

The Copyright Paradox

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The Internet has given rise to a puzzling copyright paradox. To hear the recording industry tell it, the copyright world as we know it is coming to an end. Between Gnutella and Napster-like sites, fans can easily exchange music files over the Internet, sending CD sales plummeting. Copyright law is powerless to halt the onslaught of Internet piracy, which will soon remove any economic incentive for creative activity.

At the same time, libraries, universities, and content user groups, voicing their helplessness before ever-strengthening copyright legal protections, insist that the content provider community is better positioned than ever to eliminate traditional user privileges. Historically, for example, the fair use doctrine has allowed academic users to reproduce without payment parts of copyrighted works for purposes such as criticism and classroom use. But, say these users, the new Uniform Computer Information Transactions Act (UCITA) and the technological measures protected by the Digital Millennium Copyright

Act (DMCA)¹, will soon enable content providers to create the “pay-per-use” environment they have long sought.

Who’s Right?

At first blush, it would seem that the content providers and the content users--the Recording Industry Association of America and the libraries and universities (hereafter the library community)--can’t both be right. We can’t possibly be living in both the best of times and the worse of times for copyright protection. One of these two communities must be exaggerating.

Indeed, the available facts suggest that the recording industry may be overstating the harm caused by Napster and Gnutella. Although CD sales in record stores near university campuses have fallen (college students are among the biggest users of Napster and Gnutella), CD sales overall have grown 8 percent since last year. The group *N Sync* recently broke the one-week record for CD sales, ringing up more than 2.5 million. Beyond these hard numbers, anecdotal evidence suggests that people sample music on Napster and then buy the higher-quality CD if they like what they hear. So Napster-like sites may actually spur CD sales.

Moreover, the content community seems to be on a winning streak. The recording industry secured a preliminary injunction against Napster which was affirmed on appeal, and a judge imposed the largest amount of statutory damages in copyright history -- over \$100 million -- on MP3.com. The major sports leagues shut down IcraveTV. And the

¹ Congress passed, and the President signed, the DMCA in 1998. The National Conference of Commissioners on Uniform State Laws adopted UCITA in 1999. Maryland and Virginia enacted UCITA in 2000.

motion picture studios won an injunction against DeCSS, software that unlocks the encryption protecting DVDs.

Still, there is no question that the Internet facilitates piracy by allowing the widespread dissemination of lawful copies with no degradation in quality. Further, technologies like Gnutella do not require a central server, as does Napster or a typical pirate website, making it hard to detect infringers. In short, the Internet does seem to pose an increasing threat to providers of copyrighted content.

At the same time, technological measures like encryption or copy controls encoded in software will prevent a teacher from making copies of an article in digital form for classroom use, and the DMCA has banned devices that enable users to circumvent such measures. The net effect will be less fair use, and the *de facto* extension of the copyright term, as works remain technologically protected long after the copyright expires.

Similarly, the UCITA validates the enforceability of shrink-wrap licenses (which appear on software packages) and click-on licenses (which appear on screen and which users must click to install software or access a website) and will accelerate their use to prohibit fair use by contract. The circuit courts are split as to whether such license terms are preempted by federal law, and it may take years for the Supreme Court to resolve the issue. And if the Supreme Court decides that federal law does not preempt such license terms, licensees will be at the mercy of the licensors.

Which brings us back to the copyright paradox: both the content community and the library community appear to have legitimate, yet opposite, concerns about the future of copyright in the digital era. The content community fears too little protection, the library community too much. How can this be?

Of Ends and Means

The paradox is rooted in a mismatch between the stated ends of the content community and the means employed to reach them. The content industries have responded to the threat of Internet piracy by pushing for more legislation, such as the DMCA and UCITA. But although new legislation is the most expedient response to the threats posed by new technologies, it probably will not hinder Internet piracy because the problem with piracy is not the inadequacy of existing laws, but the high cost of enforcing any law against the large universe of infringers. Each of the hundreds of millions of computers attached to the Internet is a potential distributor of unlawful copies. Although of limited use against this large universe of potential individual pirates, the new legislation snares the libraries--the most public of our institutions.

The following examples demonstrate the disparate impact of UCITA and the DMCA. A software firm markets a CD-ROM subject to a shrink-wrap license that prohibits the further distribution of the CD-ROM or its contents. If a consumer acquires the CD-ROM, copies it onto his hard drive, and emails it to a dozen friends, the publisher is unlikely to find out about the breach of contract, much less prosecute it. If, however, a library acquires the CD-ROM and lends it out in accordance with copyright's first sale doctrine, the publisher almost certainly will sue the library for breach of contract. While the shrink-wrap license (validated by UCITA) cannot stop infringing activity by the consumer, it *can* stop otherwise legitimate lending activity by the library.

Similarly, the DMCA probably would not discourage a college student from finding a circumvention utility somewhere on the Internet and using it to elude the technological protection on his favorite CD so that he could make the sound recordings

on it available to his friends. But the DMCA would prevent a library from acquiring the utility through legitimate channels to make a preservation copy permitted under Section 108 of the Copyright Act. The DMCA flatly bans almost all circumvention devices, even those capable of noninfringing uses. Put differently, the DMCA would do little to deter unlawful conduct, but much to deter conduct that is otherwise lawful.

In short, libraries (and other high-profile entities such as universities and large corporations) are likely to obey the laws and contractual terms that apply to them because they are law-abiding institutions and because they know they probably would be sued if they did not follow the law. In contrast, individual infringers are not likely to obey the law because they are not law abiding and because they know they are unlikely to get caught. Seen in this light, the copyright paradox makes sense. Because the new laws do not meaningfully address Internet piracy, the content community remains vulnerable to piracy but libraries are kept from engaging in historic library activities. The new laws also interfere with legitimate corporate activities. UCITA, for example, allows a software company to prohibit a business from selling copies of software when it sells a subsidiary even though copyright's first-sale doctrine permits the transfer.

The logical next question is whether this discontinuity between means and ends, and the resultant collateral damage, is inadvertent or intentional. The charitable view is that the content community really believes that this legislation will help reduce piracy and has no intention of stifling library and educational activities. A more cynical perspective is that the content community pursued this legislation in part because it allowed the roll back of fair use, first-sale, and other user privileges the content community has always opposed. Indeed, conspiracy theorists believe that the libraries were the real target of the legislation, and Internet piracy served as a convenient pretext. Although generally I am

not a conspiracy theorist, I am reminded of the following aphorism: “Just because you’re paranoid doesn’t mean they’re not out to get you.”