A Balanced Argument in Support of Copyright Law Exclusive of the Digital Millennium Copyright Act

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INTRODUCTION

Since books, charts, and maps were protected under the first federal copyright law enacted in the U.S. in 1709 copyright owners have sought to protect their assets through legal means. Throughout the nearly three hundred years that these law have been in effect the overall concept of copyright law has been to strike a balance between protecting the rights of authors, artists, and copyright owners and, according to the Constitution, to "promote the Progress of Science and useful Arts." That balance had largely been maintained until the arrival of digital technology, which, unlike the analog technology that preceded it, could make copies in large quantity, in faster-than-real-time, and with no degradation in quality. The response to these features of digital technology was to create a system of digital rights management and other technological deterrents where content owners could exert control over media usage and then to create and enact the Digital Millennium Copyright Act, which, among other restrictions, criminalizes DRM circumvention and creates safe harbor provisions for limiting OSP liability. It is the goal of this paper to present a balanced argument in support of copyright law exclusive of the DMCA and to demonstrate some of the ways that the DMCA and other attempts to amend copyright law can be viewed as anti-competitive, anti-consumer, and undermining of the doctrine of "fair use."

Under the current American copyright law passed in 1976, legal protection is provided for copyright owners assigned exclusive rights over "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they

can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"[1]. The 1976 law was meant to bring up to date the prior law in effect since 1909. Where the 1909 laws protected piano rolls the 1976 law added TV, movies, radio, and, sound recordings, all of which had been invented in the intervening years. Three key technologies, however, would come to pass in the years just after 1976; the VCR, resulting in Sony Corp. of America v. Universal City Studios (the Betamax case), digital technology, which would give us The Audio Home Recording Act of 1992, and the internet, which would inspire the Digital Millennium copyright Act. In the simplest terms, the first two would build upon pro-consumer legal precedents in clarifying infringing uses and widening the degree to which content owners could exercise the fair use of their media products while the third would seek to eliminate these.

SONY V. UNIVERSAL CITY STUDIOS (THE BETAMAX CASE)

The complaints of copyright owners and their supporters are manifold and, from a distance, sometimes quite understandable. In the case of the VCR, the plaintiffs in the initial Betamax case, Universal City Studios, complained that the machines that Sony manufactured infringed copyright by recording television programming for later use and resulting in non-payment of royalties for repeat viewings. Universal claimed that this would curb demand for their profitable re-run and syndicated programming. Ultimately the court disagreed, holding that "time-shifting" broadcast content for later use was not infringement and was, in fact, fair use. The court decided that as long as a device had

substantial other non-infringing uses that the company that created it could not be held liable for whatever infringing uses might occur. This decision set the stage for what kind of use consumers could reasonably expect from legal media and content ownership and made future advances in technology such as the Tivo, the PC, and the iPod possible.

The suit that Universal initially brought against Sony was both anti-consumer and anti-competition. Had Universal and Disney, and by extension all of Hollywood, won the case they may never have needed to explore additional ways to exploit their content into new revenue channels. Their rule over content would have effectively leaned over into rule over consumer electronics and would have had far reaching negative impact into businesses well outside their own. Further, if Sony had not prevailed the suit may have had dire consequences for the mediums it was designed to help, encouraging consumers not to buy products like VCR's based on the continued costs of enjoying them. In retrospect, this would have been a terrible decision for any business involved copyright ownership. It is worth noting that in the more than twenty years since the Betamax case was decided, the sale of home video products is now one of the largest sources of revenue for film and television studios[2]. Clearly the decision of the court was the right one. As a result of the Betamax case, all manufacturers of media devices are free to innovate the consumer electronics space without worry of copyright infringement liability.

THE AUDIO HOME RECORDING ACT OF 1992

In the late 1980's, digital audio recording technology for consumer use had been developed and was beginning to become the technology that would replace century old tape and vinyl with Digital Audio Tape (DAT), Digital Compact Cassette (DCC) and MiniDisc. Although digital technology presented many advantages for the consumer over it's analog counterpart, from pristine first generation sound quality to non-linear search, one in particular caught the attention of copyright owners; the ability of digital recording to make infinite copies of content with no degradation of the original signal. Prior to this the limitations of analog technology itself offered its own inherent copy protection, where each time a copy of a recording was made the result was a loss of one "generation" of resolution. This loss of quality was apparent to even the most casual music consumer and after a few copies were made the results were very nearly unlistenable.

With fear of a decline in the market for CD sales, which at the time were rejuvenating the music industry with millions of consumers replacing analog copies, The Recording Industry Association of America, et al. lobbied hard for Congress to pass legislation that would force copy protection technology to be included on digital audio recording devices and royalties paid on media. The RIAA successfully managed to convince consumer electronics manufacturers to include Serial Copy Management Systems (SCMS) and,

through the settlement of a class action suit brought by songwriter Sammy Cahn over the lack of royalty provisions in this agreement, also gave in to payment demands as well.

The Audio Home Recording Act of 1992 was signed into law as an amendment to U.S. copyright law and set important precedents for those on both sides of the copyright argument. First, for those who favor stronger governmental intervention, the AHRA represents the first time copyright law has included a copy protection requirement. This decision sets the stage for the inclusion of DRM in all manner of content. The AHRA also contains the first mention of anti-circumvention measures, an ancestor of what would later appear in the DMCA and arguably the most draconian addition to copyright law since 1976. Finally, and perhaps most importantly for those who would like to see a copyright law more focused on public benefit, the Audio Home Recording Act spelled out the idea that making copies of copyrighted content for private, non-commercial reasons falls under fair use. While there was still some question as to what formats were and were not allowable under AHRA, a subsequent decision in RIAA v. Diamond Multimedia held that "all noncommercial copying by consumers of digital and analog musical recordings"[3] were fair and gave protection to “space-shifting” under Sony v. Universal Studios. Allowing for exemption from infringement actions of consumers that make non-commercial recordings enables further development of technology by ensuring that are able to make use of their purchased content in a way consistent with ownership.

THE DIGITAL MILLENIUM COPYRIGHT ACT

The Digital Millennium Copyright Act of 1998 is likely the most maligned piece of copyright legislation ever introduced, and perhaps for good reason. The DMCA further amends the 1976 Copyright Act and implements two WIPO treaties, the Copyright Treaty and the Performances and Phonograms Treaty. These amendments add two bits of insidious legislation to U.S. copyright law, often referred to as "anti-circumvention provisions." These provisions criminalize both the "production and dissemination of technology, devices, or services that are used to circumvent" digital rights management as well as the actual act of circumventing a DRM scheme – even when no copyright infringement exists. Further amendments provided by the DMCA are the creation of a "safe harbor", protecting online service providers from infringement liability as long as they meet certain qualifications and obligations and a list of other provisions that effect libraries, distance education, ephemeral copy for broadcasters, and collective bargaining and the transfer of movie rights.

Proponents of the DMCA argue that heavy-handed protections such as these are necessary to mitigate widespread theft and piracy of digitized media in an environment that facilitates the free movement of content over networks in ways that could never have been conceived in an analog world. These measure, they would also argue, further ensure the incentive for content creators to continue to create for the benefit of all. In some ways they may be right. Surely some consideration must be given to the possibility that without laws that strictly limit what is permissible, uncontrolled piracy and theft

could be the result. Unfortunately, some of the main criticism of the DMCA is that it simply goes too far to provide these protections.

In contrast, adversaries of the DMCA paint a different picture. Opponents believe that the anti-circumvention provisions in section 1201 of the DMCA undermine fair use laws by criminalizing the act of circumvention as well as all tools and circumvention technologies, enabling copyright owners to effectively remove the fair use rights of the consumer. The Electronic Frontier Foundation points out on its web site that the DMCA has had a chilling effect on researchers, scientists, publishers, students, and many other educators and academics based on the laws in 1201 including those governing infringement for reverse engineering, encryption and decryption, and other legitimate research. The EFF cites Edward Felten and his fellow researchers at Princeton and Russian programmer Dmitry Skylarov as examples of the anti-circumvention provisions performing counter to expectations[4]. Another negative effect of the DMCA offered by opponents is the stifling of innovation and competition whereby the act blocks real innovators and not the intended target, piracy.

CONCLUSION

The state of affairs in copyright law today suggests that copyright owners are lobbying for ever more intensive protection of their assets to the detriment of the public at large. While some companies like Apple and EMI are attempting to steer clear of DRM it is certainly not based on their desire to protect consumer rights. Several European nations,

notably Norway and France, have accused Apple of unfair pricing and consumer practices with their iTunes music store. One way for Apple to overcome this is to convince its content partners that DRM is unworkable, thereby allowing Apple to position its cash-cow iPod and iTunes products as friendly to all devices, opening these new, potentially profitable markets. Beyond this example, there is a great deal of motion with Microsoft's Vista OS, the Media Center application of the Windows-based PC, and graphic cards, computer monitors, and other devices that snuff out even analog signals.

To hear the music, film, and other content industries tell the story, online piracy of digital media continues to drive declines in revenue. This position is, of course, in their best interest to uphold. If there were no demonstrable risk to these businesses lawmakers would not be compelled to draft further protections for these industries. The statistics provided by the RIAA, for example, tell a different tale. Music sales, while having seen a decline after 1999 have been climbing. The legitimate sales of downloaded digital content is showing the largest growth and the revenues from those sales appear to offset greater profit losses due to piracy. What is not clear by these statistics, made all the more murky by the under-reporting of key figures, is what impact a recession, fewer new releases, corporate shifts in personnel toward cheaper and less experienced A&R staff, and changes to pricing have had on the bottom line of the music industry.

While volumes could be (and have been) written about the various impact of the DMCA and the minutiae of copyright law, that clearly goes well beyond the scope of this exercise. What I hope has been achieved here is to reveal what some consumer focused

amendments to U.S. copyright law might look like in contrast to some that are perceived as more advantageous to copyright owners. Finally, I hope that this will serve as a jumping off point for interested parties to further pursue research into the vastly complex topic of copyright and broader intellectual property law.

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[1] Copyright Act of 1976

[2] According to the Entertainment Merchants Association website consumers spent $24.3 billion in 2005 on buying and renting home video products in contrast to the $8.75 billion spent at theaters.

[3] RIAA v. Diamond Multimedia

[4] http://www.eff.org/IP/DMCA/unintended_consequences.php