

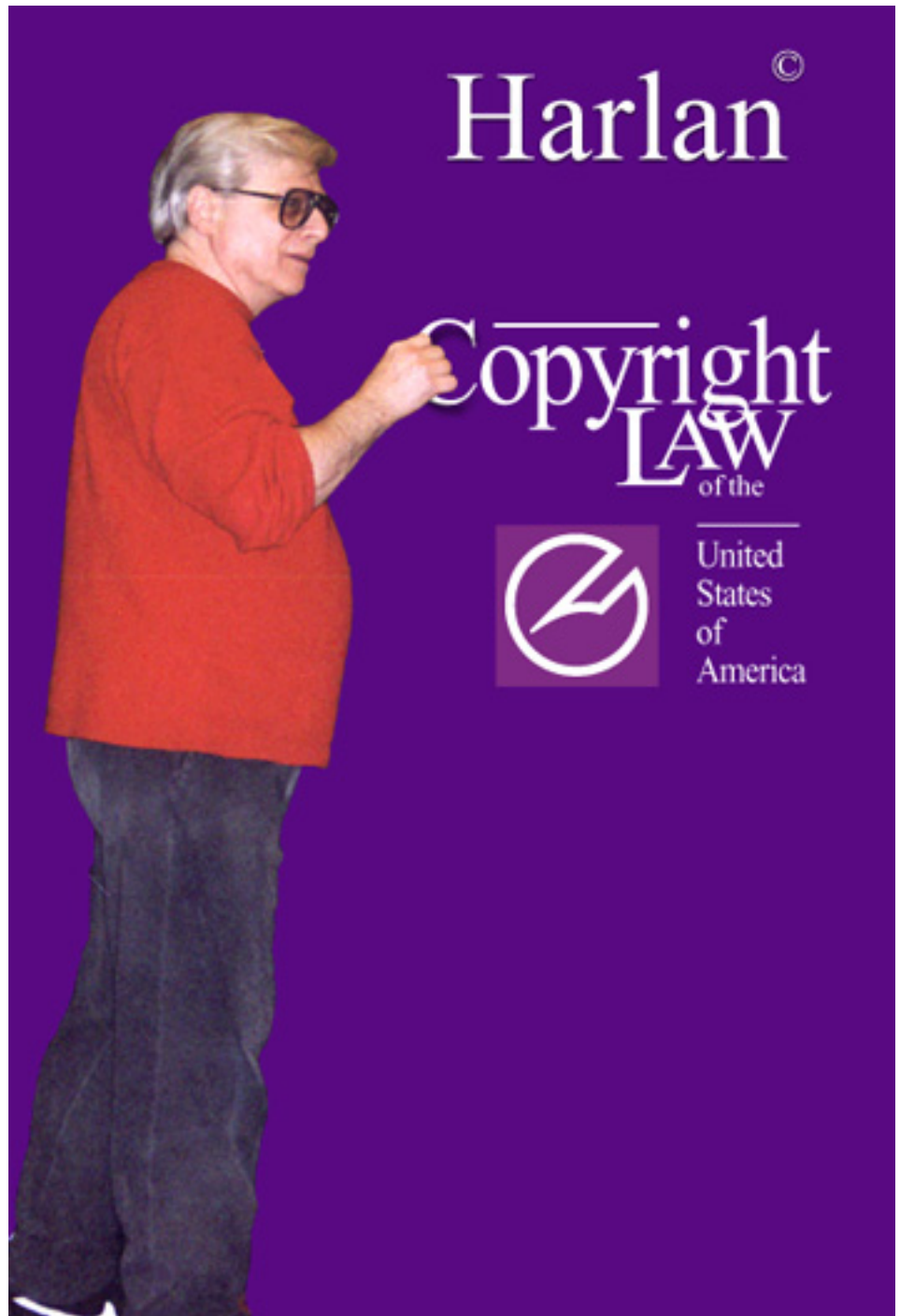
Harlan Ellison Takes on AOL, Pirates and a Sociological Paradigm Shift

by Paula Guran

At 5'5", I'm eyeball to eyeball with Harlan Ellison. But in his 67 years he's gained a towering reputation as a writer. He's been called "one of the greatest living American short story writers" and has won more awards for his books, stories, essays, articles, and screen work than any other living fantasist. Ellison's also developed a larger-than-life public persona — perverse, entertaining, annoying, and informative. He can spew invective with the rabid savagery of the pitiless Cerberus or rattle off an anecdote with the caustic wit of Lenny Bruce. He's not just opinionated — he's infallible — but has the intelligence to convince you of his unerring utterances rather than having to rely, as the Pope does, on faith for acceptance. Ellison can be utterly charming or infuriatingly irritating. Sometimes he manages both at the same time.

If you play the genre game (science fiction, fantasy, horror, and whatever other terms are *au courant* like speculative, slipstream, fantastique...) you are playing in Ellison's ballpark. He may not own the real estate or the team, but he's an ace pitcher who has to be taken into account in any scouting report. Sooner or later you'll start accumulating "Harlan stories" — good, bad, occasionally ugly — anecdotes from others and, if you are lucky, your own. At some point you may have a burst of Ellisonian-inspired exasperation with the man. Eventually, though, most players realize that he's a *mensch* with a heart as big as a house. He cares...

Ellison cares about little things (he's called me long distance to correct a spelling error), medium things (like the Edgar Rice Burroughs Memorial Park, the extremities of fandom, errant producers), and big things. His latest big thing is a fight



to protect creators' rights on the Internet — and his fight may be a lot bigger than you think.

HOW BIG IS IT?

On one level it is a legal battle: *Harlan Ellison v. Stephen Robertson, America Online, Inc., RemarQ Communities, Inc., Critical Path, Inc., Citizen 513, and Does 1-10, Federal District Court, Central District of California Civil Case No. 00-04321 FMC (RCx)* is a lawsuit filed against AOL, RemarQ/Critical Path and some individuals to stop them from posting

Ellison's works on the Internet without his permission. (If you do not understand what "copyright" means, read the sidebar.)

Although Ellison is the sole litigant, the case is important to all writers and to the publishing industry. The legal issues involved bear directly on writers' ability to control "for limited times...the exclusive right to their...writings" and the ability of publishers to profitably copy or distribute those writings.

In simple terms: Creators create. These creations are their property. They control, by law, the way in which their creations are copied and delivered. This control is what

Think he's exaggerating? Catch Ellison in his many public appearances and chances are there will be someone in the crowd who doesn't "make the connection" and makes the mistake of challenging him. (Challenging Harlan Ellison to an oral duel is committing nuncupative suicide and may involve physical injury as well.)

produces remuneration for their work. If you steal that ability, then you have stolen something of value. Ellison's suit contends a theft of this nature has taken place with his creation. (It has taken a battery of attorneys including M. Christine Valada, Charles Petit, and the litigating firm of Kulik, Gottesman & Mouton, and virtually every penny Ellison had in his bank account and retirement fund, more than \$240,000, to wage this battle.)

As of this writing, after two agonizing years, the writer seems to be winning: Ellison has settled out of court with RemarQ/Critical Path. Details of this settlement are not yet public although they should be made so by the end of December.

Both Ellison and the remaining major defendant, AOL, have filed motions for summary judgment, The public hearing on these motions is slated for January 7. As John Carmichael, one of the attorneys representing Ellison, explains, "These motions say, 'We don't need a jury because we are not disputing the facts of the case. We just want the judge to rule on the legal issues. This type of hearing is the most significant event short of a trial that can occur in a case like this. Simply: if AOL's motion succeeds — they win; if Ellison's succeeds — he wins.'"

Unlike the Napster copyright infringement matter in which the music industry as a whole confronted the issue of Internet piracy, the theft of text-based creations has been, for the most part, ignored by the publishing industry. Without rock-star musicians to front the cause, deep-pocket-

ed corporations to back it, and a centralized purveyor like Napster to fight against — there's been little attention paid by the public or the press to similar text piracy.

But for Ellison, the battle goes far beyond copyright infringement and bringing attention to a problem. It even goes beyond fighting for other writers living and dead ("I'm also doing this," Ellison has written, "for Avram Davidson, who died broke; for Roger Zelazny, who had to work like a dog till the day he pitched over; and for Gerald Kersh, whose work was reprinted and pirated in sixty-five countries, while he had to borrow money from friends to fight off cancer.") It goes beyond protection for writers as copyright affects any creator — musicians, artists, filmmakers, designers. Ultimately the clash involves a larger social issue. That's big.

"One of the basic tenets of this suit," Ellison says in his typical rapid-fire patter, "is that AOL and RemarQ/Critical Path have aided and abetted this constant and overwhelming pursuit of the philosophy 'all information must be free' — training an entire generation of basically illiterate computer-users to think they should get everything for free. This is part of a larger sociological problem. These kids don't think they should have to pay for music or books or anything else. They think that they can allow the dissemination of writers' work on the Internet without authorization, and without payment, under the banner of the idiot slogan 'information must be free.'"

"You say to them 'Listen, do you have a

car?' They answer, 'Yeah?' and you say, 'Fine, leave the keys in it tonight because I'm coming by. I need to drive to West Virginia and I'm going to take your car and drive it. Don't worry about it, it'll take three or four days but don't worry I won't trash it or run it off a cliff. I'll just leave it by the side of the road in case someone else wants to use it.' They just don't get the connection."

Think he's exaggerating? Catch Ellison in his many public appearances and chances are there will be someone in the crowd who doesn't "make the connection" and makes the mistake of challenging him. (Challenging Harlan Ellison to an oral duel is committing nuncupative suicide and may involve physical injury as well.) Others post on his Web site (www.harlanellison.com) message boards with more clodpated intensity than rational thought.

Want another example — a quote from an article reproduced from an old "pirate" newsletter in *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* edited by Peter Ludlow (MIT Press, 1996): "COMPUTER PIRACY is copying and distribution of copyright software (warez). A pirate is somebody who believes that information belongs to the people. Just as a book can be Xeroxed or placed in a library to be shared, pirates provide a type of library service." In case you don't see what is wrong with that statement, let me spell it out: Although there are exceptions, in general it is illegal to photocopy a book (especially an entire book). Libraries use taxpayer money to build, staff and BUY the books the books you share.

High Noon — you can read most of the book for free *with the author's blessing* online at <http://semmlab2.sbs.sunysb.edu/Users/pludlow/highnoon.html> — is used as a textbook in college courses. I found two essays online by students in response to that particular chapter:

www.fortunecity.com/westwood/dress/1071/id36.htm

www.geocities.com/tblfitw/articlereview.html

Read them yourself and see if you think these folks understand the basic concepts involved.

"We are truly fighting a sociological paradigm shift here," says Ellison. "They think there is something of 'geezerdome' about this, that you want to protect something as old and as outdated as copyright. They think its time has passed. But if there's no such thing as copyright then why should anyone want to produce anything?"



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Without protection it's stolen. How do you make a living? *A writer's work is not 'information': it is our creative property, our livelihood.* “

According to Ellison, some even postulate that nobody reads much anymore anyway, nobody cares, and since they can read anything for free on the Net they no longer recognize the difference between information and creative properties. “Of course,” he admits, “no one in this country has ever really understood where art comes from. They just think it magically appears in the bookstall.”

WHERE DID THIS PERCEPTION OF “FREE STUFF” COME FROM ANYWAY?

In the late nineties a new youth subculture appeared based in peer-to-peer computing. Napster and music “sharing” became its most obvious symbol and the music industry its ironic adversary. The music industry, built on previous youthful rebellions (white acceptance and exploita-

tion of black music, the hippie culture, revolutionary politics, apolitical club culture, glorification of gangsta lifestyle), thrives on the subversive creativity of subcultures. Up-against-the-wall, tear down the barricades, peace now, sex, drugs, violence, rock'n'rock — everything is cool in the music world ...except free music. P2P computing struck at the basic economics of the industry and the righteously hip quickly turned corporate and sic'd their lawyers on Napster.

Breaking copyright laws became the P2P generation's act of provocation, their civil disobedience to annoy adults. Just as smoking dope united one generation of middle class college kids, music sharing united this one. (The parallel is not perfect, dude, but the idea is the same.)

PREHISTORY

But there is previous cyber-history involved. The “free information” argument is rooted in the early hacker culture (before the word “hacker” took on negative

connotations.). The phrase “information wants to be free” later became a mantra among the fiercely democratic antibureaucratic tribe of computer geeks, who were, in large part, responsible for the birth of the personal computer and the Internet. The ethos that grew up within the community — and still permeates the Internet — incorporated a version of the slogan. Steven Levy summed up this “Hackers Ethic” in *Hackers: Heroes of the Computer Revolution* (Penguin, 1984)

- Access to computers should be unlimited and total.
- All information should be free.
- Mistrust authority — promote decentralization.
- Hackers should be judged by their hacking, not bogus criteria such as degrees, age, race, or position.
- You create art and beauty on a computer.
- Computers can change your life for the better.

—more

COPYRIGHT

Copyright is the law that protects people who create “original works of authorship.” It gives the copyright owner the right to determine who can make copies of it the work and how many copies can be made. This right can be sold or licensed to someone else. It can be bought in advance for work someone has hired you to do, as in “work for hire.”

Copyright exists as soon as the original work is created in a tangible form — your ideas and thoughts aren't copyrighted, but as soon as you “fix” that idea on paper, on a disk, in email, in computer code, whatever — it's copyrighted. In general, copyright established after 1978 lasts until 70 years after the author's death. The work also has to be “creative” — not just factual — but just about anything you write, draw, record, sculpt, photograph or create architecturally IS considered creative. (Remember — tangible form: If it's just something you say, it has to be recorded to be in a fixed form; choreography has to be annotated or recorded.)

This means that just about anything original you write and put down on paper, put in e-mail, post anywhere on the Net or code is copyrighted. And even though factual data can't be copyrighted — a “creative” compilation, organization, or editing of those facts can be. No copyright notice is required. Then why are there copyright notices? Because a notice serves as a warning to people not to violate copyright.

What can't be copyrighted? Things like titles, names, characters, slogans, blank forms, information that is common property like calendars, height and weight charts, rulers, and lists or tables taken from public documents or other common sources. Titles, slogans, etc. can, however be trademarked — but that's something else entirely.

Realistically, copyright has to do with protecting your right to profit from your creative labors. Obviously, you want to be the one to derive benefits from the making and distribution (or public performance or display) of copies of your work. Copyright infringement suits usually don't happen unless some serious money is involved. So, to be enforced, copyright should have some commercial value to it. (Like a story by Harlan Ellison.) Posting on Usenet or a Web site without permission is a violation of copyright. Plenty of people can read it and by giving it away free you can damage its value. You can extract factual information, but that doesn't mean you can use the actual wording or its “creative compilation.”

You don't have to go through any legal formalities to establish these rights. However, formal registration makes a public record of the basic facts of a particular copyright and adds additional protection. You can have evidence that it is yours, but registering it gives you statutory and more easily enforceable rights. Among other legal niceties, if you are going to file an infringement suit, this formal registration is necessary. Registration made within three months of publication or before infringement means you can receive statutory damages and attorney's fees in court actions. Otherwise you can get only actual damages and profits. Registration costs \$30, and involves filling out a form and sending a copy of the work to the Library of Congress. The forms are available online.

The concept of “free information” has become an ingrained cultural myth and chances are you believe it.

But what, exactly, is “information”? When Bill Gates and Paul Allen started peddling software, a lot of hackers felt software was just information and should not be sold. This made sense in hackerdom because most hackers at the time came from the academic/scientific community, a world in which one must make the results of one’s endeavors freely (more or less) available to the public. Hackers were also practical: how can you sell something that can be so easily copied? Obviously Microsoft (and others) ignored hackerdom’s definition of information. It’s highly unlikely their position will shift, paradigm or not.

IT TAKES A VILLAGE TO CREATE A MYTH

But the blame can’t be placed entirely on an evil scheme by service providers to convince naive children that everything should be free except their service, or the “zero-ethic tots” themselves, who warp the meaning of information or first generation webheads who probably never realized that people utterly devoid of hacker skills and ethics would quickly constitute the vast majority of computer users.

Nope. We all have to take the blame. The concept of “free information” has become an ingrained cultural myth and chances are you believe it. You expect at least some of your television content to be free, to listen to the radio for free, to go to your local library and check out books for free. None of that is really free, of course, but we begin to overlook how we pay for all of this material and entertainment. We have to stop and think about the ways we “pay” for it.

Sure, if you want to own your very own copy of a book or CD or DVD, you know you have to buy it. Or someone has to, then maybe you can dupe it. As a society we

seem to perceive that *value* resides in the copy, not in the content. We’ve convinced ourselves that we can use and reuse that content in just about any way we want. We are willing to pay for the medium, but not the message.

We also have a cultural misunderstanding of “fair use.” When we photocopy a newspaper article or duplicate a CD we own or videotape a football game — in our hearts and minds we consider it “fair use.” There is a customary and common idea that all of this is acceptable as long as we don’t intend harm by it. We see it as a “right.” *Legally*, it may be and it may not be. That’s a matter for a court to decide. *Practically* we think it is okay, in fact, we *know* it is okay because no Copyright Police are going to lock us up. Like “free information,” “fair use” has grown from a reasonable working relationship with copyrighted material into a misguided myth.

Harlan Ellison’s suit will resolve some of the legal battle and there were be more battles to come. Public perception, however, is going to be more difficult to change.

WHO, ME?

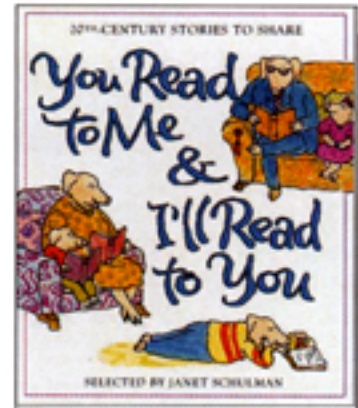
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You can also contribute financially to help pay some of the legal costs of Harlan Ellison’s suit. You think fighting AOL comes cheap? Many writers already have, but the bulk of the costs have come for his own pocket. (And no, Ellison is not a wealthy man.) It’s all spelled out at <http://harlanellison.com/kick/> and you can donate at <http://harlanellison.com/kick/donate.htm> ~

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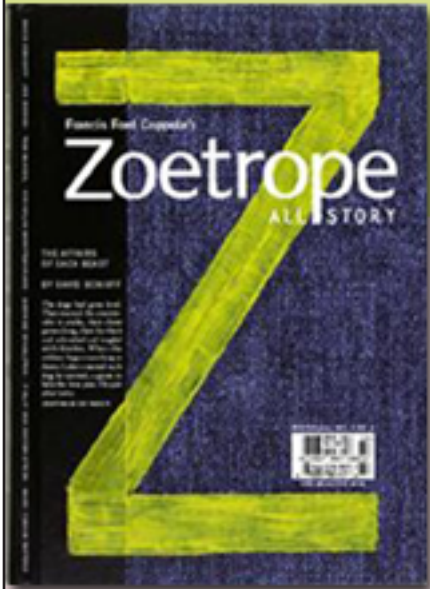
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For information, contact Anthony Sapienza

at: asapienza@thespook.com