

On Romans, Copyright Law, and the Future of the Film and Television Industry.
And Bread. There's a Little about Bread.

"You ask me to recite to you my Epigrams. I cannot oblige you; for you wish not to hear them, Celer, but recite them."

So wrote Martial – with glint in eye – nearly 2000 years ago. It is a theme which appears constantly in his work: the blackguardly nature of certain citizens gleefully misappropriating his works. Martial sought to solve the problem by publicly vilifying – with his famously poisoned pen – his tormentors. But it seems not to have worked: there are just as many anti-pirate rants in his later works as in his early ones.

One can just imagine what Celer would be doing today. Given a laptop and unlimited access to all of man's greatest literary, musical and audiovisual masterpieces . . . Why, he'd be just like your neighbor's son in the garage next door: downloading until there's no memory left. It's not a new problem, and it's not going away.

Let's be clear. Copying is human. It's how we learn languages, how we act, how we play, how we learn, how we become, in fact, human. It's the poor soul who can't mimic those around him that is branded "abnormal", and shunned. We're never going to be able to stop social simian behavior, and shouldn't try. It's pointless. Really, then, it's a question of where you draw the line. How much copying is too much copying, and why?

The companies that make money for their shareholders by exploiting copyrights are well aware of the penchant for mimicry and copying in the human populace. They form trade associations to police enforcement of the laws; they seek to educate the public (read "try to indoctrinate the public") as to how and why piracy forces artists into starvation and despair; they publish anguished outcries, saying: "Save us. Save us."

And they're right. They need saving, because, frankly, they're doomed. The old models just won't work.

(By-the-way, I love it that the studios, record companies, and other bigwig copyright exploiters call it "piracy". Couldn't it just as well be called "flattering mimicry"? It's not that they don't want the attention; it's that they want your dollars. – But we'll get to that later.)

I don't mean to make light of the situation. The erosion of copyright protection and enforcement has had, and will have, an enormous economic impact on industries that employ and animate much of our sun-blessed region, including my own livelihood. Even if you doubt the accuracy of the figures – as you should, since they are generated by self-interested trade associations such as the MPAA, or by "experts" they hire – it's clear that the old copyright industries are being affected, and even destroyed. A study done in 2006 purports that \$6.1 billion in revenue was lost by U.S. companies worldwide that year to piracy, and that the overall effect was even greater. This is serious; a sea change.

And we're all seeing it. The music business has been razed by the rise of the MP3. Newspapers are being shunted aside. Fine artists never hit it big in the first place. The television and motion picture industry is next. It has to be. As bandwidth increases, CPU's multiply, and the Net and its owners generate ever more connectivity and power, the days of holding on to a property and doling out viewings at a price are going to be gone. There just will be no way for a company, legitimate or not, to say: "Now wait. Now wait. You can't copy that. It's mine. I've been granted a government-mandated monopoly on that work, and you can't copy it for another 75 years – or, if I change the law, 100 years – or . . .") Before they are halfway through their speech, the work has been copied and recopied around the globe in a virally spiraling crescendo that UIP could only dream of ever achieving.

So, in short, the copyright businesses that we grew up with are finished. You can't make money charging people to buy vinyl or CD's or DVD's or jewel cases when the MP3 is free. Advertisers don't want to pay more money for fewer eyes – so who pays reporters? Goodbye newspapers. Why go to the theater if you can Netflix from your home? And Netflix is cheaper; much cheaper – without (at least for now) having advertisements hammering you over the head at every turn.

The upshot is that we have to rethink. Good old copyright is being left behind. The copyleftists are winning, and going to win. And since we can't change people, we're going to have to change the law.

So, how do we do that?

A raft of possibilities present themselves. This isn't rocket science, or even profit participation accounting by the big studios. It's not that complex. If we really mean to meaningfully address the question of copyright piracy and its economic impacts, we can pick among a number of possible policies and enforce one. It can be done. It was done. That is where the copyright laws in this country come from in the first place: our wise forefathers provided for them in the Constitution. The problem is, given the realities of the modern interconnected world, none of the alternative possibilities is likely to work – and, in the end, it's really not the American way, to try to solve market problems by political action, New Deal and revolution aside.

We could, for instance, just bite the bullet and criminalize copying. Why not? If we really think of copying as stealing, we could just be tough on crime. We could find, prosecute, and jail the offenders. It is called intellectual "property" after all. Why not throw the thieves in the clink? Teach them a lesson. Let the FBI use a "probable cause" standard to crack our hard drives, and find all of that illegally downloaded loot. Loose the hounds, brother. But, although a minor few would undoubtedly welcome the uptick in their corporate bottom lines, most of us don't relish Big Brother reading our emails to protect the assets of a few guys in Hollywood. And, in fact, at this point you'd be jailing nearly all of the world's population – because we all have intellectual property on our

computers, and it's being used and shared constantly, intentionally or not. I can't see criminalization as working any better later than it does now. I.e., basically, not at all.

A different tack was tried in Europe, when VHS and Betamax tapes were new. Clearly, the tapes were going to be used for copying: that's the point. You buy a videotape to put something on it, something that can be played back. I.e., you copy with it. (In the U.S., the Supreme Court ruled that copying was not the point, that consumers were entitled to "time-shift" their television viewing, and that that somehow didn't count as copying. You figure it out.) Anyway, in Europe, they decided to accept that copying was here to stay, and instituted "blank tape" levies. That is, they taxed the sale of tapes, so as to have a revenue stream to recompense the artists that were being ripped off. Good idea, but kind of hard to implement. How do you know who to pay, and how to split the revenue? The populace, it turns out, likes to support artists. They'll listen if it's about keeping that one visionary in enough food and drink that the "Mona Lisa" will emerge. But, wow, there can be problems. For instance, the U.S. studios tried to define themselves as the artists (and to some extent succeeded), entitled to big chunks of the money being held by the European collection societies -- while the collection societies, oddly enough, thought the money should be going to the artists who actually created the works in the first place, to the guy in the garret with his guitar and one pot of hot water.

But let's say that we decide something like this is a good idea (because, after all, it kind of is). What would a "blank tape" levy look like for our modern computer based Internet world-wide sharing? We might tax the sale of computer memory, the modern form of "tape", or the sale of CD's and DVD's. Or, we might tax the accessing of the Net, using the Internet service providers as a chokepoint at which to count the number of times an individual computer gets on-line. Or we might count key strokes. Other technical solutions will present themselves. But -- and this is a big but -- is this really the American way? Talk about creeping socialism. Here's another governmental organization trying to get into our pocket books, keeping track of what we're saying to one another, keeping secret records . . . It's hard to see that it works.

But there's a deeper issue. The original point of the copyright and patent laws was that they were supposed to encourage creativity and the useful arts, i.e., they were supposed to encourage artists and inventors, individuals. But, in our lifetimes, the copyright laws have been co-opted so as to protect a few monopolistic big businesses. (The length of protection under the U.S. copyright law has increased three times since I first graduated from law school -- each time that Mickey Mouse was about to go into the public domain. Odd, huh?) If you read carefully, the arguments for the protection and enforcement of the present copyright laws are all being made by the studios and record companies -- and all center on the amount of money and jobs lost, never on the encroachment on artists' rights. In fact, the studios and record companies have a hard time finding artists that will stand up and say that they oppose copying on the Net. Because, really, if you want to encourage artists, don't you want them to have unrestricted access to the greatest creative and distribution tools ever created? Don't you want them sampling, mashing-up, paying homage, using the verbal and visual and aural images and material in which we swim daily, that the Net has provided to each and every one of us? The studios don't like the

Net because it busts their monopoly, not because they think the artists are getting ripped off. And the American public, the worldwide audience, somehow always seems to side with the artists. As they should, as we should.

But, it means that a blank-tape levy type of law probably doesn't work. The Europeans supported it because they actually expect their social institutions to succeed, and because the money raised was supposed to go to the starving artists. We Americans see things differently.

For similar reasons, it's hard to see that another alternative model of artist protection and encouragement will do much good: government sponsorship. Throughout the ages, a few artists have made their livings, and, in fact, have given us some of the greatest works ever created, by having patrons to support them. (Think of the Renaissance painters, for example.) A government sponsorship might do the same thing for a lucky few – or it just might miss the boat. Completely. What, after all, is worthy “art”? A significant portion of the American populace is never going to be persuaded that their tax dollars should just be handed over to crazy Bohemians with a gift for convincing funding committees that they are brilliant. This is a program that will constantly be under the threat, if not the reality, of the axe.

So, to summarize to this point, the present copyright law is unenforceable. Stricter enforcement won't work. Taxing the Net won't work. Sponsorship won't work. Where then are we headed? A very brave new world, in my book.

First, there will be litigation, lots of litigation. Think Napster and suing college kids in their dorms. The general counsels of this world didn't get to their positions by being visionary world-changing problem solvers; they got there by being hard-headed fighters who had (and have) their clients' interests first and foremost. They're going to recommend court; they're going to recommend no-holds-barred battle. No attorney ever got fired for being too aggressive on his or her client's behalf. It's not going to work, but who does an increasingly bewildered CEO turn to? There aren't people at these companies whose job it is to take a global view, seeking to balance the competing interests of the artists, the public, the new industries of the Silicon Valley, the service providers, the . . . That kind of dreamer is shown the door the second day of the job.

So, there will be lawsuits.

In the meantime, many of the artists will be returning to, or continuing in, the world of entertainment that has always existed. Wandering minstrels, and players. Live shows. Day jobs. The music business won't die; it will become a concert business. The Net will generate interest in – probably fascination with – certain performers and bands. The bands will play around the world, live, while their handlers discover they are in the promotion business, not the sale-of-goods business, and happy to be thriving on the powers of the worldwide web.

Actors will be back on stage, some divas, some bit part players. They're not going away. How many actors do you know now, who don't or rarely work? Every waiter and waitress on the Westside . . . What we may lose is the cinema star: that person whose smoldering looks are captured and loved by the camera, but can't act their way out of a Tennessee Williams bag. They, like the rest of us, may have to find other work.

Live television and corporate-sponsored programs (e.g, "The Colgate Hour") are likely to make a comeback, to the extent they ever went away. These kinds of shows never tried to thrive on making money from an infinite number of reruns. They worked, and will work, because they generate the kinds of audiences, or good will, that advertisers covet.

I also expect the cliff-hanger to become a major art form. Artists may not be able to get their audience to pay for each look at something, but they may be able to get them to pay for a coveted early first look. It's a little bit like what is happening now in the motion picture industry. We all know that a picture will be available on pay TV, or via the Net, in a few months, essentially for free, but audiences still line up for a theatrical big-screen first look. By the same token, I would expect the serialized novel (think Dickens and "The Pickwick Papers", think Buck Rogers-like graphic strips), to be able to generate significant thirst for subsequent issues. Or, the unveiling of the latest song by Cold Play, or Flying Lotus. You get the picture. If the Net lets an artist congregate an audience for that first look, for that premier, and the audience is willing to pay . . . , then perhaps that artist can live, for a while. Soap operas and telenovelas already operate on the principle of the cliff-hanger; I'd expect to see more of them.

There's also the chance that "fan fiction" will emerge as a major factor that can help, in fact, generate even more interest in an artist's work. We see this happening in the manga world, in Japan, for instance. Under general copyright law, third parties are not allowed to create works derived from somebody else's earlier works (at least until those works go into the public domain). But in Japan, the manga artists don't seek this protection. They encourage their fans to generate whole new stories and worlds using, as a jumping-off point, characters and worlds created by the originator. Why? One, because these artists are on the forefront of our changing world, and probably don't even see the point in seeking to stem their fans' fever. But, two, because it makes their original new works that much more valuable. The fans are going crazy waiting to see what's coming next, from the guy who came up with Creature Z in the first place . . .

I would imagine that the studios – who have already basically abandoned small character-driven films anyway – will turn to ever greater and greater "event" films that everybody in the world will have to see on the big screen. Films that out-"Avatar" "Avatar". It remains to be seen whether those kinds of monster events can be funded through diminishing ticket sales, since, without copyright, the studios won't have a monopoly on selling merchandise, DVD's, etc., and it will become ever harder to justify the upfront costs of these events – but there's no ceiling on ticket price. Look at what people pay to attend the Super Bowl, for instance. We'll have to see.

Filmmakers themselves may have to become the fine artists of our times. They may have to make their living selling originals, and/or signed copies, of their creations to collectors. I imagine, for instance, that a never-seen Kubrick short film, fresh from his own lab, would fetch immense sums from certain art collectors and/or eager sponsors. I know I want to see it.

Another eventuality also seems a real possibility to me. If we can solve the technical problem of automatic micropayments – if artists could get 1 penny from each person that accesses a webpage, for example – something that would be practically invisible to actual viewers – you could start to generate sufficient sums for an artist to begin to live. A thousand views, for instance, could buy two or three loaves of bread. And with a worldwide audience, a thousand views is not that far-fetched – and is miniscule if the artist were actually to generate a following. There could be millions of views, huge bakeries worth of bread, for someone who hits that popular chord. (This is the part about bread, by-the-way.)

But the ultimate point is: Even though Celer is out there, Martial still writes. He has to; that is who he is. The writers, and musicians, and painters, and actors, and fractal coding programmers reimagining Shakespeare's sonnets as characters in a game-world governed by the laws of rhyme, are not going away. We're human. We create. We copy. We share.

It's the industries created by the copyright laws of the 20th Century that are going away, or, at least, having to mutate. We might be able to save them, or replace them, through massive governmental action – but that is unlikely. So, the forces that be will fight it out for a while, then human nature and the Net will triumph. Which means that some artists' lives are going to change, but for most, they won't. They're already working, or not working, in the same manner as artists have since the days of Martial. That is, they are doing what they love by hook or crook.

And the rest of us who depend on the studio-system for sustenance are going to have to get day jobs, too. In about ten years.

Dennis Cline is an entertainment attorney and copyright expert, who has represented talent and protected artists' rights in the film and television industry for more than two decades. He lectures from time-to-time on the future of copyright and the Industry, and has a third son he has to get through college before the curtain comes down.