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The Ownership–Usage Dichotomy and the Human Element in Newman’s Freeeconomy

Damon C. Andrews*

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I. INTRODUCTION

In *Copyright Freeeconomics*, John Newman pioneers new terrain pertaining to the burgeoning industry of zero-price, legitimate, online-content distribution.¹ By analyzing the no-cost methods that corporate–copyright firms employ to compete with illicit offerings, Newman boldly contends that end users’ ability to freely stream online content—as opposed to downloading it—has eviscerated the dichotomy between “use” and “ownership” of copyrighted works. Newman also argues that the zero-price model bridges the longstanding chasm between authors’ utilitarian rights and moral rights in copyrighted works. Newman’s multidisciplinary examination of these and other related issues is a thoughtful starting point for an ongoing discussion about the current state of U.S. copyright law in the post-Napster era of zero-price digital media. This Response continues that conversation.

* Law Clerk, The Honorable Henry F. Floyd, U.S. Court of Appeals for the Fourth Circuit, 2013–present; Law Clerk, The Honorable Michael J. Melloy, U.S. Court of Appeals for the Eighth Circuit, 2012–2013. The views expressed herein are the author’s own and are not purported to reflect the views of his employers, past or present. I thank John Newman for his friendship and for allowing me the opportunity to respond to his thoughtful article.

1. John M. Newman, *Copyright Freeeconomics*, 66 VAND. L. REV. 1409 (2013).

Although pay-to-own content services are firmly established in the marketplace and contribute significantly to industry revenue,² zero-price streaming platforms have only recently garnered widespread user bases, and the legal scholarship regarding these offerings is likewise lagging. *Copyright Freeconomics* is timely and provocative and, nearly holistically, I agree with each of Newman's assertions regarding consumer behavior and the operation of social markets. There are, however, a few gaps where Newman's analysis could benefit by accounting for certain variables. While I do not believe that including these variables *ex post* alters any of the outcomes posited by Newman, or in way detracts from the impacts or applicability of his conclusions, I do think that these variables are worth incorporating into the broader discussion to paint a more complete picture of the "copyright freeconomy" going forward.

This Response examines three aspects of *Copyright Freeconomics*. The first point, discussed below in Part II, pertains to a technological distinction that nips at the fringes of Newman's argument regarding the dissolution of the ownership–usage dichotomy.³ The second and third points focus on consumer behavior driven by emotion—what I will refer to as the "human element"—that acts as an unseen influence in the copyright freeconomy. Part III.A supplements Newman's prediction that transactions are becoming increasingly social (as opposed to market-based⁴) and goes a step further by portending that the current environment will significantly reduce the market for positive-price, legitimate content. Part III.B then casts doubt on Newman's concerns that end users will hoard zero-price content, thus obviating the need for a "non-usage" defense.⁵

II. USAGE AND OWNERSHIP: (STILL) A DISTINCTION WITH A DIFFERENCE

Practically speaking, Newman's statement that "zero-price models [for content delivery] . . . grant users control rights that begin to converge on ownership"⁶ is either mistaken or, if we accept it as true, quite narrow in scope. Based on Newman's well-reasoned analysis, I reject the notion that his assertion is wholly inaccurate;

2. As of January 2007, "more than two billion songs, 50 million television episodes and over 1.3 million feature-length films ha[d] been purchased and downloaded from the iTunes Store." Press Release, Apple Inc., iTunes Store Tops Two Billion Songs (Jan. 9, 2007), available at <http://www.apple.com/pr/library/2007/01/09iTunes-Store-Tops-Two-Billion-Songs.html>.

3. See Newman, *supra* note 1, pt. III.B.1.a. & IV.A.1.

4. See *id.* pt. III.D.2 and text accompanying notes 287–88.

5. See *id.* pt. III.D.3 & IV.A.2.

6. *Id.* at 36.

however, I also do not believe that the proposition has quite the reach that Newman purports. In my view, the rights granted to users who stream online content are more or less orphaned rights—they cannot be likened to rights appurtenant to chattel, nor are they commensurate in scope with rights inherent in a copyright. Indeed, such user “control rights” plateau at a level well short of true ownership in either context. The myth behind Newman’s argument is built upon a key distinction that I explain below and that goes unaccounted for in *Copyright Freeconomics*.

To understand my disagreement with Newman’s assertion above, it is important to distinguish between *downloading* content from the Internet, as in purchasing a song from iTunes, and *streaming* content, as in listening to a song via a zero-price platform like Pandora or Spotify. “The difference lies primarily in what happens once the transmission reaches the user’s computer.”⁷ When an end user downloads a song, a “specifically identifiable reproduction” of the song is created and stored on the user’s hard drive in the form of a phonorecord.⁸ This phonorecord is separate and distinct from the zero-price platform’s server copy that was used to create it, and it remains on the user’s hard drive after the download is complete.⁹ By contrast, when an end user streams a song, the server copy is fragmented and transmitted piecemeal to the random access memory (“RAM”) of the user’s computer. There, the fragments are reconstructed and the song is performed (i.e., played through the computer’s speakers). But “[a]t the completion of the performance, the [RAM] is empty; typically, the user’s computer retains no copy of the sound recording. If the user wishes to replay the song, the user must initiate another transmission from the streaming platform’s website.”¹⁰

Based on the mechanics of streaming, the zero-price model essentially renders the copyrighted content the focal point in a house of mirrors. To wit, that the zero-price model “allows for on-demand time-shifting, space-shifting, pausing, resetting, and a host of other features”¹¹ does nothing to change the fact that the same copy of the content (located on a remote server) is transmitted, received, and reconstructed during each iteration. These allowances also do not alter the transitory nature of individual performances of the content—once a streaming performance is complete, no copy of the content remains

7. W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 860 (2007).

8. 17 U.S.C. § 115(d) (2006).

9. See Cardi, *supra* note 7, at 854 (“A downloaded phonorecord stored on a computer hard drive is a ‘reproduction,’ as is a recording stored on analog tape or compact disc.”).

10. *Id.* at 861.

11. Newman, *supra* note 1, at 1441.

on the end user's computer or device, and the user must initiate a subsequent, independent transmission to perform the content again.¹² At least one federal appellate court has held that "data [that] is rapidly and automatically overwritten as soon as it is processed" fails to qualify as a statutory "copy" under the Copyright Act because it does not exist "for a period of more than transitory duration."¹³ Accordingly, while a user might be able to *control* streaming content as though the user owns the content while it streams, any similarities between such "control rights" and the rights inherent in copyright ownership are as fleeting as the performance itself.

The distinction that I draw above is perhaps best illustrated from a different perspective, which is to treat a downloaded copy of a song as chattel. By definition, "chattel" is "movable or transferrable property."¹⁴ When a user downloads a song in the form of a phonorecord, the phonorecord is saved to the user's hard drive, where it can be accessed and performed repeatedly without a connection to either the Internet or to the content source's server. But even more importantly, the phonorecord can be transferred to multiple other devices—for example, from the computer used to download it to an iPod—where it can then be accessed and performed, also independent of an Internet connection. The same cannot be said for streaming, however, because each individual stream is a separate transmission of the same remotely stored copy of content; thus, performance is necessarily a function of access to the zero-price platform's server.

Newman asserts that "there is little practical difference from the end-user point of view between constructing a customized playlist of songs to stream on Spotify and that same end user purchasing those songs and constructing a customized playlist of songs on her own hard drive."¹⁵ Respectfully, I cannot agree; the theoretical convergence of

12. See *Cardi*, *supra* note 7, at 861 ("Once a particular song fragment has been performed, it is usually erased and replaced in the [RAM] by a yet-unperformed fragment."); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 235, 252 (2001) ("[T]he digits that represent the sounds to be played back by the recipient's streaming audio software will temporarily be stored in the RAM of the recipient's computer, until they are processed by the software, played back, and replaced in RAM by subsequently transmitted digits.").

13. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127–130 (2d Cir. 2008); see 17 U.S.C. § 101 (defining the terms "copy" and "fixed"). *But see* *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) ("[S]ince we find that the copy created in the RAM can be 'perceived, reproduced, or otherwise communicated,' we hold that the loading of software into the RAM creates a copy under the Copyright Act." (quoting 17 U.S.C. § 101)). Notably, however, the court in *MAI Systems* failed to address the duration requirement. See Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1083–84 (2010) (stating that *MAI Systems* "offers a holding that is entirely devoid of references to duration").

14. BLACK'S LAW DICTIONARY 268 (9th ed. 2009).

15. Newman, *supra* note 1, at 1441 (footnote omitted).

ownership and usage does not destroy the real-world dichotomy as I imagine the vast majority of end users view it. Consider an end user who wants to listen to a particular song or playlist while running on a beach or hiking in the mountains, but who has no Internet access in those locations. A customized playlist on Spotify that the user created at home is of little—if any—value because it is inaccessible. By contrast, a customized playlist of downloaded songs can be transferred from the user’s Internet-connected computer to a performance-only device and played without an Internet connection. Based on this simple, real-world scenario, I am not so quick to assume that an end user would find “little practical difference” between running in silence versus running to music.

Moreover, that “Spotify . . . allows importing owned files from an end user’s hard drive directly into the Spotify platform” does not “further blur[]” the ownership–usage dichotomy.¹⁶ That is because such a transaction is a one-way street for end users and shifts the focus to the wrong content. An end user’s import of song *X* from his own music library into the Spotify database does nothing with respect to that user’s ability to download and save (as opposed to stream) song *Y* from the Spotify database. As Newman recognizes, the user “own[s]” song *X* and thus can do as he chooses with it.¹⁷ The crux of the ownership–usage dichotomy, however, is centered on song *Y*, and an end user who imports a song into the Spotify database has no more rights to, or ability to act on, Spotify’s content than do users who choose not to import songs.

To Newman’s credit, he concedes that “access is not precisely the same as ownership,” but maintains that “the new zero-price model . . . has blurred [the] distinction[] nearly to the point of rendering [it] obsolete.”¹⁸ I cannot join him in thinking that zero-price access that is wholly dependent upon an Internet connection is an equivalent substitute for true ownership of mobile content.¹⁹ Or at least not yet. Perhaps Newman is ahead of the times, and in the future, when no corner or the world is without wireless Internet and

16. *Id.*

17. See *id.*

18. *Id.* Newman nonetheless distinguishes between “zero-price-access-based content offerings” and “actual ownership of legitimate copies.” *Id.* at 1455.

19. Although “access” might not be the same as ownership, it may be still the best way to conceptualize copyright law when dealing with streaming content over the Internet and zero-price platforms. See I. Trotter Hardy, *Computer RAM “Copies”: A Hit or Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 U. DAYTON L. REV. 425, 452–53 (1997) (“[C]opyright works for tangible, relatively permanent ‘copies.’ The Internet creates intangible, impermanent copies; therefore, copyright just will not work well on the Internet. . . . [C]opyright law should give up its focus on ‘copying’ and instead be reoriented . . . to focus on ‘access’ or ‘use’ of information.”).

every device—no matter how small—has wireless capabilities, there will be no need to download online content. Even under those conditions, however, I surmise that at least some commentators would still draw a line in the sand between ownership and usage. Certainly for now, however, the Internet-independence and transferability inherent in downloaded content, but lacking in streamed content, leave me believing that the ownership-usage dichotomy is alive and well.

III. THE HUMAN ELEMENT IN THE FREEECONOMY

Part of what makes *Copyright Freeeconomics* such a tour de force in copyright scholarship is the Article's multidisciplinary examination of the zero-price model. Newman steps away from a strictly intellectual-property approach and seamlessly incorporates into his analysis research from behavioral economics and consumer psychology. There are two aspects of Newman's analysis, however, that I believe could benefit from a more complete discussion of what I will refer to as the "human element." Simply stated, the human element is consumer behavior driven by emotion, and it acts to influence behavior in ways not always reflected in binary or numerical outcomes. In one aspect, Newman accounts for the human element, but his analysis would benefit from more fully exploring its ramifications on the marketplace for positive-price, legitimate content. In another aspect, Newman does not account for the human element, and therefore I do not share his same concerns regarding one particular aspect of consumer behavior.

A. Disappearance of the Positive-Price, Legitimate Content Market

In explaining how the zero-price model could collapse the utilitarian–moral rights dichotomy,²⁰ Newman portends that transactions for online content are becoming increasingly social in nature, as opposed to market-based. In particular, Newman states that "[a] growing number of artistic creators . . . have begun to offer their works to consumers at a price of \$0.00 without receiving any direct financial compensation of the sort contemplated by the traditional utilitarian/incentivizing copyrights."²¹ This trend has made name recognition and attribution the currencies of the new copyright

20. For an explanation of the dichotomy, see Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750–56 (2012).

21. Newman, *supra* note 1, at 1461.

freeconomy (i.e., wealth exists in the form of social status).²² I agree holistically with these conclusions and thus join Newman in realizing the beginning of the end of the utilitarian–moral rights dichotomy.

I would go even further, however, and forecast that the zero-price model will not only replace positive-price, legitimate content with zero-price, legitimate content, but will also effect an increase in the consumption of zero-price, *illegitimate* content. As the ratio of zero-price, legitimate content to positive-price, legitimate content increases, consumers will likewise become increasingly accustomed to accessing content at no cost. Consequently, consumers may over time find themselves irritated when seeking content for which there is no zero-price, legitimate option, but for which there is a positive-price, legitimate option and a zero-price, *illegitimate* option.²³ Here is where the human element comes into play: when faced with choosing between either a positive-price, legitimate option or a zero-priced, *illegitimate* option, consumers' choices may depend on the identity of the copyright holder losing a potential sale.

Consider, for example, an independent, small-volume, local artist who records his own CDs: consumers may follow the behavioral pattern of the students in the zero-price versus positive-price candy experiment and act according to a norm closer to the social end—as opposed to the market-based end—of the consumer-behavior spectrum.²⁴ In other words, consumers are more likely to purchase the positive-price, legitimate content to support the local artist.²⁵ By contrast, consider a large, high-volume, corporate record label that produces a multitude of mainstream artists: consumers may opt to pursue the zero-price, *illegitimate* option, thinking that any harm to the corporation from a single lost sale would be *de minimis* or would go unnoticed.²⁶ Although there will likely always be some quantifiable

22. See *id.* at 1461–62.

23. See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 402–04 (2003) (noting that “the copyright consumer is really no different from the consumer of any other good” and “is primarily interested in getting access to a wide variety of copyrighted works at reasonable cost”).

24. See Newman, *supra* note 1, at 41 and Part III.D.2.

25. See Sarah Greene, *Clear Channel v. Competition Act of 2002: Is There a Clear End in Sight?*, 12 DEPAUL-LCA J. ART & ENT. L. 387, 437 & n.229 (2002) (discussing the results of a survey in which, *inter alia*, a vast majority of respondents “believe that [radio] DJs should be given more air time for songs they think will be of interest to their audiences rather than be required to mostly play songs of artists backed by recording companies” and more than half of respondents “say radio would be more appealing to them if it offered more new music, less repetition and more music of local bands and artists”).

26. See Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep Pockets” Hypothesis*, 30 LAW & SOC'Y REV. 121, 126 (1996) (noting two studies in which “respondents were significantly less disapproving of stealing when the victim was a government or large business rather than a small business”).

percentage of the overall market comprised of positive-price, legitimate content, copyright freeconomics may create a divergence away from this middle ground and polarize consumers toward either legitimate or illegitimate content, both at no cost.

B. Why We Should Not Become Consumed by Overconsumption

My final point pertains to Newman's concerns regarding overconsumption and the possibility of hoarding content in the copyright freeeconomy.²⁷ Newman points to several instances in which zero-pricing led to behavior that appeared wasteful or inefficient, such as overuse of roads, congestion in plane slots at airports, environmental pollution, and massive caloric intake as a result of externalizing the cost of obesity.²⁸ Before assuming that the same result will flow from the zero-pricing of online content, however, it is important to look at the possible causes of overconsumption.

Regarding the overuse of roads, for example, it is likely that any traffic inefficiencies (e.g., congestion) resulting from motorists choosing the zero-price option for travel are counterbalanced by some other benefit (e.g., a temporal efficiency). In other words, if the zero-price road is the shortest distance between an origin and destination for a motorist, and all other factors (namely the cost to use the road) remain equal as among different routes, it is not surprising that the motorist would choose the most time-efficient option. Indeed, navigation services such as Google Maps provide users with different routes based on certain characteristics, among them being the ability to avoid tolls (thus creating a zero-price option). In short, motorists choosing the zero-price route do so purposefully because of the benefits that it confers (whether to save time, take in scenery, etc.), and not merely for the sake of driving that route. Just the same, with massive caloric intake, overconsumption of food is not done merely for the sake of eating. In some instances, it may be the result of depression, for example, and thus serves to medicate; in other instances, consumers might derive sensory pleasure from tasting the food that they eat. In either scenario, consumers are not consuming for the mere sake of doing so absent some benefit resulting from a cause-effect relationship; rather, the consumption is driven by some other factor—the human element.²⁹

27. Newman, *supra* note 1, at pt. III.D.3.

28. *Id.* text accompanying notes 199–203.

29. See Apostolos Chronopoulos, *Trade Dress Rights as Instruments of Monopolistic Competition: Towards a Rejuvenation of the Misappropriation Doctrine in Unfair Competition Law and a Property Theory of Trademarks*, 16 MARQ. INTELL. PROP. L. REV. 119, 135 (2012)

I am hesitant to view the consumption of zero-price content in the same way. This is for the simple reason that I cannot conceive of what benefit—other than “bragging rights” to a voluminous content library—hoarding content confers upon end users that would encourage such behavior. While there undoubtedly will be the rare arms race among users to amass the largest arsenal of content in terms of gigabytes, by and large, the transaction costs of doing so (e.g., time spent in front of a computer) would outweigh any potential benefits that such hoarders would receive. Thus, if users are not performing (by listening, viewing, etc.) the content that they own, I do not foresee users acquiring such content in the first instance merely for the sake of owning it.

IV. CONCLUSION

John Newman makes an admirable contribution to legal scholarship—*Copyright Freeconomics* is both a thoughtful reflection of the past and an insightful roadmap for the future. For that, we should commend and thank him. The Article operates on the cusps of several emerging copyright issues, each undoubtedly to be of increasing importance as the sands shift once again in the online-content industry. Notwithstanding Newman’s discerning predictions, I offer a word of caution that we should not always allow theory to prevail over the technological and marketplace realities that still exist today. While the gap may close over time in some respects as the world grows smaller, other factors are unlikely to change and therefore should be accounted for in any further freeeconomic analysis.

(noting that “[c]onsumer preferences are directed at product characteristics for the sake of which products are being bought”).