hard drive, floppy disk, Web page, off-line publication, etc., is something that the copyright holder might not want you to use. There is a great amount of leeway in copyright law that allows for use of material without permission, provided you stay within the rules. Sometimes it is not necessary to ask for permission in using copyrighted material, but you might want to ask anyway. And in copyright law, it often does matter if you can show you tried to find the copyright holder.

5) Use of ideas or information that you may have learned from a copyrighted work is also generally OK. Copyright law doesn't protect ideas or information—it just protects the *particular expression* of ideas or information once they've been "fixed" in a tangible medium (like paper or a hard disk). So if you see the movie *Love Story* and you write your own story about Preppy finds Girl, Preppy loses Girl, Preppy really loses Girl, you probably haven't violated anyone's copyright. But the minute you start posting actual dialogue from the book to your Web site, you can be sure you'll be hearing from Erich Segal's (or his publisher's) lawyers.

6) The mere possession of material does not make you the copyright owner. Say a guy sent you e-mail out of the blue, and it's something you feel like publishing. The copyright to the material you are using may belong to the author or someone else who has acquired it. Use of the material may still require permission.

7) Look at the purpose and character of your intended use. If you are using the material for educational purposes, limited use of the material may be acceptable, even without permission. However, if the use of copyrighted material is for a commercial purpose or is intended to derive some economic benefit, you will likely have to gain permission from the copyright holder and comply with certain conditions for use.

8) Compare the proportion of the work you are using to the work as a whole. It is one thing to quote a few paragraphs of a 20-page essay. It is quite another matter to take 800 words of a 1,000-word newspaper story. The amount and substantiality of the work you can use without permission is not carved in stone (or even set out in the law books), so be aware of how much of the "meat" of the work you are taking. This is a gray area, but if you're embarrassed by how much of the work you're "re-purposing" for your own use, it's probably something you should ask the copyright holder about.

9) In general, try to make sure that your unlicensed use of any copyrighted work does not significantly affect the potential economic market of the original work. OK, you can break this rule—maybe—if you've got a copy of the latest equivalent of the Pentagon Papers and you think the world has a right to know. But in general copyright holders have an exclusive right to use their material for economic gain. That's the assumption you have to begin with. So unless they give you permission to use their work, usually done in the form of a license, the impact you have on their market by your use of the work could expose you to an infringement lawsuit. And who needs that? (It's true that sometimes a court will rule in your favor anyway, as when factors such as educational or journalistic uses are important enough to outweigh the economic impact on the copyright holder.)

10) Don't assume that your use of copyrighted material on your company's internal network—e.g., a Web page on your Intranet—is not an infringement or will not be seen outside the company. Intranet Web pages may be limited in circulation, but they're not exempt from the copyright laws. And don't circulate infringing material within your Intranet on the assumption you won't get caught.

Don't treat other people's copyright interests as if they were necessarily opposed to your interests. Presume a collegial relationship instead. Often the owner of a copyright will discover his work being used without permission and simply request that it be removed from the publication, Web site, etc. And since you're a nice guy or gal, you'll want to comply. But you can't count on every copyright holder to be so understanding. Don't risk a lawsuit for copyright infringement by assuming you will not get caught.

If you have real legal problems, you need to talk to your own lawyer, and cribbing from our (copyrighted!) guidelines here won't suffice. But our experience is that if you basically do your best to be a nice gal or guy when it comes to someone else's copyrights, you're less likely to have serious legal problems in the first place. And since part of using the Net is finding new ways to connect with people and to work cooperatively with them, it's better if everybody acts nicely enough so that no one even thinks about going to the courthouse. Or at least not before it's absolutely necessary. ◆

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Mind Over Matter

Wherever you turn, every medium of communication is saturated with the terms *information revolution* and *intellectual property*. The root cause of the fascination is simple: Lots of money is involved. Both individuals and business organizations have become aware that their rewards depend increasingly on mental products—in the form of education, patents, copyrights, trade secrets, databases, computer-assisted employee cooperation, and general know-how—and less on machines, buildings, and raw muscle.

The size of the stakes would itself be enough to generate an explosion of interest, but another factor also counts: a high degree of uncertainty over who, exactly, will collect this loot. Will it be the individual inventors who generate the ideas? Teams of innovators? Entrepreneurs who translate concepts into commercially viable products? Venture capitalists? Long-term stockholders? Consumers? The obvious answer is that all these groups will share in the bounty, but this answer leaves a lot of latitude about the precise details of the split—and billions of dollars hinge on the answers.

In the information economy, intellectual property is bringing huge returns. But just how will society split up the bounty?

By James V. DeLong

Wall Street seems to assume that a huge share will go to the stockholders. When Nervous Nellies fret that current stock price levels are extraordinary by all historic measures, and hence ripe for correction, the bulls point to the growing importance of intellectual property and information. The familiar yardsticks of companies' value, they say, are based on old industrial models in which the most important assets were plant and equipment, plus some allowance for the value of an ongoing business. But, continue the bulls, as value becomes more dependent on a firm's mental assets and less on its physical embodiments, those old measuring rods lose cogency. From this perspective, current market levels reflect the future earning power of mental assets that are not reflected in old-style balance sheets.

Take, for example, Microsoft, the flagship of the armada of new companies whose value is almost entirely mind-based. Microsoft has 2.4 billion shares of stock outstanding and, at press time, is valued by the market at about $220 billion. The company's physical existence is minimal: It has about $12 billion in cash, investments in other companies, plant, and equipment. That leaves $208 billion as the value of its patents, copyrights, trade secrets, brand name, presence on Rolodexes of customers, and the brains of its 25,000 employees. You can pare the physical component of value down even further. Microsoft's existing products are worth almost nothing in the sense that if the company announced it was freezing its designs and planning no further improvements, its products would be obsolete in a couple of years—and the company's value would drop precipitously. Clearly, no analysis based on physical assets captures the essence of this company or others like it.

So you can make a serious case that almost all of Microsoft's value lies in the new-style form of information and intellectual property, and mostly in the brains of its staff. But while Wall Street bulls may be right about that, it's far from clear that stockholders will snag those brain-based earnings in the long run. Consider that, in 1997, Microsoft produced earnings of $3.5 billion. Of this, zero dividends were paid to the stockholders—the same payout they have gotten every year since the company produced its first earnings of a penny per share back in 1982. Employees, on the other hand, not only got their salaries, they also got 96 million shares of Microsoft stock, which they were entitled to buy at bargain prices under various option plans. The company spent $2.4 billion buying shares to meet this commitment, and if this sum were added to the company's wage bill,