Chicago-Kent Journal of Intellectual Property

Volume 9 | Issue 1 Article 6

4-1-2010

What is Neutral? Another Perspective to the Discussion Concerning Access Control

Agustin Waisman

WHAT IS NEUTRAL? ANOTHER PERSPECTIVE TO THE DISCUSSION CONCERNING ACCESS CONTROL

Agustin Waisman*

Introduction

In a world of "digital network technology" access controls and changes in the commercialization of works protected by copyright, a fierce discussion among scholars, lawmakers, judges, and copyright owners has emerged.

On one side of the discussion are those who think that, as a result of technological advances, authors should have the exclusive right to control access to copyright-protected works, or at least those that are protected by technological measures. On the other side of the discussion are those concerned with the idea that granting such rights would harm uses of a work that may not be authorized but –according to them- still legal.

This paper suggests that the solution to this dispute lies in the answers to a number of questions involving the scope of copyright that remained unresolved long before networked digital technology came into play. It argues that the key to this discussion is the notion of "neutrality" and that in the context surrounding the discussion neutrality requires disregarding the Internet and digital technology in answering those questions. In the following sections, this paper argues that nothing in today's world should change the approach that was or should have been followed in order to address similar problems in the past, whether that approach leads to justifying control or not. The arguments in this paper are intended to work at two different levels: as tools for interpretation to the extent that the question as to whether unauthorized access to works is legal remains unsettled, and as reasons to accept or rethink the concepts of such provisions to the extent that the question *is* settled (for example, as a result of recent statutory provisions).

Section II of this paper explores the arguments advanced by those who represent the former view. Section III explores the arguments adopted by those who represent the latter. Section V examines the meaning of "neutrality" and explores possible ways to apply the concept of neutrality in the context underlying the discussion, as well as the difficulties that might arise in the process of determining what is neutral. Section VI, finally, isolates several problems that arise in the networked digital world in order to show that all of them either took place or could have taken place long before the "digital age." By means of this explanation, it suggests how the old questions should be answered in order to find a solution to the current dispute.

* Adjunct Professor, Torcuato Di Tella University. I would like to acknowledge Martin Hevia and So-Eun Lee for their valuable comments.

I. A Fierce Discussion: Part A

As mentioned in the previous section, proponents of the side of the discussion that has entertained the copyright *vanguard* during this decade argue that, as a result of technological changes, authors should have the exclusive right to control access to copyright-protected works, or at least those that are protected by technological measures. What does this mean? It means that whoever reads, views, or listens to a work without the author's consent or whoever circumvents a technological measure in order to do so should be liable for copyright infringement.

The rationale underlying this view is the fear that technology has such effects that authors lose the ability to fully exploit their works. But what are those effects? Digital technology, which is cheaply and easily available, has enabled anyone who is able to read, view or listen to a work to reproduce that work, because the device required for one thing generally allows for the other. And they are not just able to reproduce the work, but reproduce an exact, perfect copy of it; that is, a "close to perfect" substitute for demand.[1] Also, to distribute the work all over the world, at almost zero cost, in just a few seconds. For example, whoever has access to a computer and receives an email from a friend containing a protected song or a short story can burn that song to a CD or print out that short story in a few minutes (and therefore will rarely *buy* the CD or the book). Moreover, he or she may even share it with an unlimited number of people, whoever or wherever they are (say, the Italian, Korean, or Argentine classmates of his or her LL.M program who have now returned to their home countries), by posting it on his or her web site or simply forwarding it via email. Needless to say, those friends can do the same, sharing it with *their* friends in Rome, Seoul, or Buenos Aires, and so on. In this scenario, the proponents of this view[2] suggest that unless the authors or the copyright owners are able to prevent the classmates in the above example from accessing the protected works, they are perfectly capable of reproducing and distributing them. If they do, exploitation of works based on copyright ownership would soon become meaningless.[3] As Samuelson suggests, since copying has become so cheap and easy (and nearly unstoppable), copyright holders have become more and more interested in controlling access to protected works.[4] Even when illegal copies are made, foreclosing access to those copies might deter consumers from reading, viewing, or listening to the works contained in them and, therefore, partially neutralize the effects of the illegal copies.[5]

Scholars such as Ginsburg believe that in the world of networked digital technology, granting authors the exclusive right to control access is not very different from granting them the exclusive rights they have always had (mainly, the right of reproduction, public

---

[1] *See* Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMPUTER & TECH. L.J. 323 (1990) [hereinafter *Digital Media*].

[2] Jane Ginsburg, *From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law*, 50 J. COPYRIGHT SOC'Y USA 113, 3 [hereinafter *From Having Copies*].

[3] In addition, supporters of this position contend that, as a result of technological advances, the effects of acts that in the "old world" were clearly considered private may be similar to those of acts that everyone would have considered "public." For example, the fact that the person who receives the file in the example above *has the ability* to send it to hundreds of people who are able to reproduce and retransmit it in a few seconds makes such an impact, similar to the impact that "public" distribution or broadcasting had in the "old world." *See* Pamela Samuelson, *The Digital Dilemma: A Perspective on Intellectual Property in the Information Age*, 10-11, 16-18 (written for presentation at the 28th Annual Telecommunications Policy Research Conference) [hereinafter *Digital Dilemma*], *available at* http://people.ischool.berkeley.edu/~pam/papers/digdilsyn.pdf.

[4] *Id.*

[5] Jane C. Ginsburg, *The Exclusive Right to Their Writings: Compensation v. Control in the Digital Age*, 54 MELB. U. L. REV. 195 (2002).

distribution, and public performance). Before the age of digital technology and the Internet, such exclusive rights prevented unauthorized uses of protected works by allowing authors or owners to control the exploitation of their works (and, together with it, access to such works).[6] Moreover, controlling the technology that allowed copies and "perfect" copies became equivalent to controlling access as "consumption" of works required having a copy (except broadcast).[7] In this light, even before networked digital technology, control was already *implicit* in authors' "sphere of exclusivity."[8] Now, however, the technology to reproduce a "close to perfect" copy of a work in anybody's hands, or at least in the hands of anyone who can afford a home computer. In the age of the Internet, works may be consumed even without the need for actually making copies. In any case, the scope of authors' exclusive rights (or the exclusive "powers over works") that copyright comprehended in the old world, i.e., reproduction, public performance, and broadcasting, only reflected the old ways of exploiting works.[9] There was, however, nothing intrinsically good about this scope - *only* recognizing authors' exclusivity over those specific "powers."[10]

But this argument goes one step further; it contends that, in light of the reasons described above, granting authors the right to exclusive access control is the only way to recognize that they have exclusive rights to their works.[11] If controlling access is the only way of preventing mass copying or free-riding (this argument suggests), then that is the only way of granting effective protection. The concern underlying this argument is no small deal, since it is difficult to challenge the claim that technology has played a major role in the mass multiplication of copyright infringement. After all, the level of infringing activity allowed by the technology available only a few years ago did not pose the same threat to copyright protection that authors face today.

II. A Fierce Discussion: Part B

The concerns underlying those statements in the above section seem legitimate, and yet, they fail to show all the consequences that would follow from granting authors exclusive control over access to their works.

The concern of those representing the other side of this discussion, in a nutshell, is the threat that granting authors exclusive access control would pose to unauthorized, legitimate uses of works.[12] Underlying this concern is the principle that copyright is not only about authorship and production of works, but also about their dissemination. If works are not disseminated[13], this reasoning seems to go, then there is no point in granting a bunch of exclusive rights to certain "powers" over works (such as reproduction or public

[6] *See Exclusive Right*, *supra* note 5, at 3
[7] *See From Having Copies*, *supra* note 2, at 8; *Exclusive Right*, *supra* note 5, at 6. That is the reason why, of all the "powers over" a work, which, according to law, were comprehended in the "sphere of exclusivity" granted to authors (for example, to copy, to publicly perform, to broadcast, etc), reproduction arguably was the most important one.
[8] *See id.* at 5.
[9] *From Having Copies*, *supra* note 2, at 5-6.5.
[10] *Id.* at 8.
[11] *Id.* at 9.
[12] *Id.* at 11.
[13] And for that reason they do not enrich the cultural heritage of a society

performance). Dissemination requires limiting the scope of copyright; it requires that at least some unauthorized uses of protected works be legal.[14]

One of the central claims of those concerned with protecting unauthorized uses of works is that acts that were legal in the old world should continue to be legal in the digital world. In the old world, the exclusivity granted by copyright was subject to many limitations.[15] As a result of those limitations, unauthorized access to a protected work was not illegitimate *per se*, for many unauthorized uses of protected works were legal. The most important limitations were the doctrine of fair use, the idea-expression dichotomy, and the term limits to which legal protection is subject.[16] But these are not the only limitations; "time shifting" allows reproduction of broadcast works in order to consume them at a time other than the time of the original transmission; the "first sale" doctrine, allows a buyer of a copy to distribute that copy in any way he likes; and other statutory provisions that allow certain reproductions (for example, those that authorize copying of sound recordings, including digital ones, for private purposes) or public performances (for example, those made with home equipment) illustrate *other* limitations that legitimize many unauthorized uses.[17]

Why do some people think that the *limitations* that allowed certain unauthorized uses in the old world are threatened in the digital world? There are two main reasons.

The first reason is that the way of consuming and exploiting works has changed, partially as a result of digital technology.

With respect to consumption, a triple paradox has arisen. On one hand, the consumption of works in the digital world does not necessarily require copies. As previously explained, in the Internet age, anyone may watch a movie, listen to a song, or read a book without the need for having a (hard or digital) copy in his or her (real or digital) library. On the other hand, however, the digital consumption of a work irremediably involves the making of a different kind of copy, i.e., an *ephemeral* copy; since every time a file is *opened* on a computer, a temporal copy of the file is created in its RAM memory.[18] For this reason, it is often said that in the digital world the distinction between reading (or viewing or listening) and copying tends to vanish.[19] This fact has been the source of great controversy; if

---

[14] For a comprehensive analysis see Norman Siebrasse, *A Property Rights Theory on the Limits of Copyright*, 51 U. TORONTO L.J. 1 (Winter 2001) (Siebrasse simplifies this rationale as follows: "The intuition is straightforward. Without copyright protection, authors of new works will be undercut by pirates who do not have to bear the costs of creation. Anticipating this, authors will not enter the market in the first place, and too few works will be created. But, on the other hand, progress is cumulative, and with too much protection authors will not be able to afford to use the prior works on which they build in creating new works. Again, too few works will be created. Somewhere between these two extremes of protection lies a happy medium. So, we conclude, the aim of the law should be to find this ideal level of protection.").

[15] *See* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, p. 7 (2002).

[16] *See Demonization*, infra note 34 and *Personal Use*, infra note 52.

[17] *See Exclusive Right*, *supra* note 5, at 2.

[18] *See Digital Dilemma*, *supra* note 3, at 7-8.

[19] And so do other distinctions well-settled in the "old world", for example the distinction between public performance and distribution: In the old world, whoever broadcast a song did something analogous to a public performance. In the digital world, however, whomever "broadcasts" a song is closer to making a public distribution, since the broadcast requires the transfer of a copy and the receiver is able to make a close to perfect reproduction of the broadcast work. *See From Having Copies*, *supra* note 2, at 1-2. *See also* Jessica Litman, *Digital Copyright and Information Policy*, 4 GLOBALIZATION OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 299 (Kraig M. Hill et al. eds., 1998) [hereinafter *Digital Copyright*], *available at* http://www.personal.umich.edu/~jdlitman/papers/casrip.html.

ephemeral copies are treated by law as any *other* copies, the overwhelming majority of unauthorized uses (the digital consumption of works, such as viewing, reading, or listening) would be illegal *per se*. From a copyright perspective, making copies may have been illegal before digital networked technology. Reading a book was not, regardless of whether that book was bought, borrowed, picked up on the street, or perhaps even stolen. However, if there cannot be reading without the making of *ephemeral* copies, from a user's perspective it seems that in the digital world the creation of *ephemeral* copies should amount to reading, not reproducing. Stated differently, to consider *ephemeral* copies as copies for all purposes of copyright law is to say that any unauthorized *digital* access to a work is illegal *per se*.[20] This of course would be a serious threat to unauthorized, legitimate uses as we know them, because, for example, in the digital world there would be nothing similar to borrowing a CD or a book from a friend. Lastly, in order to "pass" a work (for example, to send a chapter of a book or a song by email) in the digital world, a copy (an "*ephemeral*" copy) needs to be made. If copying is illegal *per se* and no exceptions excuse it, how can we assure that legal "uses" from the old world,[21] such as lending a magazine or a CD, continue to be legal in the digital world?

On the exploitation end, the controversy is no less significant. The key to visualizing the impact of new exploitations in the digital world is the first sale doctrine. Technology has made possible the introduction of *digital locks* that control access to works in different ways. These locks allow consumption of works to be restricted to specific places (for example, "zones" of DVD players), to a certain number of viewings or hearings, to a limited time frame, or to specific persons or a (limited) number of undefined persons.[22] In a way, as Ginsburg argues, technology has "opened new markets." As explained above, in the old world "consumption" of works required, *as a rule*, having a copy, i.e., a physical support where the work was fixed. Thus, in order to read, a user needed to have a book or a copy of it; in order to listen, a music fan needed to have a record, a cassette, or a CD, or copies of them.

Whenever a copy (which for a long time could not be replicated perfectly without considerable investment) was transferred, control over *the copy* vanished. The owner of *the copy* could then freely distribute it, thus allowing multiple, successive "unauthorized" uses, be it in the form of resale, rental, or borrowing, by those who had access to it. As Ginsburg puts it, the "first sale doctrine removes resale and rental markets from copyright owner's control," for many of the things that a buyer may do with the copy he bought are beyond the copyright owner's sphere of influence. Thus, the majority of unauthorized uses of protected works are still legal. The first sale doctrine allows anyone who buys a magazine, a CD or a DVD to lend or sell the purchased item; it allows a hairdresser or a doctor to buy *one* copy of a magazine that will be read by more than one client while waiting for his or her turn; it allows giving away books to public libraries, as well as allowing public libraries to lend them to the public; and, it also allows operation of used bookstores. In this scenario, the concern of those who are worried about the legality of unauthorized uses is, among others, ensuring that the distribution of legal copies from the old world continues to be legal in the digital world.[23]

---

[20] *See* Jessica Litman, *The Demonization of Piracy*, Address to the Tenth Conference on Computers, Freedom & Privacy, 6-7 (Apr. 6, 2000) [hereinafter *Demonization*], *available at* http://www.personal.umich.edu/%7Ejdlitman/papers/demon.pdf.

[21] Because they involved the private distribution of a copy comprehended by the first sale doctrine, but not a reproduction of such copy.

[22] *See Digital Dilemma*, *supra* note 3, at 6; *see also Digital Copyright*, *supra* note 19, at 3.

[23] *See Exclusive Right*, *supra* note 5, at 4.

The second reason why some people think that the many *limitations* that made unauthorized uses in the old world legal are threatened in the digital world is in part related to the first reason. As explained, digitally distributed works are, more and more often, encrypted with technological protection measures that establish access controls. This fact is relevant because, in order to prevent illegal uses, the core provisions of all new copyright statutes (the DMCA being the paradigm) prohibit circumvention of access controls.[24] In this context, regulations *do give* copyright owners access control to some extent, since many unauthorized uses of digitally distributed works have indeed become illegal.[25] More specifically, the reason why these prohibitions are viewed as threatening, as Litman argues, is that they make circumvention of access controls illicit regardless of the purpose of the use of the work in question.[26] In other words, as circumvention amounts to access, in many cases access is illicit *per se*. For example, if someone encrypted a work whose protection term has expired, the circumvention of such access control would be illegal, even though any use of the work itself would not. Litman claims that to make circumvention of an access control illegal irrespective of the nature of the use[27] of the "locked" work is analogous to allowing anyone to fence no man's land and then claiming that breaking the lock is illicit.[28] In order for this argument to be convincing, the metaphor that justifies why breaking a lock is (and should be) illegal needs to presuppose that what is behind that lock belongs to the "locker."[29] Litman concludes that is not the case with works of authorship, as some "powers over" such works (such as the power to prevent the sale or distribution of a legitimately acquired copy) are not part of its creator's property by definition.[30] Also controversial are the consequences that involve other *legal*, unauthorized uses of protected works, such as the use of ideas comprehended in a protected work or fair uses of a protected work. From this perspective, the prohibition on circumvention of an access control in order to use an idea (or in order to make a fair use of a protected work) would turn an act that would have been legal into an illegal act. In fact, there is already case law that states that copyright law "exceptions"[31]—specifically, fair use—do not excuse the circumvention of access controls. The licit unauthorized uses of works excepted from the statutes that prohibit access control circumvention, such as DMCA, are not enough, supporters of this view claim[32], since they are considerably narrower than those limitations to which protection is subject in the old world. Yet, as Ginsburg argues, *all* powers over works (even the right to control access, assuming for the sake of argument that it is one of an authors' exclusive "powers over works") should be subject to the same principles, exceptions, and limitations.[33]

In short, those who oppose granting authors the exclusive right to control access to works argue that such an attribution would amount to eliminating several unauthorized uses

---

[24] *See* 17 U.S.C. § 1201 (2006).
[25] *See* Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the US Copyright Act* 6, Columbia Law Sch. Pub.School Public Law & Legal Theory Working Paper Group, Paper number 07-137, 2007) [hereinafter *Pros and Cons*].
[26] *Demonization*, *supra* note 20, at 9.
[27] *See also Pros and Cons*, *supra* note 25, at 10.
[28] *Demonization*, *supra* note 20.
[29] *Demonization*, *supra* note 20, at 10.
[30] *Demonization*, *supra* note 20.
[31] Uses of protected works that would be illicit in the absence of principles that limit the rights of copyright owners.
[32] *Digital Copyright*, *supra* note 19, at 3.
[33] *From Having Copies*, *supra* note 2, at 3.

of works that in the old world were legal.[34] In fact, these problems are partially acknowledged by many access control supporters. Moreover, the rationale underlying the *exceptions* to access controls established in such regulations as the DMCA[35] is grounded on the same concerns.

III. Obscuring the Discussion

In light of the descriptions above, both sides of the discussion seem to have a point. Notwithstanding the difficulties uncovered by this controversy, the bottom line seems clear.

Those who oppose exclusive access control claim that no such thing existed in the old world[36], while supporters of exclusive access control claim that old world copyright holders had no reason to have exclusive control over access to their works.[37] In fact—as some of the arguments underlying this position postulate—control was secured with no need to grant an *access control right*; in the old world, controlling the production and distribution of copies nearly amounted to controlling access to works.[38] Supporters of exclusive access control seem to agree that no access control right existed in the old world. However, an additional claim raised by some of these supporters (seemingly inconsistent with some of the arguments that sustain their position) has obscured the discussion. According to this claim, unauthorized uses that were legal in the old world presupposed legitimate access.[39] This means for example that the fair use of a work, or the use of an idea comprehended in a work required that the "user" obtain access to the work legally. In order to rely on the first sale doctrine, the seller should have acquired the copy in question from a legal source. Or, in order for the exception permitting a private copy of sound recordings to be applicable, the physical support in which the copy in question originated must have been a *legal* reproduction of the work. Does the claim that unauthorized, legal uses presuppose legitimate access have legal grounds? This question and its implications are addressed in the next section.

IV. The Notion of Neutrality

Of all the proposed approaches to address the questions raised in sections I and II, the most attractive one relies on the notion of "neutrality". Neutrality serves as ground for the claim that, from a copyright perspective, technology should be impartial.[40] Usually, this means that technological advances should not have any effect on (that is, they should not broaden or narrow) the scope of copyright. Analyzed carefully, however, this claim is too

---

[34] As a result of the limitations referred to above, in the "old world" people were able do many things that in the digital world they would not be able to do any longer. *See Digital Copyright*, *supra* note 19, at 3. For example, they can read a book borrowed by someone else, use someone else's computer, sell used books or CDs and make private copies of digital recordings, among other things. In the digital world, however, things are different. Among other reasons, because "passing" a work requires making a copy, which as a rule is illegal, and "consuming" works (that is, reading, listening or viewing) also implies making (ephemeral) copies and, in most cases, also disabling access controls.

[35] Which even has a review mechanism that contemplates the revision of its effects and the enactment of new exceptions. 17 U.S.C. § 1201(g)(5) (2006).

[36] That is why –they argue– if access control were granted many unauthorized uses that in the old world were legal would actually disappear.

[37] *Demonization*, *supra* note 20; *Personal Use*, *supra* note 40.

[38] *From Having Copies*, *supra* note 2.

[39] *From Having Copies*, *supra* note 2, at 11.

[40] Jessica Litman, *Lawful Personal Use*, 85 TEXAS L. REV. 1871, 1910 (2007) [hereinafter *Personal Use*].

general and overbroad: "neutral" cannot mean "equal." In order to achieve neutrality in certain scenarios, unequal treatment is required. With regard to copyright, neutrality may require the enhancement of certain powers in order to adapt to technological developments. In other words, to claim that the impact that technological advances have on copyright should be neutral is not to say that the "sphere of exclusivity" that copyright grants to authors should remain unaltered. In fact, partly as a result of technological advances, there *has been* a historical enhancement of copyrights. At one point in history, exploitation of works was almost confined to its public display or performance (before the printing press was invented). As time went by, however, exploitation was extended to reproduction and distribution of copies, and later to broadcasting of some copies. This enhancement, nevertheless, has never seemed (and still does not seem) objectionable; it is viewed as neutral. A couple of examples might help understand this point and some of its implications. When the DVD player was introduced, exclusivity over the new way of commercializing works (i.e., the exclusive right to reproduce and distribute *digital* copies of movies) was vested in the authors. Before DVD technology was invented, copyright holders did not have the exclusive right to commercialize digital copies of their works. In a way, there was a "change"—an enhancement—in authors' rights, and yet this "change" *did not* seem particularly controversial. The impact that the introduction of this new technology had on copyright was, again, perceived as neutral.[41] Until not many years ago, the only way in which paintings were exploited or consumed (apart from the sale of the original) was through their public display. At present, paintings may be consumed not only by going to a gallery or a museum, but also by buying posters, key rings, puzzles, and postcards, to name just a few. In the context surrounding these changes, the "enhancement" of copyright holders' sphere of exclusivity is also viewed as neutral. So "neutral" does not necessarily mean "unchanged," but rather, "not changed in a *relevant* way." The first example shows that neutrality is consistent with the enhancement of copyright holder's sphere of exclusivity as a result of technology advances. The second example teaches two lessons. First, the fact that certain new "powers over" a work that were not initially amongst the powers of copyright holders become a part of them is consistent with neutrality. Second, even in the absence of changes in technology, neutrality is consistent with

[41] One could counter-argue that the reason why this example is regarded as neutral is that the technological change underlying it was "innocuous" in the following way: as DVD replaced VHS technology and the exclusive right to make copies of supports was already vested in authors in times of VHS, DVD technology only *replaced* VHS technology. In other words, this technology had no effect at all on copyright. This argument, however, might be too hasty. Before VHS was invented, there was no close substitute for home consumption of movies: many decades ago, the only way of seeing a movie was going to a theatre; and later, for quite some time, the only other way to see a movie was to find it on television. So before technology for home consumption of movies became widespread, copyright holders did not have any exclusive "power" involving the exploitation of movies for home consumption. In a way, then, technology *did have* an effect on copyright, as it created new markets. In spite of this, the "extension" of copyright holders' exclusive right to reproduce, distribute, and publicly show movies in theatres (to the exclusivity in reproducing, distributing, and publicly movies for home use as well) did not, and does not, seem like a relevant change. From the perspective relevant to this analysis, the effect that this technology had on copyright law, whatever the decisive underlying reason was, was regarded as "neutral."

However, there are two facts that may be relevant to these conclusions. First, before technology that allowed home consumption of movies was invented, users did not have access (and, thus, the possibility of having unauthorized access) to movies for home consumption. Moreover, they did not have the possibility to watch those movies over and over. Therefore, its introduction did not *deprive* them of any use, and this fact leaves no room for a discussion about whether such a "deprivation" does or does not affect rights (what *could* be discussed in the examples above) and might be relevant for finding what makes some "enhancements" look neutral and some not. Second, until a couple of decades ago, technology did not allow (cost effective) mass reproduction of movies, that is, not only those shown in theatres, but also those for home consumption. Moreover, until digital technology, *perfect* (or close to perfect) mass reproduction was not possible.

certain modifications in the ways of exploiting works (for example, reproduction in several kinds of mediums or supports), even when such modifications involve "charging more than once" to the same buyer of different supports.

To claim that "neutral" means "not changed in a *relevant* way," however, is not of much help, for how are we to evaluate what changes are "relevant?" What is there in the previous examples that lead to view some changes as neutral and others as *not* neutral? Revisiting the two sides of the discussion described above give us some hints that might help answer this question; implicitly or explicitly, both sides appeal to arguments of neutrality.

On one hand, access control supporters appeal to neutrality by suggesting that in the old world, controlling production and distribution of copies (and later broadcasting of works) was equivalent to granting access control, as mass consumption of works required owning a copy (and later a broadcast medium).[42] They do so also by making the less precise argument that networked digital technology, by allowing large-scale, perfect reproduction and distribution of protected works at a very low cost, threatens to deprive copyright holders of their exclusive right to commercial exploitation (thus altering a *status quo* that clearly grants them the right).[43] As copyright assures that authors exploit works exclusively, they suggest, permitting (by omission) technological advances to threaten those powers by facilitating mass piracy would not be neutral. The dubious logic[44] underlying this argument is as follows: if (a) before networked digital technology, commercial exploitation of works by copyright holders was secure, even without granting them control over access[45]; and (b) as a result of mass diffusion of networked digital technology, commercial exploitation faces considerable threats, a claim that even "user's rights defenders" would be willing to accept; and (c) granting copyright holders an exclusive right to control access to works would mitigate such threats; *then* granting such a right has to be neutral.

On the other hand, access control detractors appeal to neutrality by focusing on the claim that *all* unauthorized uses that were legal in the old world should continue to be legal in the digital world, no matter how great the *unwanted collateral effects* of such uses may be as a result of technological advances. It is precisely the possibility of making such unauthorized uses, they claim, that neutrality ought to secure. If making unauthorized private copies of a CD was legal before networked digital technology, for example, it should continue to be legal, even if technology now permits making perfect copies and distributing them globally at zero cost in a few seconds. Litman argues that technological advances cannot be the sole reason as to why users who continue doing what they have always (legally) done suddenly become "pirates"[46] and that, historically, expansion of copyright regarded as neutral have comprehended powers over exploitation of works but have never extended to "access" or

---

[42] *From Having Copies*, *supra* note 2.

[43] *From Having Copies*, *supra* note 2; *see Digital Dilemma*, *supra* note 3.

[44] There are at least two reasons why this rationale is objectionable. First, it is unclear whether granting exclusive control to access would actually be an effective means of securing that the exploitation of works by copyright holders is not endangered. After all, if the cause of this danger is the inability to enforce the legal prohibition on reproduction or public distribution of protected works at a considerable scale (precisely what digital network technology has made possible, which lies at the core of the controversy involving access control), it is not so clear why the enforcement of the prohibition on circumvention of access controls would work. Second, even if granting exclusive control to access were an effective means of securing exploitation of works by copyright holders, it could be illegal if it involved a violation of certain rights. This reasoning is only concerned with the "benefits" of exclusive access controls, but it completely disregards its "costs".

[45] *See Personal Use*, *supra* note 40, at 1904.

[46] *Demonization*, *supra* note 20, at 8; *War Stories*, *supra* note 15, at 15.

"use" control.[47] In sum, the supporters of this view think that, from a neutral perspective, the scope of copyright should in fact remain unchanged regardless of whether technological advances facilitate infringement.

Before tackling the question of what is neutral, this paper briefly goes back to the consequences of this claim. To contend that copyright should remain unchanged, naturally, favours the *status quo*. And, as explained in section I, favouring the *status quo* seems, *a priori,* equivalent to disregarding the fact that as a result of technological advances and changes in the way of exploiting works, copyright holders' exclusive ability to exploit works may be at serious risk. But is it true that the technological advances that have taken place in the digital world *alone* have (or threaten to have) such an effect on our understanding of copyright? Or is there something else that both sides of the discussion above fail to see?

V. What Is Neutral?

So what *is* neutral? In order to find an answer to this question (and in order to find a way out of this decade-long discussion), an opposite approach to the one that has been adopted until now should be followed. An "opposite approach" means one that tries to isolate the conceptual issues underlying access control from those involving the effects that copyright infringement has in the digital world (including the ones that result from the new ways of exploiting works in the digital age). In short, the answer to the question "what is neutral?" does not depend so much on the effects that certain acts have in the digital world of access controls, but on old questions that in some cases (even today) do not have a clear answer.

(a) The first of these questions is whether (implicitly or explicitly) copyright law grants copyright holders of non-digital works exclusive access control; that is, whether unauthorized access is not illicit *per se*. The following example might help analyze the issues raised by this question. Suppose two burglars break into a house while the owners are on holiday and, after burglarizing the house, they decide to relax in the living room for a couple of minutes. Suppose one of them discovers that, among the pile of VHS tapes that lay on one side of the home theatre is a VHS tape with the director's cut version of his favourite movie. They decide to watch it, but halfway through the movie, they get arrested. Suppose that[48] MGM (copyright owner) sues the burglars in a civil proceeding, claiming that their unauthorized access to a work amounts to copyright infringement. How should this case be resolved? Would the answer change if instead of a VHS tape the case involved a DVD?[49]

(b) The second question, anticipated in section III, is whether, assuming illicit access to a work, certain uses of such work permitted by law (for example, the use of an idea comprehended in the work, or a fair use of that work) are illicit, too. In order to evaluate the problems underlying this question, think of someone who *buys* an *unauthorized* copy of a

[47] *Personal Use*, *supra* note 40, at 1904. In order to resolve the discussion described in sections 2 and 3, Litman partially relies on the concept of commercial uses: while commercial uses of works would be illegal, non-commercial uses would not. This concept is problematic for different reasons. In what matters for purposes of this argument, it does not seem neutral, as non-commercial uses comprehend many *public uses* that have significant impact on exploitation (including many kinds of distributions that are arguably *public*).

[48] In addition to the criminal prosecution for burglary.

[49] As suggested in section III, some of the premises underlying the arguments of both sides of the discussion described in sections I and II suggest that in the old world, unauthorized access to a work was not illicit *per se*. However, this question is still a source of debate. *See War Stories*, *supra* note 15, at 3.

VHS tape from a street vendor. Assume that this buyer is also an amateur movie maker and that he reproduces a few seconds of the movie in one of his documentaries in such a way that, if the reproduced copy were legal, would undoubtedly be considered a fair use. Would the use in this example be a fair use? Is the source of a fair use relevant (i.e., does it matter, from a legal perspective, where a fair user gets his source from)? Furthermore, would *buying* that *unauthorized* copy or consuming it (e.g., watching it at home) be illicit? Finally, is there any relevant difference between this example and the previous one?

The questions raised above isolate disputed issues involving access to works from the (massive) effects that such access may have in the world of networked, digital technology. They also show some of the consequences that follow if access control is granted.

The big question,[50] however, is whether the answers to questions (a) and (b) should be different in the digital networks world; say, if instead of VHS tapes the examples above involved digital copies of movies downloaded from the *iTunes* store. It is precisely in this scenario where the effects of technology that concern supporters of access controls matter: the approach to the problems underlying the previous questions might be different depending on what those effects are. However, my sense is, again, that these effects should not change the approach that should have been followed before networked digital technology and access controls. One of the ways to evaluate what such an approach would have been is asking two additional questions:

(c) Does the fact that technology permits instant, mass multiplication of copies at very low cost justify granting an exclusive access right that helps combat unauthorized consumption or reproduction of works? In order to illustrate the implications of this question, I will use an example proposed by Litman.[51] The example involves photocopiers, which became widespread long before networked digital technology. A few decades ago, the introduction of photocopiers[52] allowed cheap, instant, mass reproduction of printed works. Although they did not produce *perfect* copies, more often than not the copies produced by using them were substitutes for the works (usually books or parts of books). This, of course, seriously undermined the market for such works.[53]

(d) Are some restrictions on unauthorized uses illegal? A few examples may be useful in analyzing the issues raised by this question. Imagine that the market for DVDs, CDs or magazines changes in such a way that supports are not sold anymore, but rented for a limited time. Would such a practice be licit? Would it be licit to condition the sale of CDs or DVDs on the contractual prohibition against using them in more than one device (as has been the case with software for the last twenty-five years)? Would it be illicit to sell CDs, DVDs or magazines under the condition that they be listened to (or watched or read) only a limited number of times? And to condition the sale of a CD, DVD or magazine on resale or rental restrictions? Is there a line that separates these cases, and if there is one, where is that line? Would the agreements referred to in these examples be binding? Would the answer to any of

[50] Especially if the answer to the previous questions is "copyright grants *no* access control".
[51] *Id.* at 3.
[52] Even though not everyone had access to a photocopier at home, everyone had access to a store where photocopiers were leased at a very low cost, which tended to be equal to the cost of the support (*i.e.*, the cost of ink and paper) plus the cost of operating the technology (*i.e.*, the cost of renting the photocopier for, say, an hour, which was extremely low).
[53] It is important to note that the fact that control was not actually granted by copyright in this scenario does not necessarily mean that it should not have been granted.

these questions be different if, instead of being adopted by a few copyright holders, the same restrictions were quickly widespread, became the standard in exploitation practices, and changed consumption patterns?[54]

All the examples in (d) could well have occurred in the old world. However, their effects are similar to those that have followed the technological advances and changes in the way of exploiting works that have taken place in the digital networks world in the last few years.

Claiming that the effects of restrictions makes them problematic in the digital world (as claiming that as a result of such effects their enforceability should be restricted) seems plainly inconsistent with the usual arguments made by access controls detractors. Most access control detractors contend that a practice that is legal cannot become illegal solely as a consequence of the multiplication of its impact.[55] To some extent, however, to claim that technical protection systems "open new markets" *is*—as access control detractors suggest—equivalent to claiming that they restrict unauthorized uses. For example, to replace the present way of exploiting movies for home consumption (*e.g.*, the sale of DVDs) with a *rental* scheme would certainly prevent consumers from watching the same movie over and over (without paying again), since they would have to return it after a few days. Access control, which lies at the core of the new ways of exploiting works in the digital world, allows the segmentation of uses and consumers. This allows multiplication of possible sales of the same work (and, conversely, restricting unauthorized uses) by definition. As noted above, this is exactly what owners of copyright in software have been doing for years by restricting the use of a program to "one terminal" or to "one individualized user."[56] As Ginsburg contends, "powers over" works that were central to copyright before new ways of exploiting works emerged did not face these kinds of restrictions.[57] This fact seems insufficient to provide an answer to the question of whether these kinds of restrictions are illicit, something that scholars such as Litman seem reluctant to acknowledge. As a corollary to the remarks included in this paragraph, it is important to note that they are not intended to bias the answer to the above questions, but to suggest that such answer is far from obvious.

Questions (c) and (d) isolate the *particular effects* that access may have in the digital networks world from the issues underlying access *per se*, both by analyzing the new ways of exploiting works and the right to make unauthorized uses of such works. The example involving the photocopier illustrates the impact that technology may have on exploitation of works, by allowing easy, cheap, and mass multiplication and distribution of unauthorized copies. The examples in (d) illustrate the impact that the new ways of exploiting works in the digital age may have on unauthorized uses that were legal in times when the ways of exploiting works were different.

---

[54] A possible approach to this issue would rely on a point of view more akin to antitrust law than to copyright law. Such an approach would probably suggest that any potential problems underlying these scenarios should not be dealt with by introducing restrictions on the freedom of contract, but should rather be left to the market, which would eventually lead to a situation where competing enterprises marketing products with less restriction would emerge. However, as long as there are no collusive practices (or other illegal practices) related to the exploitation of works, the restrictions in the examples above would not be illegal.

[55] *Id.* at 337.

[56] Software did not, and does not, enjoy protection different from that enjoyed by other kinds of works, so that restrictions involving its use do not have any special status.

[57] *From Having Copies*, *supra* note 2, at 6.

Conclusion

This paper proposes to analyze the question as to whether authors should control access to works, or at least those works protected by technological measures, by relying on the concept of neutrality. As I argue in the previous sections, the best way to determine what qualifies as neutral is, paradoxically, to isolate from the observation what is going on in the "networked digital world." This allows us to answer some of the disputed questions involving the scope of copyright in problematic contexts, that either took place or could have taken place long before the era of the Internet and digital technology.