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The Front

About The [Nearly Complete] OA Landscape 2011-2014

Pardon the awkward title. This essay replaces my earlier status updates regarding the "rest of" project and its outcome—that is, the process of going through 4,218 journals in the *Directory of Open Access Journals* (DOAJ) as of early June 2015 that didn't match up to titles already studied for the *Library Technology Reports* report and graded A-D.

Here's what I said on *Walt at Random* in a July 26, 2015 post—think of it as the tl;dr version of what follows.

The Post

This note replaces my earlier discussions of what might/might not happen in terms of completing the scan (of those DOAJ listings not included in the earlier study) and its outcome. A much longer version will (probably) appear in the August/September 2015 *Cites & Insights* (if there is one), but this one has the gist.

Inside This Issue

The Obvious

- Nobody forced me to take on the extra 4,200 journals or promised any funding. It's my own idea, and it's interesting enough that I've watched almost no old movies and written nothing for *C&I* while doing it.
- Obviously, I'll finish the scan. (About 918 left to go—but I'll revisit 300-400 "not able to analyze fully" cases, so call it 1,300.)
- Obviously, I won't entirely hide the results unless people pay for it.

The Plan

- I will prepare a detailed analysis of the results—a very-nearly-entirely-complete view of *The Open Access Landscape 2011-2014*. It will be a 6×9″ paperback involving some new ways of looking at the data that may provide better insights, along with the methods I've used so far.
- A shorter and simpler version of the analysis—lacking any graphs—will probably make up most or all of the October 2015 (or October/November 2015, or if I'm really feeling burned out the Fall 2015) issue of *Cites & Insights*, probably out in mid to late September, possibly not until October (the same time the book appears, since the issue will be derived from the book).
- The book will be available in PDF ebook and paperback print forms.

The Deadline and Terms

- From now through September 1, 2015, a $50 (or more) donation to *Cites and Insights* (the Paypal link is on the home page) will yield three perquisites:
  1. A link to the PDF ebook for the Interim Open Access Landscape Subject Approach, with working hotlinks for chapters, tables and graphs.
  2. A link to a special Lulu page where you can buy the paperback version of the same book (186 p., 6×9″) for $7 plus shipping.
  3. Most importantly, once the book is ready, a link to an **exclusive** PDF ebook version with working hotlinks for chapters, tables and graphs.
- After September 1, 2015, this offer is void.
- When the full book is available, the PDF ebook version (without working hotlinks) will be at least $55; the paperback (probably around 250 pages) will be at least $60.

The Unknown

What about the dataset itself, which will certainly include full details for more than 9,000 journals in DOAJ as of early June 2015, and is likely to include 9,500 or more journals?

If donations and sales warrant, or if somebody can make a convincing case, an anonymized version will be posted to Figshare.

Otherwise, not.

(In practice, while the Figshare version of the partial dataset has been viewed more than 300 times, I've seen no indication that anybody has credited it in any further work–or that it's actually been used by anybody, with the possible exception of DOAJ itself, which asked for and received a special version.)

As for a five-year overview (2011-2015):

- I'd love to do it, if there's strong indication that it will be worthwhile.
- It would be reasonably "easy," as I'd "just" have to recheck journals for APC changes, add journals added in 2015, and revisit journals to pick up 2015 article counts. Best guess is that I could finish it by the end of March 2016, assuming that I picked up a DOAJ list in early January 2016.
- As always, I'm open to proposals: waltcrawford@gmail.com

Revisions

Before going on to some background, a couple of revisions to that post—not because it was in error but because time has passed.

- I've completed "pass one" of the study, yielding 9,711 journals that I could fully analyze, publishing 506,392 articles in 2014. (There's one bottom line: there were *at least* half a million articles in gold OA journals in 2014. That number is low.)
- I've set aside that project while I do this odd issue of *Cites & Insights*. When I come back to it, I'll revisit some or all of 97 journals where Google translate didn't yield text that allowed me to analyze the journal, 221 cases where the journal's archive was too "opaque" for me to count articles without spending an inordinate amount of time, and 242 cases where the journal appeared to be unavailable or just didn't work. I'm guessing that effort will yield 20 or 30 more fully-analyzed journals—possibly fewer, possibly more.
- Deadlines, etc., haven't changed.

The Background

After preparing *The State of Open Access Journals: Idealism and Opportunism* for *Library Technology Reports*, I updated the 6,490 journal records for that study to include *all* 2014 articles (the *LTR* report only included January-June 2014), but also simplified and modified the grading scheme.

Curiosity got the better of me: I wondered whether Chrome's translation capability (Google-powered) would allow me to analyze some of the more than 2,000 journals I'd skipped because they didn't show English as one option.

DOAJ has also grown since May 2014 (it may shrink over the next year as the new listing rules are enforced—or it may not). I downloaded the .csv data as of June 8, 2015, which included 10,611 rows of journal information. I looked at possible duplicates in that dataset, adding disambiguation where the same title appeared with two or more URLs. There were three cases where the same journal appeared twice with the

same URL; I eliminated those. I also eliminated five journals that began in 2015, leaving a total of 10,603 journals.

In the process of re-grading the *old* dataset, I found 25 apparent duplicate journals, leaving 6,465 journals of that 6,490.

Matches

Thanks to our friend Vlookup, I was able to match 6,167 URLs in the old and new datasets, saving off a baseline set. Deleting matched rows, I now had 4,436 journals in the June 2015 set and 298 journals in the May 2014 set.

Title matches (done partly by hand to eliminate normalization issues) added another 218 cases where the June 2015 and May 2014 sets had the same journal titles (but the URLs had changed). I now had 6,385 journals as a baseline along with 80 journals from 2014 not matched in 2015 and 4,218 June 2015 journals not in the 2014 (A-D) set.

Note that the 4,218 count includes all journals from May 2014 that were graded something other than A-D (e.g., those that I couldn't reach, those that weren't peer-reviewed journals, those that weren't really OA, etc.) and that are still in *DOAJ*. I decided to leave that set intact, ignoring for the moment the table of "NotA-D" journals from May 2014. In other words, I'm rechecking all the "Not A-D" cases from 2014.

There are 80 May 2014 journals unaccounted for. I'll look into those again at the end of this process, after revisiting some of the others. I'd guess most either disappeared from *DOAJ* or have title changes and URL changes that prevented matches.

Data Gathering

Since I'd already gone through the baseline journals adding full 2014 counts, I focused on "Part 2," the 4,218 journals that either weren't analyzed previously or that had grades other than A-D and are still in *DOAJ*.

As I went through the list (alphabetically), I matched each completed chunk of 100 journals against the "NotA-D" list, noting the new grade for those journals having matches—which most of them did. At the end of the process, 702 of the "NotA-D" list were accounted for—and 109 were not, which *should* mean that they're no longer in *DOAJ*, just as the 80 remaining May 2014 journals apparently aren't in *DOAJ*.

I ran into two cases where the same journal appears twice in *DOAJ*—definitely the same journal and either the same title or one close enough to be next to it alphabetically, but with different URLs. I omitted the two duplicates (one for each title).

Part 2 eventually yielded 3,318 journals graded A or B (almost all of them A) and 48 graded C, with the rest—around 850—graded but not analyzed, for one reason or another. Note that this count is barely higher than the "graded but not analyzed" count for the earlier study: nearly as

many of those journals were now analyzable as there were new journals that couldn't be analyzed.

There were two surprises in doing this pass: one pleasant, one unpleasant. The pleasant surprise is that Chrome/Google's translation worked so well so much of the time. There are only 97 cases (out of 2,500 or more) where I didn't feel I could rely on the translated text to tell me what I needed to know: is this a peer-reviewed journal, is there an author-side charge and, if so, what is it, and how many articles appeared each year? I'm guessing I can reduce that number slightly in a second pass.

The unpleasant surprise: After encountering malware in several of the journals analyzed in 2014, I made sure that I had Malwarebytes and Windows Defender running—but also McAfee Site Adviser in the browser. In 42 cases (and 18 in the base group when adding 2014 counts), one or the other of these (or, in a few cases, Microsoft Office while passing the URL from Excel to the browser), the journal's site or something on that site was flagged as possible or probable malware. In one case, nothing caught it, and the journal home page brought up a popup window that was *clearly* a hamhanded phishing attempt, obscuring the center of the journal homepage with a lengthy "warning from Microsoft" imploring me not to close the browser but to call a handy-dandy telephone number and, get this, with a female voice *reading that same warning message*.

In other words, 61 journals listed in the *Directory of Open Access Journals* appear to have phishing, drive-by downloads, or other probable or possible malware. That's simply not acceptable. I *of course* did not look further at these journals, and am now trying to decide whether to break with my usual "it's not about individual titles" approach and list the 61 journal titles. (Advice welcome.)

The Analysis

Once I've revisited some journals, I'll start in on the analysis, producing an issue of *Cites & Insights* and a print-on-demand paperback/PDF ebook.

I'm not yet sure what will be included. I do suspect that most discussions of journal size, age, fee-vs.-free, and subject breakdowns will focus on the A and B journals (currently 9,276 journals publishing 470,882 articles in 2014, but I expect both numbers to go up slightly). C journals—those I believe should be avoided—will be noted where appropriate, but it seems sensible to focus on the 95% or so that are broadly acceptable rather than the few problematic cases. (The X journals—currently 850 or so, a number that may fall—*can't* be included in the analysis, since they either aren't OA journals, aren't accessible, or are otherwise not counted. I will discuss those in some detail, just as I'll discuss the subgrades for A and B that replace the old D subgrades.)

I believe the full report will be worthwhile for anybody who cares about OA. I'm sure it will be the most extensive and complete report available.

As to the dataset…well, see the first part of this discussion.

The Future

I could just say "see the first part of this discussion" and maybe that's appropriate. I'd love to do reliable ongoing analysis, and I think a five-year study (2011-2015) would be worthwhile—but it's hard to justify that without some clear interest and revenue.

The Precursor

The State of Open Access Journals: Idealism and Opportunism is the August/September 2015 issue of *Library Technology Reports*. It should be on its way to subscribers and available for direct sale (in full or in chapters) any day now. It's an excellent concise review of the state of gold OA in 2011 through June 2014, based on the 6,490 journals that also formed the baseline for the new report.

The Rest of This Issue

This is an admittedly odd issue. I haven't been doing the lengthy rereading-and-considering sessions that form the basis of most essays because I've been looking at thousands of journal sites and trying to make the most of unidiomatic translations.

And, of course, I plan to get back to revisiting some journals (maybe a week's work) and doing the analysis and book (maybe four to eight weeks of work) after I produce this issue.

So…

I had two ideas for fleshing out a medium-short issue. One was to complete A FEW WORDS. The other was to reprint an essay (or portion of an essay) from the very first issue of *Cites & Insights* and from the least frequently downloaded issues.

I did both. Way too many pages for a summer issues. And I couldn't decide.

So…

For the first (and probably the last) time ever, the print-oriented two-column version of *Cites & Insights* has different text than the online/tablet-oriented one-column version.

In the "standard" two-column version, civ15i8.pdf, you'll find A FEW WORDS… PART 2, picking up the oddly varied story in 1995 and running through now. Take heart: I've excluded self-published material (*Cites & Insights* and 19 or 20 self-published books), which cuts the list by slightly

more than 200 items (several times that many if you count each *C&I* essay as a separate item).

In the single-column 6x9" version, civ15i8on.pdf, I'm including a few not-so-golden oldies: essays from the least frequently downloaded editions of *Cites & Insights* and from the very first issue, back when this was basically an extended continuation of *Crawford's Corner*. ("Least frequently downloaded" based on sometimes-missing statistics, and I suppose it's noteworthy that all three of these issues are at least a decade old.)I chose one or two sections that looked interesting either in "looking back" terms or on their own—and some subsections of a near-issue-length essay in one case.

You are, of course, cordially invited to read both, presumably skipping the second copy of this little essay.

Next time around (with no clear idea of just when that will be): Probably the whole issue will be devoted to *The Open Access Landscape 2011-2014*. After that, who knows?

Perspective

Some Moldy Oldies from C&I

Essays and "essays" from the least-frequently-downloaded issues of *Cites & Insights* and the very first issue, way back in December 2000.

Trends and Quick Takes

Free ISPs: Use Them While You Can

This essay originally appeared in the December 2000 issue, which does not have a volume/issue number.

In the wonderful new world of the all-commercial Internet, *everything* is free—as long as you don't mind the ads and personal information-gathering. That's the promise, with some pundits going so far as to say that we can expect not only free PCs but also free televisions, maybe even free cars. With enough advertising, who needs to pay for anything?

As I've commented before, there's a little trap in that thinking. If everything's free, who pays for the advertising? Lately, a few observers have been asking hard questions about advertising on the Internet—the hardest of which is this: If the Internet is such a great ad medium, why are so many dotcoms spending millions on traditional advertising?

Free ISPs have been around for a while, although most of them haven't been around for very long. The ones with obtrusive ads get tiresome; the ones with unobtrusive ads—well, Freewwweb and WorldSpy had unobtrusive ads. "Had" is the relevant term: both services went under,

turning their customers over to Juno's ad-heavy free service. I believe this is one area where you get what you pay for. Twenty bucks a month is a bargain for ad-free Internet use if you use the Internet more than a few hours a month—and free ISPs rely on you spending lots of time so that you're seeing those ads.

The Etail Revolution

Here's a chilling little item if you're heavily invested in the New Economy. According to Greenfield Online, as cited in the October 2000 *PC World*, "A new survey says that the percentage of Net users who have made a recent online purchase is down slightly from last year."

Elsewhere in that issue, an interesting article assumes that we all love to buy stuff online and reviews tools to make online shopping better. The article, "Smart tools for smart buyers" by Carla Thornton (pp. 58-62), is worth reading—and worth thinking about dispassionately. Some key points, either from the article or from my interpretation:

- "As e-tailers focus on the bottom line, bargains are getting tougher to find." Some Web merchants were selling below cost; far too many were issuing discounts that far exceeded any possible profit. The justification for this behavior is "customer acquisition," and that justification makes some sense if those expensively acquired customers are loyal. Which brings us to the next point.
- Shopping bots such as MySimon work against customer loyalty, by making broad comparison-shopping easy. But with MySimon and its peers, a little effort is required: you must go to MySimon.com and ask for a comparison. The new generation of shopping bots—Clickthebutton, Dash.com, and others—just sit there in the background. When you look for an item at your "favorite" Web store, the bot pops up to tell you where you can get a better deal. This is truly subversive stuff if it works, and Clickthebutton apparently does. In PC World's test, when they looked for The Thomas Crown Affair on DVD at Amazon ($17.49), the bot suggested Sam Goody at $14.48. When they looked at a $233 Epson Perfection 1200U scanner, Clickthebutton said "Psst: Buy.com has it for $177.15."
- You can avoid giving out your credit card number at online merchants through a variety of techniques. I'm not sure why you'd need to do this, but the article includes the details.
- Companies are using 3D "showrooms" to make virtual shopping more interesting, but that almost requires the broadband that people aren't rushing out to buy.

- Then there's color. If you buy a sweater, shirt, or something similar from the Web, you want it to be the same color you saw on the screen—just as print catalogs provide accurate renditions of items. But computer monitors vary widely in color rendition, with substantial differences between the standard Mac color gamut and the standard Windows gamut and display-to-display differences as well. I set my brightness fairly low; if you set yours higher, you'll get different color saturation. A company called E-Color claims to fix this with True Internet Color, a download that lets you tune your monitor so that you'll see what you should be. Unfortunately, it doesn't seem to work, at least based on PC World's initial tests.

The first and second points are the most significant, I believe. The only way Amazon will ever become profitable is if customers remain loyal as Amazon's prices go up. If people aren't bothered by Amazon's intrusive data collection and really *love* that "personalized" advice, that might work—but background shopping bots make it awfully easy to switch to another vendor. If customer loyalty has to be earned on each sale, those huge customer acquisition expenses were wasted money. (I'm using Amazon as an example because it's been the most blatant about losing money on every sale to become the Wal-Mart of the Web.)

In the real world, I will cheerfully pay a little more for several reasons, primarily to keep local merchants healthy (and keep a healthy mix of local merchants in the community) and to reward good person-to-person customer service. Loyalty to a Web merchant can't possibly strengthen local business, and so-called customer service on Web sites can't compare to my local hardware store or video rental store. I know why I won't shop at some online merchants (just as I know why I don't shop at Wal-Mart) and why others only come into play as last resorts—but there are very few commercial online sites to which I feel any loyalty. Then again, to be sure, all else being equal I'll buy in the real world. I don't claim to be typical, but I doubt that I'm alone.

How Long are You On?

Here's a charming little factoid, from the October 9, 2000 *Industry Standard:* "U.S. Net users who hunt, attend tractor pulls and earn less than $30,000 spend 11 hours per month online at home. That's 5 hours more than surfers who earn $136,000 and live in the wealthiest suburbs." The sources are Nielsen Netratings and Claritas.

Three comments come to mind immediately:

- If the demographic data is coming from voluntary forms attached to free Web services, consider it worthless. A fair number of knowledgeable (and reasonably affluent) Internet users fill out such

forms to reduce the level of spam. One favorite profile is the high school dropout who earns $10,000 a year and has 16 children.

- Otherwise, it's hard to believe that the profile above represents a large enough sample to be meaningful: that is, at least 500 (and preferably at least 1,000) users reliably known to fit this profile, who allow their usage to be traced.
- On the other hand, as one who believes that home Internet use (other than chat, instant messaging, and email) isn't likely to be an all-consuming activity, I'd like this to be true. It means that well-to-do Internet users are averaging six hours per month, or about 20 minutes per day; that sounds about right, frankly.

CD-RW: Muddying the Media?

Hugh Bennett's "CD writer" column in the November 2000 *EMedia* tells a startling story. Apparently, the race for higher-speed CD-RW results in a nonsensical decision: creating a separate, *incompatible*, CD-RW medium designed for use in 10x drives. (That's 10x for CD-RW, typically the second number in a drive's spec; 12x CD-R is fairly common and an entirely different matter.) You could see high-speed CD-RW blanks in stores marked as "4x to 10x"—but they might not work *at all* on your existing 4x or 8x CD-RW drive.

Bennett frequently harps on the relative unimportance of CD-RW as compared to CD-R, but in this case he's right to raise a red flag. Unless the discs carry a label specifying "use only with 10x drives," people *will* buy the wrong discs—after all, wouldn't you buy a "higher-quality" blank (4x-10x as opposed to 1x-8x)? Philips offers a solution—a special logo for drives and discs—but it's nonsensical, just as the MultiRead logo (for CD drives that can read CD-RW as well as CD-R discs) never meant much to users.

Very few consumers use more than a handful of CD-RW discs; most people burn dozens of CD-R discs for each CD-RW, particularly given the absurdly low prices of CD-R and the likelihood that a CD-RW disc (unlike CD-R) won't work on a typical audio CD player. It's hard to believe that nine minutes is too long to complete a 650MB CD-RW: that's what you should get at 8x speed. It's not at all hard to believe that consumers will be confused and upset by the incompatible blanks. This one seems to be a bad idea, pure and simple.

Most Relevant Sites: Just Trust Us

Users are the final authorities on relevance—and the methods used to arrive at relevance rankings in most search engines and directories are arcane at best. One reason I appreciate Google is that they state their

methodology up front; it may not be the ideal definition for relevance, but at least you know what you're getting.

James Fallows' column in the September 4, 2000 *Industry Standard* offers a crisp and remarkably telling commentary on "relevance" for many other search engines. The title is "Searching for Revenue"; the tease is "What happens when Yahoo and its kin start charging Web sites to be indexed?"

That's not a hypothetical. To some extent, it's already happened. Yahoo, and more recently LookSmart and Inktomi, charge fees to sites that want preferential coverage. GoTo.com simply sells positions within search results; the others, so far, haven't gone quite that far. Yahoo charges $199 for a promise that a site will be reviewed within seven business days. Inktomi charges a fee to assure that a site is indexed within 48 hours of submission and refreshed every two days thereafter.

Fallows, not precisely a left-wing radical, *praises* this trend as a "step back toward normal economic principles." Inktomi's spokesman says that the "only people unhappy" with the new policy are the people who "send us millions of [spam] pages a day."

Unsurprisingly, Sergey Brin of Google is a bit more nervous. "Suppose there's some very good Web site on cancer, but this Web site hasn't paid you? Are you going to give the user a worse site and worse source of information just because the site hasn't paid? I think it's an ethically difficult matter."

Web ethics? Wake up and smell the payola!

The Broadband Follies: Quick Updates

The first *Grok* appeared in September 2000, with entertainment as its theme. Although it may be sold as a separate newsstand magazine, you can't subscribe to *Grok* (so far). The new perfect-bound monthly (192 pages this time around), with its hip slightly-oversize format (9.1x10.5 inches), is mostly a way for *The Industry Standard* to reduce its weekly heft and get more advertising in the process. *Grok* is a new home for the magnificent special reports that help make *The Industry Standard* so worthwhile but made it too bulky. Now the weekly magazine fits neatly within its saddle-stitched 7.8x10.5" form (typically 200 to 300 pages), and *Grok* fleshes out special reports with lots of flash.

As you might expect from an entertainment issue, the first one has loads of hype, but it's also good reading. (I do appreciate the definitions of "net terms" on p. 15, where "Convergence" is defined "Union of the TV and PC. Still hypothetical, emphasis on the 'hype.'")

You may have to read carefully in some cases, however. A brief article on p. 15 notes, "Analysts say that it will be at least another two years before most consumers have both the superfast connections and the technology to watch TV-quality shows online." That "at least" is useful, given a Jupiter Communications projection on p. 29 of the same issue: "In 2003, more

than three-quarters of online households will still be using dialup to access the Net." Jupiter hypes new technologies as much as most forecasters, so that's probably an optimistic estimate.

Postscript: *Grok* ends its run in February 2001. That may be just as well; the special reports don't need the extra flash.

Copyright Currents

This essay originally appeared (in somewhat longer form) in the November 2002 issue of *Cites & Insights*, volume 2, issue 14.

No single topic seems most prominent at this point. Instead we have a hodgepodge, with extremists on several sides arguing past each other, politicians assuming technological expertise they clearly lack, the hired guns of Big Media continuing to say outrageous things because that's their job—and once in a while, a hopeful sign. If the groupings seem arbitrary and overlapping this time, blame my two-week vacation or the scattered nature of the field. A hint: They really *are* arbitrary and overlapping in cases; I just couldn't see covering a ream of documents in one unbroken screed. As usual, commentary—opinion, if you will—is mixed with notes from articles, and articles are considered in chronological order within a section. Also as usual, "Big Media" is grossly unfair and oversimplified shorthand for the corporations most involved in pushing egregiously unbalanced copyright stances. The set of companies and associations included in Big Media varies over time and with the specific issue, but it's sometimes too clumsy to spell things out. (Sometimes, AOL Time Warner is part of Big Media, sometimes it's not; Sony is frequently part of Big Media but also one those helping to undermine Big Media efforts

First, the standing reminder. I have no idea what the situation is in Australia, and would not presume to suggest reasonable bases for legal arguments in that nation—but in the United States, the primary basis for copyright (and patents) is the following oldie but goodie:

> The Congress shall have power…To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writing and discoveries.

P3P: Preventing Peer to Peer, or Berman and Beyond

"Dear Colleagues," begins a July 15 letter to the CEOs of seven true Big Media firms—a response to *their* letter of April 12 "in which you ask your

industry to help explore solutions to address the ongoing threat of piracy to motion pictures distributed in digital formats." (Almost as long as one of my sentences!) The letter—PDF, but you can probably find it—is from the Big B's of personal computing, Steve Ballmer of Microsoft and Craig Barrett of Intel. It's only two pages, but it's interesting, particularly in light of some later developments (see "Semi-Crippled Computing?" below).

Ballmer and Barrett note the "long and proud history" of hardware and software industries in advising the "content community" on technical ways to fight piracy. (Hmm. I typed "privacy" at first, a possibly Freudian slip.) Think DVD—where casual copying is essentially impossible, although professional piracy would barely be hindered.

But, as the BBs point out, "there is unfortunately no panacea-chip or cure-all piece of code that will stop piracy completely." Here's the real point on which technology firms disagree with Big Media:

> Peer-to-peer technologies constitute a basic functionality of the computing environment today and one that is critical to further advances in productivity in our economy. Any solutions to the problem of piracy must not compromise the innovations this functionality has to offer, and—more importantly, must first address the means by which unprotected content finds its way onto these systems in the first instance.

They go on to discuss the need for consumer education, enforcement of existing laws, ways to "harness the power of the Internet" for content, and addressing legitimate consumer expectations. Ballmer and Barrett put scare quotes around fair use—and this is the *only* use of quote marks in the entire letter.

When I first read the letter, I was encouraged. In the light of other developments, I'm not so sure. But that's another story. Meanwhile, an interview with Howard Berman in the October 2002 *Wired* makes his take on P2P networks clear: "There really can't be any doubt that their primary use is sharing millions, perhaps billions, of copyrighted works." So much for legitimate uses.

An August 9 Reuters story notes that a bunch of lawmakers "have asked…Ashcroft to go after Internet users who download unauthorized songs and other copyrighted material, raising the possibility of jail time for digital-music fans." A spokesperson said the lawmakers wanted the FBI to go after network node operators; that's not quite the same thing as "Download a song, go to jail."

David Segal had an interesting piece on *current* industry anti-P2P tactics in the August 21 Washington *Post*: "Spoofing frustrates music pirates." He discusses the recent appearance of "spoof files" on networks—"typically nothing more than repetitive loops or snippets filled with crackle and hiss." RIAA calls spoofing a legitimate way to combat piracy. I agree, as long as spoof files don't contain viruses: If you go looking for a file on someone else's computer that's reputed to be a copyright song, you

have no legitimate complaint if you get 30 seconds of static. (Told you this was complicated.) Spoofing is one of the behaviors the Berman bill would legitimize—but it's not clear that spoofing is illegal now. If it can be traced back to record companies, people might be upset—but people who pay attention to RIAA are pretty upset already, so what's new?

As usual, this article makes the phony connection between rising blank CD sales and song downloading, as though nobody uses CD-Rs for anything but illegally-obtained songs. Backups? Custom mixes from your own CDs? Limited-run business and entertainment CDs? (I know RLG uses CD-Rs to ship out software, and I'm pretty sure that indie bands use them to sell "CDs" without the hefty up-front cost of mastering.) Since nobody's done any legitimate survey, there's no way of knowing what proportion of CD-R use actually relates to illegitimate P2P sharing. (Later, the story *does* note some of the legitimate uses for CD-Rs, along with a silly and probably unprovable claim about CD-R sales patterns spiking when "major new releases" come out. Wouldn't casual pirates buy CD-R spindles, not pay through the nose for individual discs? Otherwise, they're not only unethical, they're stupid.)

The story covers a lot more than spoofing. Hilary Rosen says that the recording industry has "been, with regard to enforcing our rights, pretty generous with consumers." Note the lack of any suggestion that consumers have rights over items they've purchased. Rosen claims they're looking for "a way to stop gross infringers, and there are measures we can take to prevent people from making 100 copies or uploading CDs for millions to take." Read that carefully, noting that true "gross infringement" is done via disc replication and sale, not by a college student copying 100 songs. The story goes on to note, "foolproof locks…don't exist in the digital realm." Segal also notes that the "ultimate goal" of recording companies is to get rid of audio CDs and replace them with inherently secure media. I love the mention of Ripflash: "Plug the $179 gadget into your stereo and it will convert anything that plays over your speakers—an LP, a cassette, a CD—into an MP3 file." Wow! Here I thought I'd have to buy a $5 cable from Radio Shack (two RCA jacks at one end, a stereo minijack at the other) and plug it into my sound card to do the same thing (via MusicMatch Plus or any comparable program). Instead, I can spend $179: ain't technology grand? The maker says, "there's no legal way to restrict that, that I know of"—but it's my belief that any real-world technology to satisfy CBDTPA requirements would, along the way, make the Ripflash useless.

Another Washington *Post* article from the same day notes the Berman bill, CBDTPA, and the letter to Ashcroft. Comments on the Berman bill include the note from EFF's Robin Gross that "This is more power than we give to law enforcement to go after terrorists."

In late September, Berman and colleagues attacked critics of his bill for "scare tactics," according to a Declan McCullagh story on ZDNet News.

This was at the first congressional hearing on the bill, now called the P2P Piracy Prevention Act, and it was as open and balanced as most such hearings: Precisely one opponent of the legislation was allowed to testify. Hilary Rosen, predictably, accused opponents of "misinformation" and "irresponsible descriptions" of the bill (such as allowing "copyright vigilantism")—and yet, she gave no actual facts to suggest such misinformation. When people are authorized to disable, interfere with, block or otherwise impair nodes that they *suspect* are distributing copyright material, with no specification of allowed techniques and absurdly limited recourse, what else would you call it but copyright vigilantism? Another Declan McCullagh story, this one at News.com.com (that's the URL!) and dated October 22, says that Berman's aides may be listening to critics and might make his bill a little more reasonable.

As an incidental note, the July 2002 *EMedia* includes a quick report on a Jupiter Media Matrix survey showing that peer-to-peer downloaders are 75 percent *more* likely to buy more CDs than people who don't download. The RIAA says their research shows just the opposite—that downloaders buy less music. Make of this what you will.

In late August or early September, RIAA asked Verizon to identify a particular subscriber, and you won't be surprised to find that DMCA gave them the leverage to do so. Verizon is resisting on procedural grounds, and groups such as EFF and EPIC have filed briefs opposing the move. (Information from a Declan McCullagh posting at ZDNet News.) Doug Isenberg writes, "Is this the way to fight copyright infringement?" on September 4 at News.com, after a somewhat similar lawsuit had come and gone. That time, 12 Big Media companies sued four of the biggest Internet backbone providers to force them to block access to Listen4ever.com. No lawsuit was filed against Listen4ever itself. Can you sue the transmission company? Once again, "hello DMCA!" This time, the lawsuit became moot (Listen4ever disappeared), but there will be a next time. The **recommended** commentary makes sensible points without attempting to excuse piracy or theft.

Someone somewhere will doubtless take this story seriously: "RIAA sues radio stations for giving away free music." That's from *The Onion* for October 2, 2002, headlining a "news" story involving a $7.1 billion lawsuit against the nation's radio stations. If you can find this story, take a look; I must say that the Hilary Rosen "quotes" are fully in character—and the fact that *The Onion* finds this satire timely says a lot about the depth of RIAA nonsense.

Howard Berman himself offers a commentary on his act at FindLaw.com, posted October 1, 2002. (writ.news.findlaw.com/commentary/20021001_berman). He says he believes in a "carrot and stick" approach to dealing with "rampant P2P piracy"—but his statement that copyright owners "must offer reasonably-priced, consumer-friendly ways to access legal content online" is akin to my wishing for peace in the Middle East.

Berman's providing a stick, period. He goes on to describe just how narrow he believes the bill to be. His take isn't quite the way I interpreted the bill itself, but maybe I'm wrong. **Read Berman's comments** yourself, then go back to the bill to see what you think.

Gary Shapiro of the Consumer Electronics Association offers a thoughtful set of comments on consumer rights and how you *can* "compete with free" in "The campaign to have copyright interest trump technology and consumer rights," available somewhere at politechbot.com. **Recommended**.

An October 16 ZDNet commentary from Cary Sherman of the RIAA responds to a Gary Shapiro speech (which may or may not be related to his politechbot posting). In the interests of fairness, I would also **recommend** that you read Sherman's vehement disagreement with Shapiro. As the headline says: "RIAA response—you're dead wrong."

Copy Protection: Bad News and Good

The bad news first. Or, given the parties and the situation, maybe these are early warnings of potential bad news. To wit, Microsoft and Intel may have implemented or be on the verge of implementing partial lock-down systems to make Big Media happy—or maybe not.

I haven't heard much about Microsoft's Windows XP Media Center Edition, but a Joe Wilcox story on ZDNet News (September 3) and a David Coursey commentary at ZDNet's AnchorDesk (September 8) show the essentials. The specialized OS is for "digital entertainment PCs," and HP and Samsung both promised systems in time for the holiday season. If that's true, they should be in ads when you read this. The systems include a user interface for digital media, with a remote control; HP's versions should run $1,500 to $2,000. The systems will include TV tuners and digital video recording (DVR or PVR) functions in addition to the usual multimedia features. The rub: when you use the DVR functions, the programs are encrypted. You can burn DVDs, but they can only be played back on that particular PC.

Some analysts deride the product: "There's no way consumers are going to like this proprietary way of doing business." Von Ehman (an analyst for West Virginia and also a musician) says, "If you copy protect in any way, the kids will scream bloody murder…that would be suicide." The story notes that Sony's VAIO ships with DVR features and *no* copy protection (the players do get confusing, don't they?).

David Coursey's take is fairly clear: "Redmond [Microsoft headquarters] is perfectly happy to sell out its customers to keep the entertainment industry happy." The **recommended** column includes a variety of speculation as to Microsoft's motives.

An October 9 story in the Washington *Post* notes that Microsoft is already changing its tune: Media Center will create DVDs that will play on "any PC that runs Windows Media 9 Series player and the latest version of Windows XP," and by year's end users should be able to burn DVDs that run on set-top players.

Then there's Intel. According to a September 10 story in the Boston *Globe*, its next generation chips will include hardware antipiracy features. The features are related to Microsoft's Palladium software initiative, another troubling possibility. This is the "post-Pentium4" chip, so at least we have a couple of years to hope for sanity.

Another twist in copy protection is the long-promised DataPlay medium, quarter-size optical discs with 500MB capacity—and built-in copy protection in prerecorded form. Some major record labels want to see DataPlay replace CD—but that's going to be a tough sell, even if the media are cute. (As of September 27, it's going to be an even tougher sell. DataPlay laid off half its staff in July after burning through $119 million. Most recently, the operation is entirely shut down.)

The good news, if we can believe a September 3 News.com story by John Borland, is that record labels are backing down on plans for copy-protected CDs in the United States. Apparently it's now the record *stores* that are hot for copy protection. That makes sense: They drive out anyone over 30 with blaring grunge rock or rap, and now they'll piss off everyone *under* 30 by pushing for crippled CDs. Since it's apparently record stores as much as the record companies that continue to *raise* prices every time sales go down, you might wonder whether industry executives have strong suicidal tendencies. The News.com story included the automatic RIAA claim that a 7% drop in CD shipments must come from piracy; high prices, a stumbling economy and crappy music can't possibly have anything to do with it. Borland says that labels may be holding off on copy protection but "their desire" hasn't diminished—and outside the U.S., people are apparently rolling over for this nonsense. Maybe those lawsuits and tough talk from Rep. Rick Boucher (D-Va.) actually did some good. The fact that copy protection doesn't really work—it shafts honest people who play music on PCs without seriously deterring even casual thieves—may or may not matter. Naturally, Midbar (a producer of copy protection technology) says people won't criticize copy protection once it's universal. Would you expect the company to say, "People will scream bloody murder, and it doesn't really work, but buy it anyway"?

The Broadcast Flag and DTV Sagas

When you hear that consumer electronics and entertainment companies have agreed on a solution to protect digital TV, look closely. That's what Lauren Wiley did in an August 2002 news report in *EMedia*, and what she saw isn't pretty. The group, Broadcast Protection Discussion Group

(BPDG), proposed an embedded broadcast flag—and proposed that *all* digital devices would be required to recognize the flag. Hear sounds of CBDTPA in the distance? The discussions were closed, apparently, and the supposed consensus masks a bunch of real issues. Hollywood wants to plug "the analog hole"—what I call the D:A:D cycle in my December 2002 "Crawford Files." That is, convert a digital program to analog, then back to digital, and any flags or watermarks should be gone. There's only one way to plug that hole, and it's pretty draconian.

The Consumer Electronics Association frets that the tens of millions of existing DVD players wouldn't be able to play new "protected" DVDs—but Hollywood, as you'd expect, is opposed to "grandfathering" those drives. Not at all incidentally, the proposed solution also makes all digital TVs that have been sold so far obsolete and possibly useless.

Rep. Billy Tauzin (R-Louisiana) released a draft of a DTV bill in September. According to Brad King's September 20 *Wired News* report, the bill includes the broadcast flag—and for removal of analog output from digital TVs, so that you can't record shows on VCRs.

Speaking of CBDTPA and DMCA…

What's happened to Declan McCullagh? He's been the source of many good brief articles on various aspects of filtering, copy protection and other technological issues, and his Politech list has included worthwhile commentaries. I don't expect consistency of other people any more than I display it myself, but recent articles have been odd enough to cluster.

First was a Politech column, "Geeks should write code, not laws." I haven't read the column, but the gist appears to be that it's better to spend time writing "disruptive" applications than lobbying for better laws. A series of thoughtful responses—"thoughtful" on many sides of a far-from-simple issue—included the note that disruptive code as an alternative to better laws tends to destroy the rule of law, leading to chaos. Public Knowledge posted a response noting, "writing code and taking political action are not logical opposites when it comes to protecting freedoms. You need to do one to do the other… No amount of good code can overcome harmful laws and bad policy." Astonishingly, McCullagh responded that this last sentence is a "misstatement… Of course good code can do just that." In essence, he seems to be saying that with enough "disruptive technology"—encryption, anonymous remailers, anonymous digital cash—you can just ignore the laws you don't like. Amazing and absurdly shortsighted—or maybe he's saying that Only Übergeeks Deserve Freedom?

Oh, yes, the heading mentions DMCA. Here's an August 19 McCullagh "Perspective" on News.com, "Debunking DMCA myths." He pooh-poohs researcher fears of being sued, even saying of the Felten situation that "the fears of legal action may not all be justified." To some extent, that may be true—if research doesn't include working code, it's

probably not covered by DMCA—but it's *clear fact* that DMCA threats have been used to suppress publication of research. Not paranoia, not EFF "extremism." Yes, Felten could have given his paper at the original conference and looked for lawyers to defend him if the threatening letter was followed by an actual lawsuit—and he would almost certainly win. After spending a couple of hundred thousand in legal fees, most likely. The ALA legal effort on CIPA is a $1.3 million affair; how many individual libraries would spend that kind of money to avoid unreasonable restrictions on their operation?

The problem with bad law is that it leads to bad legal threats. Maybe that doesn't bother McCullagh—after all, he puts his faith in "disruptive technology"—but it bothers me. "Freedom to tinker" has a response from Edward Felten and others that points out the extent to which McCullagh "misses the boat." I **recommend** this brief commentary (www.freedom-to-tinker.com/archives/000020.html), including this key sentence: "It is disruptive to the progress of research when scientists must first consult with attorneys to determine if previously legitimate research might be in violation of the DMCA." No kidding.

How about this one? The August 27 News.com story is an interview with Sarah Deutsch of Verizon at the point that the RIAA wanted the name of a subscriber and some telecom companies began lobbying against new copyright laws. Here's the headline: "Why telecoms back the pirate cause." Now there's a neutral headline for you. The piece is interesting. For example, the Berman/Hollings bills "came as a complete surprise to Verizon, because we had thought we had a long-term deal with the copyright community after spending three years negotiating [DMCA]. That was supposed to be the end of the war." Deutsch gives clear and sensible reasons that ISPs are nervous about the draconian new measures. McCullagh uses interesting phrasing in one question: "You're sounding a little like consumer groups and fair-use activists. Isn't it odd for such a huge company, a once-strictly regulated monopoly, to come across like Ralph Nader?" Deutsch responds by noting the need for fair use (without scare quotes) and that copyright should balance the interests of many parties. "We have a 300-pound gorilla on one side of the scale. Many of us are joining together on the other, to reach that necessary balance." (Meanwhile, isn't it odd for McCullagh to sound like a mouthpiece for Big Media? I mean, "back the pirate cause"…)

You have to give Big Media credit for changing the language. Even some otherwise reasonable people have started using "piracy" instead of "copying" and "pirates" instead of "downloaders," when even copying a single file is now "piracy," apparently just as evil and felonious as running off a few thousand counterfeit DVDs. Both may be theft, both may be wrong—but the law makes distinctions between misdemeanors and felonies, between the petty and the grand, and the switch to "piracy" as a universal term undermines such distinctions. Good for Big Media's efforts

to overrule freedom and technological progress on behalf of "shutting down piracy." Bad for reasoned discussion and debate.

A later note: McCullagh's October 14 ZDNet commentary, "It's time to fix copyrights—permanently," offers a reasonably balanced view of the copyright situation. **Worth reading.** (My printout shows "zdnet.com.com" as the domain, which seems redundant but consistent with the sister CNet site news.com.com.)

CTEA and Lawrence Lessig

Three interesting items on the road to the Supreme Court, all worth reading:

- Aaron Swartz wrote a rather nice one-page summary of the government response in Eldred v. Ashcroft; you'll find it at www.aaronsw.com/weblog/000474. He's placed it in the public domain, so I could quote the whole thing, but go read it yourself. I haven't read anything from Swartz before, but based on this I envy his succinctness. **Recommended**.
- The usual CTEA-related sources should get you to the *Reply Brief for the Petitioners* in Eldred v. Ashcroft, and if you've read the government's earlier response, I **strongly recommend** you read this relatively brief reply: 19 pages plus tables and one addendum. Good stuff, clearly written, and as far beyond my ability to properly evaluate as all the other legal briefs were and are.
- Steven Levy does an adulatory writeup on Lawrence Lessig in the October 2002 *Wired*, "Lawrence Lessig's supreme showdown," available in the wired.com archives. I was astonished to find that Lessig is a mere child of 41 years. One charming (and unsurprising) point: Michael Hart, the Grand Poobah of Project Gutenberg, wasn't the lead plaintiff because they wouldn't buy into his "manifestos attacking the greed of copyright holders." You won't find any more balance or skepticism in this article than in most *Wired* content—but it's still interesting background and **recommended**.

In case you missed it earlier: I agree that CTEA is bad law and hope it will be overturned. I do not agree with Lessig's assertions (not mentioned in this article or relevant to CTEA) about how short copyright protection *should* be. Nuance, nuance: What a mess it makes of life.

I wrote the section just above before the actual Supreme Court hearing, which happened on October 9. According to the October 10 *Chronicle of Higher Education*, the judges questioned both sides skeptically. (An interesting October 25 *Chronicle* article discussed Eric Eldred and why he's in court; it's worth finding and reading.) Lawrence Lessig's own Weblog (cyberlaw.stanford.edu/lessig/blog/archives/) has four print pages of his own thoughts on the hearing, posted October 16.

Finally, the transcript of the hearing—27 print pages, but it's large print—*may* be available for downloading at www.aaronsw.com, but I wouldn't bet on it. I haven't had time to read and digest it yet, but I **recommend** that you take a look if you care about CTEA. If it's gone, go to Lexis.

More from Janis Ian

In the previous "Copyright Currents" I recommended an article by Janis Ian on the RIAA, NARAS, and Internet distribution of music. This time, I can **recommend** "Fallout—a follow up to The Internet Debacle" (www.janisian.com/article-fallout.html), in which Ms. Ian discusses early response to the original article. "I had no idea that a scant month later, the article would be posted on over 1,000 sites, translated into nine languages, and have been featured on the BBC." In 20 days she received more than 2,200 emails—and answered them all! "Do I still believe downloading is not harming the music industry? Yes, absolutely. Do I think consumers, once the industry starts making product they *want* to buy, will still buy even though they can download? Yes. Water is free, but a lot of us drink bottled water because it tastes better."

There's a lot more to it. She believes the heavy-handed tactics of the recording industry stem from three issues: Control (wanting all of it), Ennui (Lack of interest in developing new models), and "The American Dream"—but she's really saying that the last is the fundamental reason that copyright balance needs to be regained.

She's hopeful, partly because she believes we (consumers) will stop buying CDs altogether—"a general strike"—if RIAA pushes too hard. She suggests a "modest experiment" involving all the record companies, music that's out of print, and truly reasonable prices for a pure-download model. She suggests a quarter a song, with no limits on how many you can download or your ability to retain them. Try it for a year—with no loss of sales for current CDs, since this would be entirely out-of-print material. See how it works. (Her proposal includes more detail on how money received should be spread around, additional services that could be offered, etc.) It's an astonishingly sensible proposal. I'd guess the chances of Hilary Rosen and friends doing anything with it are pretty much nil.

If you want even more Janis Ian, a little searching on Slashdot.org should yield a 12-page September 23 interview (her responses to questions invited in an earlier posting)—fascinating, and covering lots of ground—and many pages of additional comments from the many slashdotters. Some of the comments are even relevant. I would no more attempt to summarize or comment on a 40+-page Slashdot.org melee than I would slit my wrists.

Digital Choice and Freedom

I'll admit that I give this one less chance of passage than CBDTPA, but *pro-consumer* copyright legislation is so unusual these days that it's worth a mention. Zoe Lofgren, from around these parts (D-San Jose), introduced the above-named bill to "ensure consumers can copy CDs, DVDs and other digital works for personal use." Lofgren thinks that consumers should have the same rights with digital material that they do with analog material—what a notion! This bill and a promised similar bill from Rick Boucher amend DMCA to allow bypassing technological protections in order to make personal copies.

Paula Samuelson of UC Berkeley's Boalt Hall law school says Lofgren's bill "aims to restore what Congress thought it was doing [with DMCA]—preserving fair use for people who have lawful rights to use stuff." As you might imagine, Jack Valenti issued a juicy rejoinder: "If this bill were to pass, it would render ineffective, worthless and useless any protection measure we would have in place to protect a $100 million movie. You could download a million movies a day, and no penalty for it." Does the Lofgren bill suggest anything of the sort? Probably not—but for Valenti, it appears that fair use means nothing and the only acceptable policy is 100% Hollywood control. He usually wins, but maybe at some point our elected representatives (there's a quaint phrase) will recognize just how extreme Valenti and his Big Media friends really are.

Copyright Currents

This section includes (most of) two portions of an issue-length essay making up the Mid-June 2004 issue of *Cites & Insights*, volume 4, issue 8.

While I'm probably missing more than I catch here, most copyright-related threads continue to be active. Still no real action on any copyright-related legislative front—including any attempt to reverse the FCC's abysmal broadcast flag ruling—but at least there have been hearings on one possible corrective bill, the DMCRA. This mass of stuff, organized by general topic and chronologically within topic, may gain coherence in the reading—or it may not.

Big Media and Peer-to-Peer

Anderson, Chris, "Memo to the new head of the MPAA," *Wired* 12:01 (January 2004).

This brief piece takes off from Jack Valenti's coming retirement (after *37 years*!) to suggest that the movie industry can avoid "the implosion of the music industry" by avoiding the RIAA's "history of ham-handed

industry actions and executives in denial." Anderson calls the long-standing copy protection in videocassettes and DVDs an "advantage" in the piracy wars (even as it denies citizens with what might otherwise be fair-use rights) and notes that, "unlike music labels, movie studios are not hated by consumer and artist alike." Well, yes, except that I'd guess *most* music lovers don't "hate" the big labels—and, let's face it, there's a fair amount of overlap between MPAA and RIAA members. I agree with Anderson's comment that DVDs, with bonus material and moderate prices, are perceived as offering better value than CDs and that "**Customers who feel they're getting their money's worth are less likely to turn into pirates.**" [Emphasis in original.]

He notes that high compression on downloadable movies means that, "unlike an MP3, the quality usually sucks." (So do many MP3s, but you never hear that from journalists outside the audio field.) And, lastly, most people don't watch a movie as often as they listen to a song—and watching movies "is not an offhand activity." But, Anderson continues, the MPAA is at risk of alienating customers just like the music industry, given moves like the broadcast flag. Further, he claims, online file-trading will soon get much worse, citing BitTorrent as "the Napster for movies." He says studios should accept that new technology means a new way of doing business, allow people to use digital media however they choose, and "think $5 for a downloadable film—unlimited use."

Is the MPAA likely to listen? I doubt it. And there's one crucial weakness to the whole argument: Turns out that CD *sales* (as opposed to CD shipments) have been rising in recent quarters, which makes "the implosion of the music industry" a suspect basis for changing a business model.

Peer-to-Peer software and the Betamax decision

Just a brief February 4 AP item on a hearing in a federal appeals court. In April 2003, U.S. District Judge Stephen Wilson said Grokster and StreamCast Networks are not legally responsible for the swapping of copyright content—they just provide the software. The appeals court was hearing an appeal of that decision. Russ Frackman, arguing to overturn the decision, cited the Betamax decision—an odd citation, given that the Betamax decision (which found that, since VCRs have legitimate uses and their manufacturers couldn't control uses, manufacturers couldn't be held liable for copyright violations) would seem to back Wilson's decision.

Why is peer-to-peer different? Because, Frackman claims, 90% of content flowing through the networks is illegal. Judge John Noonen noted that 10 percent non-infringing use "sounds like a lot of non-infringing files to me." (I don't believe Frackman *can* back that 90% claim, since there is no plausible way to measure all P2P usage and determine which files are truly infringing. This is in line with the assertion, during the same hearing,

that P2P providers can and must *prevent* exchange of copyright files, which the providers claim is not possible.)

Fred von Lohmann of EFF noted that millions of swapped files represent authorized distributions, including live music by bands that encourage such distribution.

Collective licensing: A voluntary approach?

Last year there was much discussion of proposed compulsory licenses to make P2P sharing legal, by imposing a monthly charge on internet connections. I thought then that it was a terrible idea, and continue to think so: It forces every U.S. internet user—including those of us who don't find downloaded music interesting—to subsidize both the music industry and those who download music actively.

Now EFF has an alternative, one behind the "let the music play" ad campaign that I found disturbing (as it seemed to celebrate infringement). The white paper (downloaded February 26) advocates *voluntary* collective licensing, suggesting $5 per month to allow as much P2P file-sharing as you want with no threat of infringement lawsuits. The $5 per month would be divided among "rights-holders" (or, later, "artists and rights-holders") based on the popularity of music within file-sharing networks.

The premises are stated bluntly: Artists and copyright holders deserve fair compensation; "File sharing is here to stay"; fans do a better job making music available than do legitimate stores such as iTunes; solutions should minimize government interference. The proposal carries with it the *explicit* assertion that fans are going to keep sharing music no matter what the labels do, stated in a manner that strikes me as dismissive of ethical concerns.

Later, the white paper posits a $3 billion annual revenue stream of "pure profit"—based on the concept that 100% of the 60 million Americans who have, at one time or another, used file sharing software *for any purpose* will instantly sign up for this deal and continue using it indefinitely. That's one heck of an assumption—as is the claim that this is all pure profit, since there are "no CDs to ship, no online retailers to cut in on the deal, no payola to radio conglomerates"—and, presumably, since it costs nothing to acquire the artists and produce the wonderful new music that will keep this money-making "evergreen revenue stream" going forever. A bit later, we hear that payment will come from those who want to download music "only so long as they are interested in downloading." So, for someone like me who would primarily like to fill in the spaces in my collection of music from the 60s, 70s, and early 80s, it would seem to make sense to pay $5 a month for one or two months, download everything possible with full legal immunity, then stop.

What about existing CD sales? "The music industry is still a long way from *admitting* that its existing business models are obsolete." [Emphasis added.] That paragraph goes on to mention "sliding revenues" and to offer another stick: If the publishers continue their "war against the Internet" it

may be time for "Congress to take steps to force their hand"—by enacting compulsory licensing. I'll admit that I never thought of 300 or even 3,000 infringement suits as a "war against the Internet" (or, for that matter, that file-sharing was the only real use of the internet)—and I'm guessing that EFF knows good and well that the chances of getting Congress to come down on the side of known copyright infringers and against the RIAA is roughly equal to the chances of getting Congress to outlaw DVD copy protection.

How do we know that file sharers will pay up? Because the EFF says so: "The vast majority of file sharers are willing to pay a reasonable fee for the freedom to download whatever they like, using whatever software suits them." That would seem a prime candidate for a footnote citing one or more surveys, as you'd expect in a white paper—but supporting evidence is not provided.

A February 26 *Wired News* item by Katie Dean provides followup with notes from a Hastings College of the Law music law conference. Fred von Lohmann raised the suggestion. David Sutphen from RIAA "pooh-poohed the idea," although the notes also suggest that he didn't understand it. A law professor liked the idea and added a twist: To take care of people who still share music illegally, we'll just add "a small surcharge" on products such as CD burners, just as they do in Canada. Sutphen called this idea "pie in the sky." Apparently, nobody noted that there's *already* a surcharge on audio CD-Rs that's supposed to take care of questionable copying—or that Canada's surcharges (none of which have yet reached recording artists) make CD-Rs *far* more expensive in Canada. For those of us who burn a lot of CD-Rs, all of them legitimate, this is another "tax everyone to take care of the violators" idea.

In some ways, I dislike poking holes in EFF's proposal and my growing distrust of EFF itself. I think the voluntary licensing proposition has some merit, but I believe that the white paper overstates the likely revenue, uses threats that are unlikely to have much merit, and has an unfortunate "they're going to steal anyway, so deal with it" attitude.

Audible Magic

A March 3 story at news.com discusses Audible Magic's supposed technology that can sit at an ISP, monitor data traffic, and *prevent* complete file transfers for copyrighted songs. Naturally, the RIAA loves the idea. How does it work? By identifying "psycho-acoustical" properties of songs, "listening" to each file, comparing it to a huge database of copyrighted material (none of which, presumably, can be shared under any circumstances?), and shutting down the file transfer once it's found a match, "usually about a third to half of the file."

Would it actually work on a widespread basis? Unproven. It can't handle encrypted files at all, it probably wouldn't be hard to bypass through hacks. Even if it does work, it would almost require legislation to

force use of the system by all ISPs, regardless of privacy, legitimacy, and other issues, and that would enshrine one particular solution as the only way to handle things.

Oberholzer, Felix, and Koleman Strumpf, "The effect of file sharing on record sales: An empirical analysis," March 2004.

It's PDF, so I don't have the address, but it should be easy to find. This 25-page paper (with an extensive bibliography and another 20+ pages of appendices) comes to a crucially important conclusion, given all the brouhaha over P2P and CD sales:

> Downloads have an effect on sales which is statistically indistinguishable from zero, despite rather precise estimates.

Oberholzer is at the Harvard Business School; Strumpf at the University of North Carolina, Chapel Hill. The study used a dataset containing "0.01% of the world's downloads" and matched it to U.S. sales data for a large number of albums.

This is an important study, one that tends to contradict both the claims of RIAA and its allies (that downloads are ruining CD sales) and the claims of some P2P advocates that downloading is a wonderful sales tool for CDs. That said, this is also a statistically deep paper; after reading it, I feel wholly unqualified to provide intelligent commentary. My sense is that the authors know what they're doing and that this may be a landmark paper, but about all I can do is suggest that you read it yourself. Maybe you'll understand it better than I did.

Edward Felten discussed this study and another study, Eric Boorstin's senior thesis at Princeton. That study approaches downloading and CD sales from a very different angle. You'll find his comments and "Grand Unified Theory of Filesharing" in the freedom-to-tinker archives, 000573 and 000574 (April 9 and April 12) respectively, along with a number of comment son each one. The Grand Unified Theory suggests that there are two categories of filesharers: Freeriders, who are generally young, have few moral qualms, and use filesharing to accumulate libraries rather than buying CDs, and Samplers, generally older, morally conflicted, and more likely to download songs they can't buy—and who buy more CDs because they find more music they like. The overall net effect on CD sales could be roughly zero, as the Oberholzer and Strumpf paper suggests.

"Speaking of music piracy"

That's the title on an April 8 AP story about pricing for legally-downloaded music. $0.99 per tune, $9.99 per album, right?

Wrong. *Fly or Die* by N.E.R.D. costs $16.99 at iTunes, $13.99 via Napster—and $13.49 at Amazon for totally uncompressed "files" delivered on a handy 12cm disc with jewel box, cover art, liner notes, and no limitations on copying to portable media—the CD itself. That's not

unique. One Sony album costs $13.99 on iTunes and averages $10.88 with all the audio-CD extras in a music store.

The story says all five major music outfits want to *boost* the price of single song downloads: $0.99 isn't enough. Maybe $1.25, maybe $2.50. Or, hey, why not force people to buy a bunch of songs they don't want so they can download the one they want? Hasn't that worked so well for CDs?

Most of these wonderful user-friendly pricing initiatives charge more for brand-new cuts. That makes sense in some ways: After all, you can typically buy rereleases of older albums at considerably lower price points and compilation CDs tend to offer 20 or more songs—frequently the "good ones" from four or five albums—for less than a typical new-CD cost. (My favorite cases, from good old "all sides of the issue" Sony, are the "essential" series: two very full CDs of well-chosen tracks from an artist's or group's career, typically 33 to 40+ cuts, selling for $12 to $13 at Target.)

But when it comes to pure unbridled greed, the big record companies get philosophical. Here's the last sentence in the story:

> Some executives, for example, believe they should be charging a premium for the online versions of older tracks because consumers may be willing to pay more for harder-to-find material.

DMCRA: The May 12 Hearing

The most citizen-friendly and library-friendly copyright legislation in some time is HR 107, the Digital Media Consumers' Rights Act, which—as Rep. Boucher's handout says—"restores the historical balance in copyright law and ensures the proper labeling of 'copy-protected compact discs.'" Not that DMCRA actually balances copyright law, but at least it would correct some major problems in DMCA—both the law and how it has been applied. Summarizing from the one-page handout (www.house.gov/ boucher/docs/dmcrahandout.htm), DMCRA:

- Reaffirms fair use, by providing that it's not a DMCA violation to circumvent a technological measure to gain access or use if that access or use does not infringe copyright.
- Reestablishes the Betamax standard, by specifying that it's not a DMCA violation to make, distribute, or use hardware or software capable of significant non-infringing uses, even if that hardware or software may also have infringing uses.
- Restores valid scientific research by explicitly permitting researchers to produce software tools needed to carry out "scientific research into technological protection measures."
- Ensures proper labeling of "copy-protected compact discs"—and it's good to note that the handout appropriately uses quotes around that name, since copy-protected audio discs *cannot* be true Compact Discs, as they violate the CD licenses.

The House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on HR 107 on May 12, 2004. I didn't listen to the hearings via webcast, but did download the prepared testimony of witnesses (it's not hard to find). I've tried to avoid endless commentary—but it's difficult with this string of witnesses. Witnesses are cited alphabetically. (Gigi B. Sohn from Public Knowledge provided a prepared statement that appears essentially identical to that of Chris Murray from Consumers Union; I've omitted Sohn's version.)

I've made an effort to highlight interesting points the first time they appear and to be fair to both sides, but I may not be any more successful in that balancing act than DMCA is in balancing copyright and citizen rights. But then, those against HR 107 all acclaim the magnificent balance of DMCA, so I guess I'm being as fair to them as DMCA is to citizens and creators (as opposed to "copyright industries," that revealing catch-all for companies more interested in control than creation).

The fundamental division here can be stated in three ways:

- Either the DMCA is broken (and the balance between copyright holder and citizen rights has come undone) or it isn't. If it is, then DMCRA is at least a partial remedy. If it isn't, then DMCRA is pointless.
- Either it should normally be legal to produce products with substantial legal uses, even if they also can be used for illegal purposes, or the possibility of illegal use should be sufficient to outlaw products with legal uses: The Betamax issue. (I also think of this as the crowbar issue: How can it be legal to produce and purchase crowbars, when they are known to be used to enable breakins and other illegal acts? For that matter, people hit other people over the head with hammers: How can they be legal?)
- Either copyright offers a limited monopoly balanced by ordinary uses of purchased materials and fair use exceptions, or copyright does *and should* allow copyright holders to control uses of material in any manner and with any granularity they choose, ignoring all other legal issues. Another way to put this: If the potential for "piracy" overrides all other issues related to citizen rights, then all rights must necessarily adhere to the copyright holder, with the citizen and purchaser having no inherent rights.

Note that I say "citizen" rather than "consumer"—because the "pro-consumer" statements of RIAA and others make it clear that "consumer rights" consist of freedom to purchase or not purchase, possibly enhanced by a choice of more than one thing to purchase. Consumer rights appear to end once the sales transaction takes place, given the general assumption of "copyright industries" that they should have complete control over what consumers do with the items they purchase.

Robert W. Holleyman II,
Business Software Alliance

BSA claims that DMCA achieved a "balanced and effective" outcome and opposes HR 107. They oppose the labeling of "certain audio CDs" (a misnomer) because it touches on the broader issue of mandatory labeling: a "camel's nose" objection to the provision. As is typical in such corporate arguments, Holleyman argues "mandated labeling may well delay prompt action by companies to keep consumers informed." He also says—and I certainly agree—that "government mandates should be avoided as long as market forces are working." But as soon as music discs that can't be played on the full range of CD equipment, that restrict otherwise-ordinary uses of purchased music, and that don't fully inform potential buyers of those facts are on the market, *market forces have broken down.*

BSA doesn't like the research provision either: They call it "unnecessary and dangerously overbroad." After all, BSA members are "industry leaders in the business of secure computing"—*they* do the research. Who else needs to do it? Reading the testimony makes it clear that BSA regards any outside researchers as "bad actors." The only purpose of research into encryption that BSA recognizes as legitimate is research that advances the state of the art of encryption and other "protective" technologies—research into problems and dangers in "protective" technologies is not recognized as legitimate.

In discussing the other exemptions, Holleyman uses a phrase that turns up in more than one other statement (coincidentally, I'm sure!): the exemptions would "swallow the rule" and essentially nullify section 1201—and since Congress didn't provide for citizen rights in 1998, it shouldn't do so now.

As with other anti-DMCRA witnesses, Holleyman places great trust in the LC/Copyright Office triennial rulemaking process. He says it's "functioned exactly as Congress intended it to function," that it's a better mechanism for addressing noninfringing use than HR 107's exemption, that the *existence* of the process "renders a broad noninfringing use exception unnecessary," and that noninfringing use exceptions have been rejected earlier. Note what's being said here: Not that noninfringing uses—in other words, *legal* uses—are being prevented, but that Congress should not broadly exempt otherwise-legal uses!

Why? Because "removing the technological protections from a work in digital form, even if it's done for a noninfringing purpose, leaves the work vulnerable to infringing use." Edward Felten is quoted here and elsewhere on this point. Note the lack of balance here: Even if 90% of the use of a device is for otherwise-legal noninfringing purposes, it should be outlawed because it *could* be used to break the law.

Why not generalize this? Cars can exceed the speed limit and can be used for getaways from bank robberies. Outlaw them. Crowbars, of course, were outlawed long ago, as were knives longer than two inches and other

weapons of personal destruction. And so on… Oh, that's right, "digital is different."

I love the specific "disincentive" in Holleyman's testimony: HR 107 would "create a huge disincentive for our industry to develop the technological protection measures that content providers need in order to make their intellectual property available in digital form on the Internet." Without complete control in the hands of copyright holders, the Internet will be stripped of content! Naturally, he goes on to refer to the "copyright industries" and to assert that broad access to circumvention tools will "lead to copyright piracy." As with every "copyright industry" witness. there is never a distinction between casual copying and legitimate personal use and "piracy"—RIAA's been smudging those distinctions for years, and BSA's right in there with them.

Peter Jaszi, Washington College of Law, American University, and Digital Future Coalition

Jaszi is a law professor but, in this case, speaking on behalf of DFC, a "coalition of 39 trade associations, non-governmental organizations and learned societies" organized around the time of the DMCA. DFC argues for a balance between "rightsholders' legitimate interests in strong protection and the public's interest in reasonable access to copyrighted works." Jaszi is one of those who doesn't put scare quotes around fair use; the DFC endorses HR 107.

Jaszi begins with five key points:

- HR 107 is "the best and possibly last clear chance—before it is too late—to reverse the unintended damage done to our copyright system by the enactment of Section 1201 of the DMCA."
- For more than 150 years, fair use of copyrighted materials has been essential to the growth of our society. "Without fair use, Disney could never have made all the great movies that draw on modern retellings of classic fairy tales… And without fair use and other exceptions…none of us in this room would have had the chance to learn through the use of books and other materials made available in libraries, schools and universities throughout the nation."
- HR 107 would help to properly balance the rights of copyright owners and information users: "In a world of fair use and strong intellectual property protection, society as a whole will benefit."
- HR 107 "will ensure fairness to your constituents by guaranteeing their freedom to make lawful use of media products they own… When consumers can use these digital products more flexibly, they will place greater value in this new medium," expanding the market to the benefit of all parties.

- Post-9/11, our priorities must change. DMCA tipped the scales towards protection; now, we need to "eliminate obstacles to the research and testing so important to our collective security."

There's a lot of detail behind those five points. I'm not thrilled that Eldred v Ashcroft is now used to cite *limits* on copyright law, but that's a fine example of making lemonade. Jaszi discusses the centrality of fair use to U.S. copyright law (at least since 1841). He notes that the motion picture and computer software industries grew "not despite the fact that filmmakers and programmers were free to copy important elements of their predecessors' work, but because of it." He asserts that creativity and innovation "are fueled as much by the 'gaps' in [copyright] as they are by its strong protections."

He cites examples of important and otherwise-legal uses that can be prevented (in some digital cases) through DMCA: student inclusion of text or images to enhance a term paper; sale of used books for charity; mix CDs combining selections from personally-owned music collections; and, generally, the freedoms to use that enable "many consumers of copyrighted content to become producers—to move from absorbing and repeating the words, images and notes of others to making their own creative contributions to the general fund of cultural resources."

Jaszi asserts, based on the record, that DMCA was primarily intended to crack down on "black boxes," devices with no legitimate purposes—but notes that Congress did much more, whether intentionally or accidentally. "The anti-circumvention provisions of the DMCA are a blunt instrument." Known problems: Some DVDs require you to watch promotions for other movies before getting to the movie itself, even those that—as a parent—you consider inappropriate for your children. A child can't make a one-minute excerpt from a copy-protected electronic encyclopedia for a multimedia class project. If a professor of computer science worked with his class to test scrambling technology meant to block terrorists from accessing first-responder communications, he would violate DMCA.

"Rather than promoting long-term security for copyright owners, the DMCA has actually done the opposite. Its enactment has helped to trigger a disastrous public decline in the public respect for copyright on which the success of our system depends." This is a good and rarely-made point: The extreme unbalance created by DMCA makes it harder to convince people that they should behave ethically with regard to copyright material, when copyright industries are viewed as behaving unethically toward those same people.

Jaszi notes that most publicized uses of DMCA "have had nothing whatsoever to do with copyright piracy." He also notes that, based on the record, we can "only expect further excesses in the use of Sec. 1201"—naming as examples effectively preventing use of non-copyrighted facts through technological protections and rationing the availability of ebooks

to young people in rural communities where print books are not readily available.

This is the first of several testimonies to claim that the triennial rulemaking has proven "wholly inadequate," partly because the Copyright Office has adopted an extreme standard for claiming harm. This should not be surprising: The Copyright Office exists to protect copyright holders. Jaszi also clarifies that a conduct-oriented approach to protection would be compatible with international treaties, undermining the assertion of other witnesses that DMCA in its strict form is needed for such treaties.

Lawrence Lessig, Stanford Law School

After affirming the necessary belief in copyright and asserting that *commercial* piracy is "an important threat that government rightly should address," Lessig notes that the law "must not lose sight of the crucial balance in copyright that has also been at the core of our tradition." He believes Congress's "zealous efforts to attack 'piracy' have had the unintended collateral effect of destroying a crucial balance in copyright law." He suggests copyright law is heading towards being "the IRS code of the creative class," directly burdening creative work. Who benefits? "Existing, highly concentrated, copyright industries, and lawyers." Who loses? "Creators and innovators, both commercial and noncommercial."

Lessig has a name for the assertion that stances such as his are arguments against copyright: "IP McCarthyism." As he notes, "The rhetoric from both extremes makes it sound as if the only choices were between two extremes." But the "anti-copyright" extreme barely exists in the real world, at least within the U.S.

Lessig offers a thoughtful discussion of the historical balance of U.S. copyright that distinguishes between fair use and unregulated uses. Unregulated uses—reading a book, giving it to someone, lending it—are "independent of the regulation of copyright." Fair use is a *privileged* use that might otherwise infringe on copyright—"a copy that the user is privileged to make regardless of the desire of the copyright owner." Reading a book is an unregulated act; quoting a book in a critical review is fair use, since it *is* a form of copying but is protected under most readings of fair use.

> The traditional contours of copyright law thus secured to authors exclusive rights over just some uses of their creative work. But it secured to consumers and the public unregulated access to that creative work for most ordinary uses. And it privileged the public for some uses that would otherwise have infringed the exclusive right to copy.
>
> This traditional balance has been changed in the context of digital technologies. For it is in the nature of digital technologies that every use of a digital object produces a copy. Thus every use of a digital object is presumptively within the scope of copyright law's regulation. And

> that in turn means many ordinary uses must now either seek permission first, or rely upon the doctrine of "fair use" to excuse what would otherwise be an infringement.

Too bad about the quotes around fair use, which is law as well as doctrine, but Lessig goes on to discuss the inadequacy of fair use, with some interesting examples. More to the point, as he notes, "fair use is effectively erased by technical measures that block ordinary or fair uses of creative material"—and the DMCA prohibits any effort to evade those measures.

Fair use is a central aspect of *American* copyright law; Lessig notes that it's "less familiar within other legal traditions." He uses that difference as a possible excuse for the outrageous statements of people within trade associations—such as the RIAA, since every major label within the RIAA is now foreign-owned. He quotes a senior executive at one record label: "Fair use is the last refuge of scoundrels."

There's a lot more here. He notes that the ordinary use restricted by "CD" copy protection is *not* ordinarily a copyright infringement, and that copy protection technologies can actually damage a user's equipment. Without clear labeling, the mere existence of copy-protected "CDs" may reduce the demand for CDs by nervous users.

As regards circumvention, Lessig believes that Congress should regulate technologies only when there's an actual showing of harm from lack of regulation (not the case with DMCA) and should focus any such regulation.

> The question of harm is whether the existence of a technology (a) cannibalized a market (by enabling some to get the content without paying for it) more than it (b) expanded the market (by making the underlying content more valuable). That harm must then be discounted by the constitutionally required fair use enabled by that technology.

Lessig regards DMCRA as "just the first step in a series of actions that Congress should consider to assure that copyright law continues to function in the balanced way that is our tradition."

Robert Moore, 321 Studios

Moore notes that 321 sold more than a million copies of its DVD-copying software before it was enjoined from doing so, that the software "is designed with many anti-piracy features," and that, after growing to 400 jobs, he now represents fewer than 40 remaining employees, thanks to "a nightmarish 'Catch-22' created by the courts' incomplete reading of the 1998 [DMCA]." He offers 321's experience as "a surreal example among many of why H.R. 107…is such vital legislation."

Moore considers Americans in general to be "people, not pirates." He notes that 321's product is virtually impossible to use for *real* piracy (high-speed volume bootlegging and internet distribution). I think he overstates

the case for "DVD rot," but he's right that DVDs are easily damaged. He lists the ways in which 321's software is designed to prevent actual piracy and offers this dramatic question (quote marks in the original):

> "If consumers can make a personal copy of an audio CD they've bought to put on their iPod or play in their car…
>
> "If consumers can use a VCR or TiVo to make a tape or digital copy of a movie on broadcast or cable TV…
>
> "If consumers can use conventional and digital photocopiers, and digital scanners, to reproduce pages from a book…
>
> "If consumers can make a backup copy of a computer program like Windows…
>
> "Then, how can it be that consumers are criminals for making a backup copy of a DVD they've bought and paid for and why is our company—indeed any technology company—criminal for selling them the digital tools that they must have to make their rights real?"

That litany is weakened only by one point: the "copyright industries" have every intention of preventing *at least* the first, second, and fourth of those uses—thus we have copy-protected pseudo-CDs, the Broadcast Flag, and proposed ways to shut the "analog hole." 321 Studios may be this year's poster child for extreme copyright protection, but it won't be the last if Big Media have their way.

Chris Murray, Consumers Union

CU (and Public Knowledge, of which CU is part) strongly supports H.R. 107 as "a narrowly tailored bill that corrects some of the major imbalances in our copyright law that were unintentionally created by [DMCA]." CU is notoriously in favor of strong copyright, as their positions on other issues have made clear. This is the longest statement in the collection, and I'll note just a few points.

Murray asserts that Congress intended to protect fair use in DMCA, but that practice has proven this to be illusory—in part because the U.S. Copyright Office "has defied the express will of Congress" as it has applied the triennial review.

He predicts (correctly) that "this committee will inevitably be told that to permit a fair use exemption…is to undermine the effectiveness of the entire DMCA. This is simply not true… It ensures that the controls function solely as intended—to stop illegal activity and infringement."

Murray regards making a backup copy as a traditional fair use, just as excerpting for the purpose of critique and comment is *certainly* traditional fair use—but both are prohibited under DMCA. He cites three examples—inability to fast-forward through ads, inability to play European DVDs on an American player, inability to play DVDs *at all* on "increasingly popular computer platforms" [that is, Linux]—and notes: "None of these is a

technical limitation of the DVD. None is associated with infringement. Instead, they are controls placed on consumers by the content providers, and the DMCA arguably makes it illegal to get around the controls." And, to be sure, the court in the 321 Studios case stated that the legal use of purchased copyright materials was *not* a defense against DMCA violation.

That case included the usual assertion that, well, you can make a copy using analog means. But Murray considers that "impractical and insufficient," both because analog media are disappearing and because of the industry push to close the analog hole.

> For the consumer, this means that fair use will end with analog distribution formats. In an all-digital world, there will be no way to legally exercise fair use. Because the software and hardware tools for fair use will be prohibited, access to the content will be prohibited as well.

There's extended discussion of the triennial Copyright Office review and how flawed it's been—so flawed that the Assistant Secretary of Commerce protested the methodology as "inconsistent with the opportunity that Congress intended to afford the user community." This is all summed up in the believable claim that the Copyright Office treats the review function as a way "to protect particular business models," in essence strongly favoring the *existing* copyright industries over any citizen or fair use rights. Can't play a DVD under Linux? The Register of Copyrights says that's "no more than an inconvenience"—and, after all, you can go out and buy the same DVD players or Windows PCs that anyone else can. Let them eat cake, indeed.

Miriam M. Nisbet, ALA

ALA's legislative counsel spoke on behalf of ALA, AALL, ARL, SLA, and the Medical Library Association, urging support of HR 107. This relatively brief discussion points out the needs of libraries for fair use, first sale, and special library exceptions—and the extent to which DMCA now undermines those provisions. Some of her examples:

- HR 107 would make it possible for libraries to go around copy protection to make preservation and archival copies. "Remember that libraries and archives must be able to make such preservation copies well into the future, as digital storage formats become obsolete. Preservation of knowledge is a core mission of libraries."
- The bill would permit foreign language teachers to use digital works purchased abroad (e.g., to subvert the region controls on DVDs).
- The bill would allow a university professor "to bypass a digital lock on an e-book so that she can perform a computerized content analysis on the text."

- And a librarian could unlock a technological measure to make a copy for a library patron, for interlibrary loan, or for electronic reserves.

> Significantly, each of the examples involves a copy paid for by a library and a use otherwise permitted by the Copyright Act… These examples demonstrate that H.R. 107 would allow taxpayers to receive the full benefit of their significant investment in copyrighted products.

Nisbet regards the current DMCA exemption for libraries and archives as "so narrow as to be meaningless," as it allows a library to circumvent access control "for the sole purpose of determining whether the library wants to acquire a copy of the work." That's not a problem; the exemption was not requested by libraries. "I suspect that it was inserted for the purpose of permitting certain proponents of the DMCA to argue that library concerns had been addressed." As you can expect, Nisbet is no happier with the triennial review process than others.

> In sum, the DMCA is broken, and it needs to be fixed. Libraries fear that they are spending hundreds of millions of dollars a year for products that they might not be able to use. They worry that they may not be able to share those products fully with the millions of patrons for whom they were bought. They worry that they are unable, through restrictions in law and through technological measures, to make preservation copies of their digital resources. Moreover, some fear that the law combined with technological locks will lead to "pay per view" as the way of the future, that "metered use" will be imposed upon all digital materials, that the "digital divide" will widen even more. Such a scenario is not acceptable in a society such as ours, which is founded upon the principle that "information is the currency of democracy."

Think Big Media doesn't want a pay-per-use future? Think Big Media is fundamentally protective of the special place of libraries in our society? Think again.

Debra Rose, Entertainment Software Association

Here's an odd one, from a good revolving-door person (she served as counsel to a House subcommittee for seven years before jumping over to the private sector, and makes that clear). ESA is the video and computer game association—and not only do they oppose any circumvention of DMCA, they even oppose labeling of copy-protected pseudo-CDs. Why? That's not really clear from the statement, except on a camel's-nose basis.

What is clear is that, if the statement is to be believed ("piracy levels that reach as high as 80% and 95% in some markets"), DMCA must be a miserable failure and should simply be scrapped: With all the copy protection and other DRM tools built into game software, they don't seem to be stopping or even slowing down true piracy. Indeed, the explicit claim

is that "billions of dollars" of pirated entertainment software is present—and that technological protection measures save ESA members "millions of dollars" per year. This is given as sufficient reason to forbid technologies *that do not result in copyright infringement*, according to ESA: So that their 0.1% prevention rate can be sustained. And, of course, DMCA is cited as "carefully balanced" legislation that is "well-designed rulemaking" and "is working." So says ESA.

Gary Shapiro, Consumer Electronics Association

CEA represents the "American technology industry"—and that might tell you where Shapiro comes down on DMCRA:

> This vital, bipartisan bill would restore some balance to a copyright system that has recently been tilted to elevate the interests of media giants over those of ordinary people.

Shapiro also represents the Home Recording Rights Coalition; there's certainly no conflict of interest. As he notes, for both HRRC and CEA, "Intellectual property is our lifeblood" and "We hate piracy, and we hate pirates. We are all in favor of the vigorous enforcement of fair and balanced intellectual property laws." Shapiro is representing big businesses here—in sum, probably bigger than Big Media (with some crossover, to be sure, Sony the most obvious case). This is no socialist hothead speaking.

> What has happened recently, however, is a radical departure from the balanced approach that our Constitution calls for and our public interest requires.
>
> Over the last few years, entertainment and media industry giants have persuaded Congress to restrict private and public use of books, music, and other material when it is in digital form.
>
> And now they are working through the Courts to change the laws and limit our freedoms even further.
>
> Many of these problems are a result of the 1998 enactment by Congress of [DMCA]…

Such as? I'll quote six of the eight bullet points to show the surprising breadth of Shapiro's testimony:

> Consumers buy new "copy-protected" Compact Discs unaware that they may not play in their PCs or automobile CD players.
>
> Venture capitalists refuse to fund legal and innovative technologies for fear of DMCA lawsuits.
>
> Scientists have been threatened with prosecution if they publish their research on digital encryption issues.
>
> Libraries and universities are unsure of whether or how they can archive and use the digital materials they have acquired.

> Viewers who own HDTV television receivers may lose their viewing and recording rights because of the unilateral use of "down resolution" and "Selectable Output Controls" by giant media companies.
>
> Americans' fundamental rights to buy legal products such as VCRs and digital video recorders are in jeopardy as media giants have declared war on the Supreme Court's landmark Betamax ruling.

Whew! If only Shapiro was overstating the case. He's not. He notes that Hollywood asked the Supreme Court to ban VCRs twenty years ago—and that VCRs have been enormously profitable for Hollywood, while also representing "a turning point in American cultural and economic life." In Shapiro's view, HR 107 is needed to enable innovation to continue. He also notes anti-competitive uses of DMCA, including the garage-door opener and inkjet cartridge cases. He anticipates "more abuse of the DMCA to forestall legitimate competition."

Shapiro speaks plainly:

> I understand that individuals representing the entertainment industry have told this Committee that H.R. 107 would somehow provide a haven for those who engage in piracy. That is absurd.
>
> H.R. 107 only authorizes consumers to circumvent a technological protection measure in those instances where they do not infringe a copyright. H.R. 107 takes away no intellectual property rights. It merely re-aligns the DMCA with historic copyright law by ensuring that there can be no DMCA liability without copyright infringement liability.
>
> …Twenty years ago, the same entertainment representatives told you that the VCR would mean the death of the American movie industry. They were spectacularly wrong.
>
> Now, they make the identical claim about the impact of H.R. 107. I believe history shows you have every good reason to be skeptical.

Cary Sherman, RIAA

After telling us how the RIAA comprises "the most vibrant national music industry in the world," *all of it foreign-owned* (but Sherman doesn't say that), and claiming that "music is the world's universal form of communication," Sherman makes an explicit equation between "intellectual property" rights and the "theft of physical goods." Then things get really strange. Sherman claims that 40% of recordings worldwide are pirate recordings and says that total optical disc manufacturing "greatly exceeds legitimate demand"—but never says what he considers "legitimate." I'm guessing mix CD-Rs don't enter into it. With this wholly useless figure, he proceeds:

> You can see why allowing the manufacture and distribution of machines that strip away copy protection and permit the making of unlimited copies poses risks for mass duplication that would make the piracy problem even worse.

How so? Virtually *no* audio CDs in the U.S., and a tiny percentage of those worldwide, *have* any copy protection. Under what circumstances could the situation be worse?

As with all extreme-copyright lobbyists, Sherman asserts that DMCA "went to great lengths to balance the interests of copyright owners and users of their works." He touts the triennial review process. He says that DMCA is responsible for legitimate downloading services. And, of course, he wants to outlaw hammers and crowbars, since you can't assure that circumvention tools *won't* be used for illegal purposes.

> While this bill is proposed under the banner of consumer rights, consumers will, in fact, be hurt if it were enacted. Members of the music community strive to provide consumers with many different ways of accessing our content. Allowing "free-riders" access to our music by enabling circumvention will raise the costs to honest consumers, and limit the incentive and ability of providers to invest in, and offer, new technology and digital media alternatives.

Don't you feel for RIAA members, who have been "striving" so diligently to give us choices? That's why they were so supportive of MusicMaker and other sites that would let you put together custom CDs at fairly high prices ($20 for 15 cuts). Oops, I forgot: the labels did nothing at all to help those services and seemed happy to see them disappear. Maybe that "striving" is why the legal download services have full access to the millions of songs in RIAA members' archives, at bargain rates for older songs. Oops, I forgot: The biggest inventory is a small fraction of what should be available—and RIAA members want to *raise* download prices even for the flawed downloadable files you get. But RIAA's on *your* side: Trust them.

Sherman mentions fair use but, of course, puts it in scare quotes. He asserts that "options" benefit consumers but that the ability to make copies does not. He calls H.R. 107 "a solution in search of a problem. He asserts that H.R. 107 promotes piracy—in so many words.

No surprises here.

Allan Swift, private citizen

Swift is another revolving-door case: He notes that he spent 16 "rewarding, and I hope productive years, serving on this Committee" as a Congressman. He's now a lobbyist, but the firm has no clients with stakes in this issue, apparently: He claims to speak as "an informed private citizen, with a background in communications."

He's done home recording for 54 years. Unlike me, he *has* given friends mix tapes, cassettes, and CDs—although never a straight copy.

> I respect our copyright laws. I do not believe that anyone should be allowed to use copyrighted material for profit without appropriate permission, license and payment. I think the industry is right to protect itself against piracy.
>
> But, one of the things I noticed serving in Congress on this Committee is that some people have a remarkable ability to carry a good idea to a bad extreme. Look at the history of the recording industries. They have always distrusted new technology. If Hollywood had been given its way the video tapes and DVDs, from which they now make a great percentage of their profits, would have been smothered in their bassinettes. This Committee reported out a perfectly absurd bill that—the industry claimed—was essential to prevent the Digital Audio Tape (DAT) machines from destroying the recording industry. Now you can hardly find a DAT machine—except for commercial purposes.

Surprise! This ex-Congressman isn't fond of copy restrictions. "When I buy a CD or a DVD, that content should be wholly mine to do with as I please as long as I am in no way selling its contents or profiting from it." He calls the bill "a sound and modest correction," while noting that he would be inclined to go further. "But this bill is no doubt more prudent than I would be and—in the long run—prudence usually produces better law."

Swift owns 3,000 CDs and notes:

> You do the math. You will find not only that my hobby spending is out of control. You will also find that I am—like other American consumers—a profit center for these businesses. It is about time they treated us with a little respect.

Jack Valenti, MPAA

WHY H.R. 107 IS A PRIME HAZARD TO THE FUTURE OF AMERICAN INTELLECTUAL PROPERTY

No pussyfooting here: That's Valenti's headline. H.R. 107 will "devastate the home sale market"—much as the Sony Betamax destroyed the motion picture industry (well, that's what Valenti claimed at the time). He echoes Sherman in citing entertainment as "America's greatest export prize," "more than five percent of the GDP," and asks "why is it in the national interest to put to risk this engine of economic growth? Why?"

He asserts that making backups of DVDs "is not legal, is not necessary, and allows 'hacking' of encrypted creative material, which in turn puts to peril the future home video market." He tells us that "an encrypted DVD is well-nigh indestructible," which will surprise a good many parents and librarians. Anyway, "if by some very rare happening a DVD should malfunction, another can be bought at ever-lowering prices." Can you play it on a Linux PC? Does Jack Valenti know what Linux is? Can he cite a law that says making personal backup copies is illegal when it comes to DVD? Why should he?

What's HR 107 about?

> This is not just about facilitating back-up copies, illegal and unnecessary though they may be. It's not even about enabling consumers to make their own extra copies, rather than to pay for them in the normal channels of commerce. It's about opening a Pandora's Box that our present technological capabilities are powerless to close.

Just how knowledgeable is Valenti? He calls Internet2 an "experiment." He says that an "uncompressed DVD-movie contains some 4.6 gigabytes"—which is wrong on two counts. Most Hollywood releases use double-layer discs, allowing for up to 9 gigabytes—and there's no such thing as a commercial "uncompressed DVD movie," since DVDs use MPEG-2, which has *very* high compression.

But Valenti loves the consumer, as long as the consumer shuts up and buys.

> Consumer-friendly choices are promoted by providing consumers with legitimate market-driven alternatives for renting, purchasing or even copying. But these options will never come to pass if the circumvention of technology *that provides these consumer choices* is legalized by this legislation.

There it is: Pass DMCRA and Hollywood will stop providing content. Just as the RIAA stopped producing CDs because they weren't copy-protected. And I do so love the thinking that can turn copy prevention into "technology that provides these consumer choices."

That was the last statement, alphabetically. I've read some commentary on the actual hearings but won't cite it here. DMCRA wouldn't restore copyright balance—but it would help. I continue to be astonished that, given Valenti's horrendous track record on decrying villainous new technologies, Congress continues to listen to him. But oh, there's that hair, and that voice, and that persona.

Historical followup: So what happened to DMCRA? Not much. Eventually, portions were incorporated into the 2007 FAIR USE act—which went nowhere.

Ethical Perspective

Weblogging Ethics and Impact

This essay originally appeared in the May 2005 issue of *Cites & Insights*, volume 5, issue 7.

There's no stopping metablogging (blogging about blogging), which guarantees lots of weblog entries about the ethics of weblogs. I ran into enough of these, along with related essays that aren't weblogs and weblog

entries only indirectly related to ethics, to form the basis for an interesting discussion.

My own position has changed since the first ETHICAL PERSPECTIVES: REPUBLISHING AND BLOGGING (*C&I* 5:3). I have a weblog—not my LISNews "weblog lite," but a full-fledged (if lighthearted) weblog, *Walt at random* (walt.lishost.org). I try to follow most ethical and other guidelines I've seen for weblogs, giving credit for ideas whenever I can, using appropriate links—but studiously ignoring market-oriented advice on how short my sentences and posts should be.

J.D. Lasica

J.D. Lasica posted the nine-page essay "The cost of ethics: Influence peddling in the blogosphere" at *Online journalism review* on February 17, 2005. Lasica notes the inevitability that "the captains of commerce would latch onto" weblogs as they become more popular and worries about the ethical standards bloggers should follow "when offered payments or freebies…for buzz."

For example, if there are ads on your weblog, how can readers be sure the ads don't influence content? Did Marqui's experiment (paying bloggers to mention the company) cross an ethical threshold? Does a formal code of ethics for blogging make any sense—and how could it be enforced? What about wholly sponsored weblogs?

Lasica says bloggers don't play by the same rules as journalists (where there's supposed to be a wall between editorial and advertising) and don't seem to think they should. I'd hope that's not true. Five points appear to be widely (not universally) held as appropriate principles for bloggers: Transparency, following your passions, being honest, trusting your readers to form their own conclusions, and maintaining independence and integrity. I've surely seen a few bloggers who won't be happy until all readers form the same conclusions the bloggers do, but the other four tenets seem common to most blogs I read.

Lasica's discussion of Marqui's pay-for-blogging experiment is weakened significantly for knowledgeable readers by calling Elizabeth Lane Lawley, a professor at Rochester Institute of Technology, "Rensselaer Polytechnic Institute lecturer Liz Lawley." Yes, Liz is what she usually goes by—but it's hard to believe any journalist could be too lazy to distinguish RIT from RPI and a lecturer from a (tenured) professor. (**Full disclosure**: I've known Liz since before she had a Ph.D. I disagree with her on lots of things and we haven't seen each other in a couple of years. I like and respect her quite a bit.) How hard can it be to double-click on a vita when you're talking about someone who's active on the web? Particularly for a hotshot web journalist like Lasica who seems concerned with ethics and journalism?

The next example strikes me as naïve: Om Malik criticizing a bunch of Silicon Valley "influentials" for being offered free products or services "to tout or not tout as they please." Malik believes that after you write

about a product "you ship it back." I must say that, when I was reviewing CD-ROMs, it never occurred to me to send them back to the publishers—any more than it would occur to a book reviewer to ship the book back to the publisher. If that makes me unethical, so be it. I appreciate the fact that *Consumer Reports* buys everything it tests and that *Condé Nast Traveler* doesn't accept free travel—but I recognize that those are exceptions.

There's no question about one guideline:

> If bloggers are paid by a corporation to write about the company, they're no longer acting as amateur journalists. Journalists cannot and do not accept payments from sources.

Lasica notes that bloggers are free to do so—but at that point they're not journalists.

Liz Lawley blogged about the article one day later, noting that her trust in the piece "is somewhat marred by JD's poor fact-checking" but that Lasica "does a decent job of outlining the issues in the debate." Lawley defends her Marqui posting (it was impossible to ignore the sponsored nature of her posts)—but she didn't renew the contract.

Dan Gillmor posted "Blogging sponsorship, silicon valley style" on February 23, 2005. He notes a local blog announcing its first sponsor: "[T]he announcement comes in the form of an advertorial full of praise for the sponsor." Gillmor compares this to a newspaper running a Page One story to praise a new advertiser that's agreed to buy a full page ad each day. "Now, I'm not telling you that some newspapers don't bend over in sleazy ways for big advertisers. But I can't imagine a newspaper doing what I hypothetically suggested above. It would be over the top."

Is the comparison apt? Possibly—if the blog in question claims to be equivalent to a newspaper. But possibly not: Given the way blogs work, if the blogger is clear about the sponsorship, I don't know that there's anything wrong with saying nice things about the sponsor in the same post. Blogs are *not* newspapers; you can't push the analogy too far.

Librarian way

A March 12, 2005 posting (programmingpeers.com/librarianway) discusses Cyberjournalist's *A Bloggers' Code of Ethics* (see *C&I* 5.3), and brings in Rebecca Blood's *The Weblog Handbook* and that book's section on ethics. I disagree with the relativist view of ethics suggested here: "Ethics really depends on your viewpoint, your culture, your local community of peers, and the time in which you live." I partially agree with this comment:

> You have to decide how much credibility you want—and what your readership thinks is [credible]. If you have an intentionally biased Web site *and your readers know your bias*, then like intentionally biased newspapers and television programs, you are [credible]. [Emphasis added]

Not necessarily: Better to say that a transparent bias does not automatically discredit a medium—but it doesn't automatically give it credibility either. Some clearly liberal or clearly conservative publications and websites are credible. Some, on both sides, are full of disinformation and propaganda.

Civilities: An Ethics-and-Impact Cluster

Jon Garfunkel writes *Civilities: constructing informative viewpoints* (civilities.net), with extensive entries on media, politics and the internet. He's given to lengthy essays, many interesting and provocative. I saved a handful posted between March 10 and April 8, which sparked this PERSPECTIVE as a whole. It's about ethics but also about impact, classification, archetypes and mapping the blogosphere.

Start with "Media legitimacy: The core responsibility of the media," posted March 10. "The ideal of journalism is to be responsible to the truth." That's a strong and appropriate start. "There is a common belief that blogging can meet this challenge." Can it? Has the nature of the "contract" changed—does blogging really "put journalists in closer contact with their readers"? Garfunkel points out that "at larger scales, it's impossible" for the reader to become part of a "conversation." Some of the most popular blogs don't allow comments, undermining most of the "conversational" aspect.

Circling back to the "Webcred" conference, he notes that some of the "little guys" took issue with the claim of people like Gillmor to be blogging champions of the little guys. As Seth Finkelstein has pointed out on many occasions, and as Garfunkel quotes here, it's not that blogging eliminates gatekeepers—it just "has a *different* set of gatekeepers." This whole set of questions, and related issues of legitimacy, inspired Garfunkel to prepare a set of questions on legitimacy.

The legitimacy survey

That set of questions appears the same day with the title "How legitimate are you to your readers?" or "Legitimacy: How responsible are you to your readers?"—depending on when you hit the post, as far as I can tell. (Changing the name of a post doesn't raise ethical questions, but it's a trifle irritating.) The list consists of 28 questions in seven categories: Consistency, Who are your readers, What sources do you use, What sources do you read, What tips do you get, Response, and Corrections. Garfunkel's looking for responses—but he also talks about "a perfect score," which makes no sense given the nature of these questions. Go to *Civilities* for the full set: Not only doesn't the blog have a Creative Commons license, it explicitly says "All rights reserved."

I should note that he refers to my "Dangling Conversation" PERSPECTIVE as "a thorough job of considering which online technologies facilitate conversations," which is not what he's after. His site requires

registration prior to commenting—which I consider an obstacle to conversation but he calls "a value that protects the names of the innocent from misuse." I dunno: Seems to me that requiring a real email address should do that nicely (as *Walt at random* does because it's the WordPress default): If the blog proprietor is suspicious of any name, he can use the email address for verification or hold the comment until there is verification.

Some of the questions are (in my opinion) just plain strange for a weblog. "Do you admit when you don't know things, and how often is that?" I, for one, usually don't blog about something if I'm aware that I don't know anything about it. That would seem a fairly standard limitation. Some of us, who don't own our blog hosting environment, can't answer some questions ("How many regular readers do you have?") and might be bemused by a question like, "Of your regular readers, how many do you know?" Well, I've *met* four or five people who I know have read *Walt at random* at least once—but even an obscure weblog such as that will have many more readers I've never heard of. To quote a Phil Ochs title (ah, the blog and the journal do mesh), I do try to go "Outside of a small circle of friends."

Some additional questions seem hardly worth answering. "Do you give any signal as to how confident you are, in a give[n] piece, that you've given the best sources that you can find to your readers?" Nah, I hide the good stuff, and only give my readers some junk that's handy. "Do you wrap up a conversation with a 'final word' to ensure everybody that you've listened to all their points?" Many good comments don't require responses—and "final words" suggest an end to the "conversation." On the other hand, there are good questions here—I'm nitpicking.

Intent

This March 14 essay is a brief attempt to divide bloggers into four archetypes, a shorter version of a much longer essay (which I admittedly haven't read). Here's his breakdown, paraphrased:

- If you don't write for a public interest of some sort, you're a "**singer**"—like the majority of weblog writers, just singing your own story.
- If you're already well known beyond your online personality, you're a "**ringer**," "slumming it online, and we don't care any more about you now."
- If you focus on a narrow set of subjects, you're a "**stringer**"—"You tell me something new that you care about, and you make me want to care about, too."
- Otherwise, if you're more interested in providing the larger context for a story you're a "**finger**," and if you'd rather advocate a

> political viewpoint you're a "**winger**." He notes, "Some days it's tough to tell the difference."

Garfunkel admits these are just archetypes. He regards himself as a stringer, focusing on "constructing informative viewpoints, the study of how ideas are structured, promoted, and agreed upon." Within the library field, I suppose I'm a "ringer"—but *Walt at random* is more the blog of a singer, and I'm happy enough with that.

Identity

Garfunkel has ambitions to classify lots of blogs and bloggers. He's looking for *answers* to his questions, preferably building a "census" of some form. That's ambitious, but I'm not sure to what end. This March 15 post asks whether you use your real name—or, if you use a pseudonym, can your real name be discovered? Most library bloggers can answer "yes" to one of the two; so can I, to the first. He wants to know the "standard demographics categories"—age, sex, race, religion, location, language, education, occupation. I wonder why most of these matter *at all*. He goes on to propose "three additional questions" for each category: Is this known or easily guessed by your readers, do you write about your association with this identity, do you seek out people of the same backgrounds to engage, do you seek out people of "opposite" backgrounds to engage? (Yes, it's true again: Nobody expects the Spanish Inquisition.)

He offers his own three (4) answers to the demographic slices, but not the slices themselves. I would note that "opposite" is only meaningful for the second slice (what's the "opposite" of white, lapsed Methodist, California, or English, for example?). I'll be happy to answer most of the questions: 59, male, "white," Mountain View, CA, English, BA in rhetoric, library systems analyst. My religion is my business. As for the 3 (four) subquestions, I'd say most of them are irrelevant to my blog and to most of the blogs I read.Very few library webloggers spend much time on ethnic, religious, "locational," or sexual issues. I write some items related to where I live and what I do and maybe my age. I certainly don't specifically seek out middle-aged white males from Silicon Valley to engage, and I do seek out much younger library people of all stripes to keep my mind active. Mostly, though, the census is just irrelevant to me and most library bloggers.

I can guess the religion in which *Library stuff*'s proprietor may have been raised: So what? I know where some library webloggers live and what they look like; in other cases, I haven't a clue. In no case *does it matter at all*—these just aren't considerations for weblogs unless the weblogs are focused on such personal considerations. Here's an example: *Caveat lector* is (at times) a deeply personal weblog. I have no idea how old Dorothea is (or I didn't until a few weeks ago), I don't know where she lives, I have no idea what her ethnic background and religion are—and none of that matters.

Bloggers from the A-list to the Z-list

This one, posted, March 20, 2005 shows considerable ingenuity and I **heartily recommend it**. Loaded down with links, which in my usual old-media fashion I haven't followed, it's enjoyable on its own. Getting past a brief commentary on the renowned A-list ("You know who you are…"), Garfunkel goes on to define 26 more categories (two for "X"). Just a couple highlights, once you get beyond the semi-serious "B list" (actually the "**Be-list**. Or more precisely, the Wanna-Be List") and the "**C-list**" consisting of grassroots journalists who "see everything":

- "The **E-list** is for the people who have no idea what blogs are. Or they do and don't care. They are still using mailing lists…some still call them e-lists."
- "The **LJ-list** is of people who use LiveJournal. They have a completely different culture than the blogosphere. They write in their journals for their friends, not for you, you nosey websurfer."
- "The **R-list**: For Red-Staters…"
- "The **Why-list**. Why is the blogosphere so self-focused?..."

Go to all the links, and you'd get a curious cross-section of the "blogosphere," I suspect. You'd also lose an hour two that you could never get back, but isn't that what the internet is for?

Draft: Social Media Scorecard

Here's one that has nothing to do with ethics. Garfunkel offers up a "scorecard" for 32 blogs, identified as "people [and groups] who identify as bloggers…and who seem to write about social media a good portion of the time." This isn't the classic "A list" although there's some overlap. What interests me most about this essay isn't the table itself—so far, I'm not a big "social media" person—but the concept behind it and his discussion of the measures involved.

Here's what he uses, paraphrasing and excerpting enough to stay within the bounds of fair use (hey, Jon, get a CC license!):

- Occupation, "grossly an abstraction" but enhanced by his anagram "CLUB" for related factors: **C**onference-goers/presenters, **L**inked to by others within the list, **U**niversity-affiliated, and **B**ook-published. Only two on the list get the full CLUB. Four have no letters at all (in addition to the six group blogs in the list). My assumption is that "Conference" is restricted to those conferences about blogging and social media, and related conferences that Garfunkel tracks—and I suspect "Book-published" may be a bit narrower than I might think. (Or not.). Also general location (e.g., "US-BayArea")
- When the person started writing online and when the blog started.

- Frequency, the number of posts published in the first 12 weeks of 2005, sometimes estimated. (Garfunkel notes that the frequency of posts "generally is inversely related to the size of the posts.")
- Subscriptions at Bloglines, the only readily available public measure of readership.
- Inbound links and sources as asserted by Technorati; the table is arranged in descending order by inbound links.
- Three tentative computed measures that he lumps together as A, the amplification factor—a measure of effectiveness, if you will. A1 is the number of links divided by the number of posts. A2 subtracts the sources from the links (since many single links are really blogrolls) and does the same division. I can't figure out what A3 actually is or means, but it has something to do with the longevity of the weblog.

He admits "these are cheap calculations of imperfect data" but still sees patterns. If you're interested in social media and some of the "top" bloggers in that field, read it for yourself. As it happens, I have five of these weblogs in my Bloglines list, and should probably add a sixth and seventh—and as it also happens, only one of those five ranks high on any of the measures.

"Impact" (or "amplification") is one of those curious measures in net media, particularly with weblogs, since it involves assumptions about motives. If you're a "singer" (going back a couple of entries), you might be happy to have ten subscribers and an "impact" that can't be measured—you might even prefer it that way. For that matter, the nature of the audience may be more significant than its size. According to this essay, *mamamusings* (Liz Lawley's own weblog) has fewer Bloglines subscribers than *Walt at random*—but it has far more impact, albeit mostly in a different community. (Liz is also part of *Many2many*, a group blog that scores high on almost any measure of reach.)

I'm blown away by some of the frequency figures. Dave Winer posted 1,094 items in 12 weeks: How is that even possible? Robert Scoble did 800, Jeff Jarvis 763. Can these folks really have that much to say that anyone wants to listen to? Well, Winer and Scoble have inbound links by the thousands—even more than Joi Ito, Jeff Jarvis and Dan Gillmor.

Some of you may have guessed where I'm going with this particular extended discussion: What would such a study show within library-people weblogs? (I don't mean weblogs produced by libraries, and I don't say "librarian" because I'm including myself in this group.) Such a study wouldn't be too hard to conduct. I'd probably throw in one or two other measures such as "conversation intensity"—average number of comments per post over a given period—and maybe a measure of overall *amount* of writing. Hmm.

The New Gatekeepers

A series of essays with this title considers the likelihood that weblogging is no more a level playing field than traditional journalism and that the A-list are "gatekeepers" of a sort. The series may be ongoing. I have mixed feelings about this topic, as I do regarding Seth Finkelstein's occasional discussions of the blog power law and the difficulty of people outside the A-list being heard.

For big political and social topics on a grand scale, I believe it's all true. What I say about a general political and social topic at *Walt at random* or what Seth says at *Infothought* will have infinitesimal impact compared to comments from Jeff Jarvis, Markos Moulitsas Zuniga (DailyKos), Dan Gillmor *et al*.

Fortunately, life is as full of smaller interests and topics as the media is of niche magazines, small-run books, and tiny-circulation newsletters. Jeff Jarvis says there are actually "a hundred A-lists," one for each subject; I'd say it's more like several thousand. Jon Garfunkel responds that "*certain subjects are of more interest than others*: politics and the press, which touch on everything else."

To which I respond: "It depends." If "touching on everything else" is the key to interest, then we should all be discussing water, air, and food—and most of us spend as little time thinking about the press as we do thinking about air and water. I'd guess that most sensible people spend relatively little time each day thinking about politics. Most of us have other interests and concerns, most of those interests and concerns narrower than politics and the press. I've never read DailyKos, Jeff Jarvis (except back when he was a third-rate writer for *TV Guide*) or most other Big Names, and I don't believe my life is the poorer for it.

I've suggested that there's an "A-list" among library-related weblogs, but I've done so in a lighthearted manner and I'm beginning to think I'm just plain wrong. Yes, a few weblogs have four-digit Bloglines subscriber counts (and, doubtless, substantial Technorati ratings) and a slightly larger group have high three-digit counts (400 and up): If there's an A-list, that's the group. I don't consider those people gatekeepers in any real sense. Their friendliness or hostility to a new weblog won't make it or break it. They don't (usually) gang up on other bloggers. It's not even clear that they're taken more seriously than bloggers with smaller readerships. Some of the most influential library-related blogs fall into my casual "B list" categorization, with 100 to 399 Bloglines subscriptions—and a few fall into the "C list" (20 to 99).

Maybe I'm fooling myself. It's certainly true that a few of the A-list people seem to be speaking at a *lot* of conferences, and maybe there's a direct connection.

Getting back to Garfunkel's posts, "Part 2: Who they are" (April 5) discusses some of the "new gatekeepers" and their tendency to disclaim any special importance. Garfunkel wants to be heard by a wider audience;

in that quest, he's become convinced "that there truly *was* an A-list" and that there are questions about their legitimacy and the power they wield. It's an interesting essay, best approached with some caution. There's one wild generalization: Going beyond the note that A-list bloggers "primarily link to each other," Garfunkel says "just about everybody links to them—whether in their blogrolls, or in everyday citations." That's a highly specialized use of "just about everybody," apparently restricted to those who blog about politics and the press (and maybe social media).

Technorati claims to track eight million weblogs and more than one *billion* links. The highest-ranked *individual* weblog has 15,358 links from 10,318. Only three weblogs have links from more than 10,000 sources; only 15 have links from more than 5,000.

"Just about everybody" turns out to be roughly 0.125% for the most "powerful" individual weblogger. **99.8% of weblogs** have no links to the top individually run weblog. At least 97% of all weblogs have no links to *any* of the top 15 "gatekeepers." By real-world standards, that translates to "Nobody links to the gatekeepers."

How many people *read* these enormously powerful gatekeepers? If Jeff Jarvis' actual readership is ten times his Bloglines count, that comes out to 13,000 people: Not bad for a small-town newspaper but wretched for a Dominant Voice. On Garfunkel's list of 32 prominent social-media weblogs, only one has as many Bloglines subscribers as the top two library-related weblogs. It does make you wonder.

That's the charm of net media. We get claims of "A list," dominance and enormous power—with numbers that wouldn't register in traditional media.

Finally, here's "The new gatekeepers, part 3: Their values," posted April 8. He cites eight values "associated with, and celebrated in, the blogosphere"—then considers "what values they replace: Freedom over responsibility, Anonymity over traceability, Immediacy over thoroughness, Talking over listening, Breadth over depth, Ego over deference, Involvement over detachment, Serendipity over coherence."

Garfunkel groups four values as pointing toward "quantity over quality." He also notes that the values cited are those that press critics dislike, and that (some) blogs are exacerbating the flaws of 24-hour "news" channels. "This wasn't supposed to be how journalism was saved." That's true, and I'm inclined to believe that blogs won't "save" journalism or that it necessarily *needs* saving. Still, despite my nitpicking (and despite Garfunkel's tendency to leave out words—he's no better a proofreader than I am), this essay is well worth reading and thinking about. That's particularly true if you *do* believe weblogs have some relation to journalism.

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