



**Interview with Fred von Lohmann, Electronic Frontier Foundation  
Recorded at [OnCopyright2010](#)**

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- Q: My name's Fred von Lohmann. I'm a staff attorney with the Electronic Frontier Foundation, a nonprofit located in San Francisco.
- Q: And what about the relationship – you were talking in the panel this morning about the relationship, the changing relationship between innovation and copyright, where it's moving, and where is it taking us. Tell us about that.
- A: Well, copyright law and new technology have always had a symbiotic relationship – sometimes antagonistic, many times mutually supportive. But certainly we've seen the Internet be one of the biggest disruptive innovations in copyright in some time. Certainly not the only one. People forget that broadcast radio, cable television, the VCR, the player piano, every one of those technologies created a panic among copyright owners, incumbents of the era, upon their introduction. But certainly the Internet and digital technologies are the current flash point, if you will, between copyright law and new technologies.

Interesting to me is the fact that I think we're seeing a slow move toward what we copyright lawyers call collective administration, or collective licensing. And in layperson terms, that just means, rather than trying to count every copy and stop every unauthorized copy, instead we figure out a way to give a blanket license, sort of a all-you-can-eat model. As long as you pay, or as long as someone has paid on your behalf – maybe your university, maybe your ISP, maybe your employer – you can pretty much do whatever you want. The end user, the consumer, the individual, no longer feels the pinch. In fact, some people like to say that this is, information wants to feel free. It's not really free, but it feels free, in frankly the same way that a lot of mass media has for the last 60, 70-odd years, the way radio has felt for the last 80 years.

So I think we're seeing a slow migration toward that kind of solution.

- Q: Now, that's a situation that prevails in a lot of other countries. Give us your assessment of how likely it would be for it to come to this country, and what do you think the reaction might be? This is a very – this is a country, if I can generalize, less inclined to be collective in its behavior, more inclined to be individualistic.



A: (laughter) Ideally, ruggedly individualistic, right, as the old Western meme goes. Well, frankly, I think collective licensing is already here, and often people overlook the fact that, obviously, the Copyright Clearance Center, the CCC, is an entity that does exactly this, grants blanket licenses to institutions like universities and corporations, to basically give them the right to photocopy freely, to be reuse materials in a relatively free way, in exchange for a recurring payment.

We also have similar models for music publishers, for – so when radio stations, for example, play music, the songwriters get paid through BMI, ASCAP, or CSAC, all of which offer blanket licenses. And even in the new digital context, we're starting to see some pretty grand experiments along these lines. The Google book search settlement, for example, has this general approach. We're going to basically put all of the published works into a pot, let Google use them, in exchange for a relatively standard set of fees. And in the music space, we're seeing the major record labels just now start to experiment with the idea, anyway, of giving a blanket license to universities to allow their students to basically do what we know they're going to do anyway, which is copy and share music.

Q: So in the short sense, then, you think there's a chance we could get to this kind of collective management for copyright, and for the sharing of content in this country.

A: I think so. In fact, in some ways I think, for certain kinds of media in certain kinds of markets, it's inevitable. Certainly, when I look at digital music online, where the music industry itself still today estimates that 95% of all of the copying is unauthorized, we're 10 years down the road. There's iTunes, there's amazon.com selling MP3s, there's every legitimate licensed model you can think of, and still 95% of the market is illegitimate, unauthorized. Well, you get to a point where you have to start saying, well, what can we do? What's left? And I think collective licensing becomes kind of the only sensible solution.

Q: I wonder, though, we've got so much creating going on, on the one hand, so much copying going on on the other hand. Fred, you'll create something and I'll pay you for it somehow, and I'll create and you'll pay me. Why don't we just all let it go free?

A: Well, I think we'll do a lot of that too. I don't think we're ever going to see one model – the era of, there is only one way to make money, I think, is behind us. We're going to see lots of models. Some of it will be just freely, people will make things and copy things, and no one will ask for payment. There's certainly an enormous rise in the so-called Creative Commons licensed material. I think if you



go to a Website like Flickr and you look at the enormous explosion of amateur photographic creativity there, I think it's fair to ask yourself, what do we need exclusive rights for when people voluntarily are creating so much content that they want other people to reuse and share, as evidenced by the use of the CC license, and frankly, the fact that they weren't ever doing it to get paid anyway. They took that snapshot for themselves. So I think there'll be plenty. There'll be an ever-growing market of free – not free as in pirated, but free as in always intended to be free. That was the goal from the beginning.

Q: And you made a good point this morning, which was that under this new world of collective management, the ideal situation would be to have multiple societies, because then that would force a competitive marketplace to evolve. Talk about that.

A: Well, from the author or creator's point of view, it's a bad outcome if there's only one collecting society that you can go to, because of course then that society has very little incentive to be efficient, to be transparent, because after all, their core "customer," namely the rights holders, has nowhere else to go. And we all know that if you want to avoid that, the best way – I mean, here is an example of something that's quintessentially American – the best way to do that is let's have some competition, as bare-knuckles as possible. That's what gets the customer the best deal.

Q: How about you and me start a collecting society?

A: Well, I think a key is, for collecting societies, you need a few, but not too many. It defeats the purpose of having collective administration if there are 50,000 licensing agencies that must all be paid before you as a user of the content can basically have the freedom that a blanket license offers. So you need a few, and we have in the United States, for example, in the area of the performing rights organizations, so-called PROs, they're the guys who license the songwriters to the radio stations, we have three of them. Turns out, pretty good number, much better than what they have in Europe, at least until very recently. In Europe there was one collecting society per country, there was no choices, and in fact rights holders couldn't even opt out if they wanted to. That I think of as the worst outcome. So somewhere between 50,000 individuals and one state-run monopoly, there's something we can do there.

Q: Now, we're at a program that's called Collision of Ideas. There's this notion that it's more of a conversation than a confrontation. What's your hope, end of the day,



walk out here feeling about the future of copyright, the future of intellectual property?

- A: Well, it's many ways the same hope I've had for many years, which is that the existing incumbent copyright industries begin to appreciate not just the threat that new technologies create, but the opportunities, to start seeing creators and new businesses that are thriving in this environment, showing that it's possible. So folks like Gawker, for example, who are speaking on the future of journalism panel here – thriving business, doing really well in the face of the same kinds of forces that companies like the *Wall Street Journal* and the Associated Press are fretting so much about. I think those examples are very powerful. It really shows to people, you can still make money, content still matters – in fact, content arguably matters more than ever. But you can't do it necessarily with the same business models you had before.

And we can talk about the law all day long, but it's not until a businessperson sees that somebody else out there is making money that they're really going to say, OK, send the lawyers home, we've got to get in the game.

- Q: I think a lot of people would like to send the lawyers home.

- A: I think that's right. I often say copyright law moves in waves with the new technology. So after a new technology has been absorbed into an existing business model, it gets to be real boring for the lawyers. And that's a good thing, right? I mean, certainly all of the litigation around VCRs, that was hot stuff in the early '80s, but by the late '80s and '90s, nobody – everybody was too busy making money to hire lawyers to sue VCR makers, and finding the people who are copying VHS cassettes. Everybody knew they were out there, but there was so much money being made, it wasn't something that you engaged attorneys to deal with. And I'm looking forward to returning to a sleepier copyright bar. May take five to 10 more years, but I think we'll get there.

There have been other major turning points in the past. Certainly the rise of broadcast radio, I think, is an important one. It was the first time that you have the opportunity to make audio content – music, of course, being the most important example at the time in terms of an industry that had made its money by – well, maybe had been doing sheet music until not so long before, then after fighting tooth and nail against the player piano, ultimately becomes the phonograph, they start doing well again, and then, oh my God, this broadcast radio crops up, and now suddenly people are listening to music for free, a particular complaint that should ring familiar in the current environment as well. You could have tens of thousands,



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hundreds of thousands of people listening to a piece of music. You couldn't find them, you couldn't catch them, you couldn't count them. And yet, that's what broadcast radio made possible. And it seemed clear that there was no – I mean, certainly to us sitting here today, it's absurd to imagine that somehow you could have broadcast radio and ban music from it. I mean, that just seems insane. What is it – it's one of the primary things it's good for. Why would you want that kind of scarcity?

And in fact, it took many decades and a lot of lawyering in order for songwriters to finally manage to work it out with the broadcasters. In fact, in the end, ASCAP was created. ASCAP tried to strong-arm the broadcasters. The broadcasters boycotted ASCAP music for a year, said, we're not going to play any of your music because the rates you're asking for are extortionate. And ironically, that's what brought us the beginnings of the pop music that we take for granted today, because the broadcasters shouldered aside the traditional songwriters, said, you're ASCAP, we can't play your music, and instead brought on a lot of African-American artists, had their first blues, jazz, the early beginnings of what would become rock and roll, all of that really sort of took hold because of the ASCAP – that year of no ASCAP music. So in the end, it worked out, and in fact, in the end, the record companies realized, hey, the best way to sell records is to put those records on the radio. In fact, as we all know, for the decades since the '20s, the problem hasn't been too much money flowing from broadcasters to the music industry, but in fact, the efforts of the music industry, through things like payola, to pay the broadcasters to play things.

So I think we learn lessons about how humble we should be about predicting what the future looks like. And I do think the Internet is another one of those pivotal moments, because we for the first time have a coincidence of digital – everything can be digital, bits become cheaper and cheaper, digital storage is – one gigabyte today costs 7¢, whereas in 2000 that same gigabyte would have cost many times that amount. And of course, now the Internet makes moving those bits around incredibly cheap as well. So you see the combination of these things – cheap storage, cheap transmission capabilities, it's like broadcast radio. To us now, of course music was going to be played on it. Looking back in 10 years at the Internet, people will say, how did anyone ever think that anything that could be copied wouldn't be copied?

We have to figure out a way to monetize that. We need to make sure the creators are adequately compensated. But this idea that we're somehow going to control, prohibit, or count every time a copy is made or moved? That to me already seems ridiculous, and I think it will seem even more ridiculous 10 years from now.