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William W. Fisher, III. *Promises to Keep: Technology, Law, and the Future of Entertainment.* Stanford, CA: Stanford University Press, 2004, 340 pp. ISBN 0–8047–5013–0 (cloth). $29.95.

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The entertainment industry is a mess today. Record sales have declined drastically in the last few years, consumers have lost respect for copyright laws and openly engage in unauthorized digital downloading, and many songwriters and artists do not receive their well-deserved royalties. If that was not enough, the entertainment industry has filed many rounds of lawsuits against technology developers and individual file-sharers, chilling innovation, alienating customers, and consuming resources that otherwise could be spent on improving products. The technological countermeasures for which the industry has lobbied also have reduced consumers' access to entertainment products while creating unintended consequences that have drawn the ire of consumer and civil liberties groups. "How did we get into this mess? And how are we to get out of it?" (p. 6) are the questions inspiring Harvard Law School Professor William Fisher's new book, *Promises to Keep: Technology, Law, and the Future of Entertainment*.

The first half of the book focuses on the interplay between law, technology, and the entertainment business. Chapter 1 discusses how new media technologies have brought about innovative ways to create and distribute music and movies. By making reproduction and distribution cheaper, quicker, and more convenient, these technologies not only have allowed artists to earn a higher income and be exposed to a larger audience, but also have enabled viewers and listeners to enjoy a larger and richer variety of entertainment products, or even to reshape them. Nevertheless, these technologies have harmed society by corroding the traditional ways in which artists, record companies, and movie studios make their living, as well as by making it difficult for artists to preserve the integrity of their original creations and for society to maintain a stable cultural environment. To strike a balance between these promises and dangers, society needs to develop "business models and laws to maximize realization of the potential benefits while minimizing the associated harms" (p. 37).

To illustrate how society has failed to strike this balance, Chapter 2 takes us back in time to 1990, the year when new media technologies began to affect the entertainment industry. Through a review of the legal rules, customs, and business models that shaped the industry, this chapter explains how the industry failed to

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take advantage of the opportunities created by these technologies and why it resisted new business models that involved online distribution. Although this chapter is filled with complex legal concepts, business relationships, and industry-related issues, the book was written with a lay audience in mind. Without much oversimplification, most of the legal and business jargon has been translated into easy-to-understand prose. This chapter is in-depth, informative, and insightful; it demonstrates Professor Fisher at his best as an academic lawyer.

Although new media technologies affect more than music and movies, the author has carefully confined the discussion in this chapter to only the American music and film industries. By discussing the differences between the two industries, the chapter provides insight into why they have responded differently to the challenge created by the new technologies. It also shows how the two industries, despite their differences, have been operating under the same winner-takes-all system, which, though fairly successful, has led to "the persistence of unnecessary transaction costs, radical inequality in the pattern of incomes they produced, and the limited range of material they generated and disseminated" (p. 81). From the standpoint of aggregate social welfare, an alterative system may be more preferable, as "[t]he average creator [under the new system] would likely be more skilled, creative, and productive—and thus would contribute more to the welfare of consumers" (p. 79).

Chapter 3 documents the industry's recent struggles with the developers of eight specific new technologies: digital audiotape recorders, encryption circumvention, music lockers (MP3.com), Webcasting, centralized file sharing (Napster, Scour, and Aimster), decentralized file sharing (Gnutella, FastTrack, and Freenet), CD burning, and enhanced personal video recorders (TiVo and ReplayTV). The chapter describes how "eight times in the past thirteen years" the industry—through litigation, law reform, and the use of technological countermeasures—has shut down innovations that offered consumers better or more convenient access to recorded entertainment (p. 133). Although the author does not fault the industry for its failure to appreciate new technologies and contends that the industry executives "were merely doing their jobs" to protect the financial interests of their shareholders (p. 133), he laments their "short-sightedness—for failing to imagine combinations of legal reforms and new business models that would enable them to flourish in a more technologically open environment" (p. 82).

To redeem the promise of new media technologies and to help industry executives develop a long-term vision that harnesses these technologies to its benefit, the second half of the book advances three proposals that seek to remake the entertainment industry: a property-based regime, a regulation-based regime, and an administrative compensation regime. Although the author claims that each proposal would put the industry and society at large in a better position than they are today, it is quite clear from the outset that the author prefers his last proposal, and merely uses the other two for comparison or back-up purposes.

Chapter 4 explores the first proposal, which builds on the industry's longstanding claims that copyrights should be treated just like property rights in tangible objects. This chapter discusses the strengths and weaknesses of the various measures that could be used to strengthen rights in entertainment products, such as the elimination of compulsory licenses, the creation of an unqualified public-performance right in sound recordings, the stiffening of criminal penalties for copyright infringement, and the expansion of copyright holders' authority to take "self-help" measures. To the author's credit, the book offers a balanced and emotionally-detached discussion of property law—something that is rare in today's copyright debate. For example, it discusses in detail the many limitations on real property rights, such as fire and building codes, zoning ordinances, the common-law doctrine of "nuisance" and the various restrictions to the right of "quiet enjoyment," the right to convey property, the right to exclude, and the privilege of self-help. It also explains why existing property law does not justify the unqualified power advocated by Senator Orrin Hatch (at least briefly) and by Representative Howard Berman, who introduced a bill to enable movie studios and record companies to hack into personal computers and peer-to-peer file-sharing networks when they suspected infringing materials were being circulated.

Chapter 5 articulates and critically examines the second proposal, which treats the entertainment industry as a regulated industry, like railroads, telephone companies, and other public utilities providers. Under this proposal, record companies and movie studios would license their works to distributors, regulate the fees they charge, and prescribe the way they share their revenues with artists and intermediaries. As the author explains, although this proposal has not been widely discussed in the public debate, it is apt to analogize the entertainment industry to a regulated industry, as the industry contains many features distinct to a regulated industry and "is already regulated in many respects" (p. 184).

Chapter 6 describes and evaluates the author's preferred solution, which can be summarized as follows:

> A creator who wished to collect revenue when his or her song or film was heard or watched would register it with the Copyright Office. With registration would come a unique filename, which would be used to track transmissions of digital copies of the work. The government would raise, through taxes, sufficient money to compensate registrants for making their works available to the public. Using techniques pioneered by American and European performing rights organizations and television rating services, a government agency would estimate the frequency with which each song and film was heard or watched by consumers. Each registrant would then periodically be paid by the agency a share of the tax revenues proportional to the relative popularity of his or her creation. Once this system were in place, we would modify copyright law to eliminate most of the current prohibitions on unauthorized reproduction, distribution, adaptation, and performance of audio and video recordings. Music and films would thus be readily available, legally, for free. (p. 202)

To make the proposal more flexible, the author includes at the end of the chapter an alternative proposal on the "Entertainment Coop," a voluntary licensing regime that could be instituted in lieu of the tax-based regime (p. 252). The chapter also discusses the possibility of expanding the regime to cover other forms of digital entertainment, such as television programs, books, photographs, and video games.

Although the proposal has many benefits and the author considers it the best option, there are still many shortcomings. For example, as the author concedes, taxes are likely to be unpopular, and many readers will be uncomfortable with a system that gives a government agency immense discretionary power. Some artists, record companies, and movie studios might try to manipulate the system to their advantage, causing distortions in consumer behavior. The proposal also would create cross-subsidization problems by requiring low-volume users to subsidize copyright holders and high-volume users. In addition, without an opt-out opportunity, the proposal would erode the artists' ability to control the artistic integrity of their creations. Unless other countries adopt similar proposals or provide compensation, the risk of leakage across national boundaries also exists.

There are additional problems not mentioned, or discussed in detail, in the book. For instance, it would not be easy to determine how to divide the royalty pool, and no easy technological solution—at least for now—exists to prevent people from abusing the system. The limited taxes might not generate sufficient funds to compensate artists, songwriters, and copyright holders, especially if the regime is expanded to cover other forms of digital entertainment. The additional taxes also would make Internet service less affordable, threatening to slow down broadband deployment while widening the digital divide. Finally, the proposal would create an unhealthy culture that assumes everything should be licensed.

These shortcomings, nevertheless, do not flaw the book. Instead, the opportunity to criticize the proposal, and to compare it with other proposals discussed in the book or elsewhere, has made the book even more attractive and valuable. While recent books have documented the industry's woes and criticized the increasing enclosure of the public domain, very few of them have offered constructive proposals. This book is a welcome change, and Professor Fisher has done us a great service. By offering a concrete and carefully-designed proposal, the book provides us with material to ponder, digest, and analyze. It adds fuel to the copyright debate and enriches and broadens our discussion.

The success of the book should not be determined by the flawlessness of its proposals, but rather by its ability to provoke us to think about the proposals in a constructive and meaningful way. Many of the questions in the copyright debate have no easy answers, and these answers often depend on an individual's philosophy and baseline. Should we let technology develop first before we protect the entertainment industry? Or should we do the opposite, and protect the industry even at the expense of technological developments? Professor Fisher is optimistic in his belief that technological change is inevitable and that the industry needs to adapt. Many of his contemporaries, however, will disagree. Although some will contend that he has given up on the existing business models way too soon, others will question the need to save the dinosaur-like industry from extinction.

Although I found the book informative and insightful, I wish it had developed at greater length the concepts of semiotic democracy, collective creativity, and the end-to-end principle. Defined as "the ability of 'consumers' to reshape cultural artifacts and thus to participate more actively in the creation of the cloud of cultural meanings through which they move" (p. 184), the concept of *semiotic democracy*—which originated in John Fiske's *Television Culture*—is particularly useful today when the power to make cultural meanings in Western societies has been concentrated in a few media conglomerates. The concept of collective creativity is equally important, as it transforms listeners and viewers from passive consumers to active producers (or re-producers) and encourages them to be "more collaborative and playful, less individualist or hierarchical" (p. 31). It also captures the essence of the free culture, free software, and open source movements, which have considerable potential to remake the entertainment industry. Finally, the end-to-end principle is the architectural principle on which the Internet was built. It facilitates network durability and helps foster creativity, diversity, and freedom. It is therefore no surprise that the author has said that he would greatly regret the erosion of this principle.

Each of these concepts is essential to understanding the author's choices in the book—in particular, why he finds the final proposal more appealing than the other two, why he considers price discrimination "on balance … socially pernicious" (p. 170) despite analyses stating that it can result in more economically-efficient outcomes, and why he would require artists to accept a smaller share of the compensation (say, two-thirds of the tax revenues) if they chose to retain control over the creation of derivative works. Without fully developing these concepts, the author fails to provide his readers with enough information to sufficiently evaluate his proposals. More importantly, he fails to convince those who do not share his values and worldviews as well as those who were trained in the civil law tradition and advocate strong moral rights.

Promises to Keep is a thoughtful, thorough, and well-written book. It gives a serious and scholarly treatment of the subject, yet provides a lively and interesting read. The book will be of great interest to legal scholars, economists, media professionals, artists, managers, and general readers. In the copyright debate, some commentators have suggested that it is important to take the lawyers out and bring the economists in. Professor Fisher has proven them wrong. There are many complex, intricate issues in our copyright system that only lawyers can understand. Professor Fisher not only understands these issues, but is one of the rare few who can explain them clearly and concisely. He has given us an invaluable book that we should promise to keep.