

# TOWARD A NEW POLITICS OF INTELLECTUAL PROPERTY

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# OVERVIEW

- Why you pay so little attention to copyright and its politics
- Why you should pay attention now
- How the copyright policy process broke down & why the current politics of copyright are so one-sided
- Obstacles to reform & reasons for optimism
- What a new politics of copyright might do

# WHY LITTLE ATTENTION TO COPYRIGHT

- Most people think copyright law does not apply to their ordinary activities
  - Law mainly regulates public & commercial activities, not private and noncommercial ones
  - *Sony* case: private, noncommercial copies = presumptively fair use; elsewhere private copying OK
  - Other limits on copyright (e.g., first sale) permit a wide range of unlicensed activities
  - Besides, private infringements are hard to detect and enforcement vs. individuals is not cost effective
  - Digital environment (so far) enables many free uses

# TECHNOLOGICAL CHANGE

- One reason private uses/copies have been largely exempt from copyright regulation is because they generally had negligible effects on the market
- Computer & networking technologies change the ease & cost of copying & distribution—digital copies are perfect (do not degrade as generations of analog copies do)
- Private digital copies may displace sales of commercial products (e.g., CDs), especially with aid of services like Napster, Aimster, & Grokster
- Yet, digital rights management (DRM) technologies are enabling new controls over private digital copying/uses

# NEW MARKETS FOR PRIVATE USES

- Pay-per-view movies on cable/satellite TV
- DivX: aimed to be alternative to Blockbuster
  - you purchase a disk to play a movie in any 48 hour period, after which content is technically disabled
  - only viewable in special player; licensed to that player
  - every time you watched the movie, your machine logged onto DivX system (which kept track of what you watched & when you watched it & how often)
  - DivX failed in the marketplace but is a precursor of other systems (e.g., play CD 15 times, then it dies)

# MORE ON NEW MARKETS

- New digital music services:
  - pay \$ per month for access to music
  - OK to listen but not to save or transfer files
  - service may gather data on what you listen to
- Annual software licenses (disabled after a year unless you renew; Microsoft is trying this)
- “Celestial jukebox” (order books, movies, music via satellite by pressing buttons; downloaded to secure player on a pay per use basis; content disappears afterwards unless you pay more)

# PUBLIC'S VIEW OF PRIVATE COPYING

- Widespread view that private copying is OK on one or more theories:
  - My copying doesn't harm anyone
  - Didn't *Sony Betamax* say it's OK?
  - Record/movie companies are greedy (Glynn Lunney: private copying cures excess incentives problem)
  - Copyright is outmoded in the digital age
  - This music is part of my identity, so I need to copy it, play with it, & share it with friends
  - No one will catch me anyway, so why worry?

# CONTENT INDUSTRY VIEW

- “I’m so shocked & dismayed at the lawlessness of the young”
- Let’s mandate copyright education for everyone
- Let’s arrest a few punks & send them to jail; that will teach the rest a lesson they won’t forget
- Let’s lock up music, movies, & other digital content so people can’t infringe
- Let’s further increase the penalties for infringement & make hacking DRMs a felony
- Let’s outlaw the general purpose computer



# NEW THEORY ON CONTROL OF PRIVATE USES

- Every access to and use of copyrighted works in digital form requires making of temporary copies in RAM of computer (e.g., read, listen, view)
- Arguably violates copyright's reproduction right unless authorized by copyright owner or law
- Private use limitations are arguably no longer appropriate because digital technology enables new licensing models
- No more "1<sup>st</sup> sale" rights because sharing your copy of digital content requires copying (besides, digital information is typically "licensed" so 1st sale inapplicable)

# WHILE WE WERE SLEEPING

- Clinton Administration's 1995 White Paper on NII and IP and European Commission's Green Paper asserted the RAM copying theory is already the law
- Tried to get international treaty to mandate it
- Under this theory, copyright becomes a law giving content owners absolute control over all access to and uses of digital information!!!
- *And that's not all:* Further goal is to tame digital technologies (e.g., make general purpose computers illegal) & rearchitect Internet to make it safe for "secure" (DRM) content

# OLD COPYRIGHT POLITICS: INDUSTRY CONFLICTS

Until quite recently, copyright law- and policy-making mainly addressed intra-industry conflicts:

- Authors v. those who commissioned new works (work for hire rule in §201(b))
- Songwriters/publishers v. sound recorders (§115)
- Broadcast TV v. cable TV (§111)
- Broadcast TV/cable TV v. satellite TV (§119)
- Publishers v. libraries/archives (§108)
- Similar skirmishes & results in other countries

# US: NEGOTIATED DEALS

- Intra-industry conflicts were generally resolved by US Congress saying: “go behind closed doors, work out a compromise, and we’ll enact it”
- Copyright industries had more expertise about how rules would affect them than Congress did
- Congress generally assumed compromises reached among industry players would be fair
- Legislation became politically feasible if affected industry players supported bill
- Similar closeness between copyright industry and policymakers in other countries, though less dealing

# DOWNSIDERS

- Copyright law became extremely complex, unreadable, & counterintuitive (bad but tolerable when law only regulated industry players with copyright counsel)
- Also became stronger & stronger:
  - industry players won't support a lessening of protection
  - if IP/copyright protection is good, greater protection must be better
- Because emerging industries were not at the bargaining table, their interests were typically either ignored or subverted by established industries (e.g., web radio)

# MORE DOWNSIDES

- No one there to represent the public's interests (Digital Future Coalition tried in US in 1990's)
- Established industry players are used to being the only (significant) lobbying group on copyright
  - resent it when other groups offer alternative views
  - may be hostile to bills they didn't write
- Serious public choice problem: concentrated benefits (for copyright industries) & distributed costs (for the public) generally leads to rent-seeking legislation (DMCA as “best law money can buy”)

# CURRENT POLITICS OF COPYRIGHT

- As IP has become more important to the economy of developed countries, legislators have become receptive to copyright industry concerns
- Very concerned about “piracy”
- More and more acts are characterized as “piracy” (e.g., pretty much any unauthorized copying)
- Legislators have not been looking very carefully to consider narrower alternatives—tend to pass what copyright industries ask for

# RECENT COPYRIGHT LEGISLATION

- No Electronic Theft (NET) Act criminalized “willful” infringement, even for non-commercial acts (very little enforcement so far)
- Sonny Bono Copyright Term Extension Act extended the term of existing copyrights for 20 more years (*Eldred v. Ashcroft* challenge)
- Digital Millennium Copyright Act protects DRMs vs. circumvention & tools—undermining fair use (const’l challenge in *Universal v. Reimerdes*)
- EU Copyright Directive: DMCA redux



# THE NEED FOR A NEW POLITICS OF COPYRIGHT

- Copyright industries have gotten far more than they need (e.g., DMCA)—& they want more
- Copyright law now affects everybody, so past and current politics no longer acceptable
- Industry capture of the legislative and executive branches has produced imbalanced policy
- Copyright works BECAUSE of balance (fair use)
- Only way to restore balance is by new politics
- That means the public needs to grasp what's at stake and act to protect its interests in IP rules

# BOYLE'S ANALOGY

- In the 1950's, no concept of the “environment”
- Logging and mining companies thought that they “owned” legislative issues affecting them
- Took time for hunters, birdwatchers to recognize common interests in preservation of nature
- They invented the concept of the environment, then organized and lobbied to preserve it
- Need for parallel concept of “information ecology” (public interest in information commons) to counterbalance copyright industry lobbying

# WHO MIGHT BE ALLIED?

- Digital media /Internet portal companies
- Authors/artists (they need public domain/fair use)
- Telecommunications companies
- Computer hardware & software industry
- Consumer electronics industry
- Computing professionals/scientists
- Universities/libraries/other nonprofits
- Consumer & civil liberties groups

# WHAT A NEW POLITICS MIGHT DO

- Oppose legislation to mandate installation of DRM technologies in interactive digital devices and DMCA-like anti-circumvention rules
- Outside US, support narrower anti-circumvention rules
- Support legislation to outlaw use of privacy-invading, price discrimination-enhancing DRMs
- Support legislation to establish that fair use and other limitations on copyright are “rights” of the public, not just defenses to infringement

# BILL TO MANDATE DRMs

- Hollings bill: Consumer Broadband & Digital Television Promotion Act (S. 2048)
- Premises:
  - Digital content won't really be secure until DRMs are embedded in all interactive digital technology
  - Broadband deployment has been slow because of content industry's fears of "piracy"
- FCC will mandate DRM if private negotiations fail to produce "voluntary" standard
- Illegal to build nonconforming digital devices or remove DRMs

# WHY OPPOSE?

- S. 2048 will impede many beneficial uses, add expense to digital technologies
- S. 2048 will retard innovation & investment in IT
- S. 2048 may make systems less usable & more vulnerable to attack
- Gov't and content industry shouldn't dictate how IT industry builds its products
- Open source software and general purpose computers provide many social benefits, but will be illegal if Hollings bill passes

# PRECEDENTS

- Public legislation:
  - Audio Home Recording Act: serial copy management system (SCMS) chips required in consumer grade DAT machines
  - 17 U.S.C. sec. 1201(k): VCRs must build in Macrovision anti-copying technology
- Private legislation:
  - Content industry consortium (DVD-CCA) licenses for DVD players require installation of CSS
  - SDMI aimed to achieve similar result

# ANTI-CIRCUMVENTION

- WIPO treaty calls for “adequate protection”
- The DMCA rules in the US go way beyond preventing “piracy” (harmful to research, competition, innovation, & fair uses)
- In EU member states, Canada, & many other countries, there are opportunities to:
  - adopt narrower rules (e.g., outlaw circumvention for infringing purposes, tools intended to facilitate infringement)
  - adopt more and more balanced exceptions



# INTELLECTUAL PRIVACY

- DRM systems can monitor what you read or view & how long (e.g., DivX system)
- Monitoring enables profiling for marketing purposes (if you liked X, you may like Y)
- Also for price discrimination (if willing to pay \$3 for this, may be willing to pay \$5 for that)
- User profiles can also be sold to other vendors
- A privacy law could give individuals a legal right to read/listen anonymously, or at least require notice if monitor & limits on uses of data

# US: FAIR USE AS A RIGHT

- If fair use is merely a defense to infringement, then it's arguably OK to override it by contract or DRM (2d Cir in *Universal v. Reimerdes*)
- If fair use is a “right,” then contractual or DRM overrides are questionable
- Courts often say that copyright is compatible with 1<sup>st</sup> A because of fair use; does this mean there is a constitutional basis for fair use as a “right”?
- Fair use is also arguably necessary to “promote the Progress of Science & useful Arts” under I/8/8

# MORE ON FAIR USE RIGHTS

- Fair use is already in the US copyright statute, but maybe its status as a right v. defense should be clarified
- Maybe the DMCA should make explicit that there's a right to hack a DRM to make fair uses
- Maybe law should require DRMs to allow personal use copies, as AHRA does
- Maybe the DMCA should require rightsholders to make fair uses available to qualified users, as EU did
- Burk & Cohen: require copyright owners to escrow DRM keys with 3d party so fair users can get access

# OBSTACLES TO REFORM

- Lack of public awareness/concern
- Few organizations represent the public's interests
- Public's interests are diffuse & intangible
- Copyright industry groups have strong relationships with legislators & other policy actors (generous with campaign contributions; glamour)
- Courts don't perceive "capture" (yet)
- The DMCA and EU Directive set "precedents" that put pressure on other nations to follow suit (that, in turn, makes reform hard in US & EU)

# CONCLUDING THOUGHTS

- Copyright is an important information policy—no longer a backwater affecting only a few
- Copyright provides incentives to invest in creative work & to enable markets for dissemination
- BUT copyright also promotes critical commentary, free speech, free press, democratic discourse, knowledge creation, ongoing innovation, and even playfulness
- These often require some reuse of others' works—which is why limits on copyright are so **important**

# CONCLUDING THOUGHTS

- Copyright's limits are not “bugs” of past technologies, but “features” that deserve to be preserved in the new technology environment
- Politics of intellectual property now are very biased in one direction and copyright industries are the sole beneficiaries of lopsided copyright
- Reform of the copyright policy process is possible—but need for public engagement
- We must work to create an information policy for an information society we'd actually like to live in