

Copy Fights In Cyberspace

BY CLYDE WAYNE CREWS JR. AND ADAM THIERER*



Spiderman, *Minority Report* and *Fellowship of the Ring* were recent blockbusters, but pirated versions are available on the Internet, and in some cases were there before the movies even opened in theaters.

Splashy instances of piracy like these get much of the attention these days, but, like hacking, they are often inside jobs. You need to be an insider to get a preview copy that winds up on the Internet before a movie even opens.

Nonetheless, post-Napster, copying has gone directly peer-to-peer, and there is more trading than ever—well over a billion files every month. Over 7,000 pirated book titles are freely available online, including hundreds of versions of the popular Harry Potter books. Electronic Arts predicted immediate hacking of the video game spinoff. Other games like Tony Hawk's Pro Skater have been made available for free download.

File sharing defenders point to "substantial non-infringing" uses. That defense failed for Napster.

Meanwhile, post-Napster peer-to-peer file trading services like Kazaa allow trading of video as well as music, without a Napster-like central server, and are thus much more impervious to media and content company attempts at shutdown.

Throughout the world, such ongoing tensions have seemingly reached a boiling point. The "Napsterization" of just about everything digitizable—books, music, movies and, of course, software itself—have brought copy protection issues to the forefront as never before, re-energizing the debate over such questions as:

- Why do we protect intellectual property at all?

- Do we really have "property rights" in our intangible creations the same way we have property rights to our homes or the land on which they rest?

- Are there more effective market-oriented ways of incentivizing artistic creation and scientific discovery than through the use of copyright and patent laws that protect a limited monopoly?

- Do trends in digital copy protection threaten free speech?

It seems that even with legal protections of IP in the digital age, the reality of copying has confronted us with a need to find incentives to produce in the absence of legal intellectual property protections.

It's only going to get worse, with terabyte data storage, fiber broadband, and wireless broadband.

Some worry, though, that if the market succeeds in its effort to self-protect, can it go so far that we need legal protections from that?

This debate pits those who fear file-sharing technologies like Napster and Kazaa, against those afraid that rights holders will lock up content with copy protection and digital rights management.

In other words, as so many have said, it's Hollywood vs. Silicon Valley.

In the U.S., the extremes manifest themselves in colliding legislative proposals. On the one hand we see file sharing companies and some ISPs calling for compulsory licensing. On the other we see demands for mandatory, government-chosen digital rights management (DRM) technologies to prevent file sharing.

But to the extent the market can be capable of self-protection, it reduces the sphere of disagreement by minimizing the amount of legal protection required and forcible "fair use."

For example, the market alternative to shutdown of file sharing, or targeting individual file swappers, may well be the improvement of digital rights management technologies to protect intellectual property. Perhaps such private, "barbed-wire" solutions can be superior to legal protections. Indeed, some must think so, because they argue that DRM technologies lock up content and violate fair use.

But not so far: New copy-protected CDs were cracked with a 99 cent felt-tip pen.

Debates over the nature and scope of intellectual property law are centuries old, yet "new" at the same time. Over 200 years ago, these questions concerned our Founding Fathers, who, when authoring the Constitution, constructed a utilitarian compromise to ensure that science and the useful arts would be promoted by offering limited terms of protection.

They arrived at the balancing act contained in Article 1, Section 8, Clause 8, which gave Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Clyde Wayne Crews, Jr. is Director of Technology Studies and Adam Thierer is Director of Telecommunication Studies at Cato Institute.

But they did not answer specific questions regarding such matters as the lengths of copyright or patent protections for various artistic or scientific creations, or what “fair use” or “prior art” was to mean.

IP and First Principles

Governments exist to protect property rights among other natural rights. But the property status of intangibles has always been unclear from a natural law perspective. Some agree with Ayn Rand that, “Patents and copyrights are the legal implementation of the base of all property rights: a man’s right to the product of his mind.” Yet other theoreticians claim that there is no right to own intangible ideas, which are not scarce in the sense that physical property is, anyway.

To this line of thinking, the cost of protecting IP is just another cost of doing business, so why socialize it?

Yet a good argument can be made that in a world without any IP protection, some individuals would be discouraged from producing important goods or ideas (consider pharmaceuticals or genetically altered foods to feed hungry populations). One can observe wealth creation across societies to ascertain the relative benefits of protection. Indeed, much of our future wealth creation will consist of intangible rather than tangible output. Before fully disparaging intellectual property, those who advocate the abolition of copyright or patent law might ask themselves why their same arguments and reasoning should not be applied to tangible property.

Nonetheless, it is clear with copyright that some creators seek and receive excessive terms of protection—which by extending far beyond the life of the author seemingly go beyond any reasonable possibility of motivating creators, who often are deceased (think Walt Disney and Mickey Mouse, or *The Wind Done Gone*). Or they may seek to expand what is covered by copyright and patent law in the first place, even when obvious or widely used, like one-click Internet shopping or even

hyperlinking itself.

So, succinctly stated, the problem we face is how to balance artistic and entrepreneurial incentives with the interests of the larger community of users in an unhindered exchange of ideas and products.

The Internet Changes Things

It’s true that previous periods of technological innovation forced society to reconsider the proper balance of IP protections. Consider photocopiers, VCRs, and other advances. Fortunately, though, we’ve managed to avoid banning technologies.

Nonetheless, the shifts brought about by the modern communications and computing revolution are more profound because copies are *perfect reproductions*.

Thus record companies and Hollywood claim that their intellectual property rights are under attack as never before, threatening their economic livelihood and making it less likely they will want to put anything in the public realm at all.

In response, critics claim that copyright and patent law has been corrupted and that the balance has tilted too far in favor of copyright holders, and that digital technologies and other market developments have so fundamentally altered the nature of intellectual property that we need to radically shorten established terms of protection or eliminate them altogether.

“Information wants to be free!” is the rallying cry of many who claim allegiance to this school of thinking. These thinkers hold that information transmitted in electronic or digital formats should not be “bottled up” and controlled by its creators.

They fear that copy protection technologies can go too far—even further than existing legal protections—and erode fair use rights that individuals have come to expect, as well as pose a technological threat to free speech. Thus they want assurances that non-infringing uses of materials and rights of fair use are preserved in the law.

Their concern over the Digital Mil-

lennium Copyright Act is similar. Here, one’s intent to infringe is not relevant; rather, a person engaged in the development or distribution of circumvention technology, even for a benign purpose such as research or archiving, is at risk of being held criminally or civilly liable. There is no defense under the Act even if there is no underlying copyright infringement.

Two cherished principles, property rights and free expression, are at war in cyberspace.

Potential Common Ground Solutions

Is there *any* common ground in this debate? Perhaps. All sides make some excellent points. Again, two important principles are at issue: legal protection for intangible works butts up against free expression and exchange of ideas.

It helps to remember that the justification for copyright law is to create incentives. But if markets can create them, law may not need to play as great a role. Sometimes a private security guard and barbed wire may be superior to the policeman and the court.

The first step toward common ground is to take the principle “To Promote the Progress of Science and Useful Arts” more seriously. Many agree on the concept of the protection of property; the disputes often arise over such matters as how long property should be protected. Any term set in law will be unavoidably arbitrary.

But copyright protection that extends far beyond the life of the originator provides diminishing incentives for that person to innovate (even if one assumes he is innovating on behalf of yet-born descendants).

Thus terms of protection may need to be rethought; indeed a new Supreme Court case challenged the “Sonny Bono Act,” which extended copyright protection terms to life of the author plus 70 years (up from 50 years). Some call it the “Mickey Mouse Protection Act.”

Rights owners certainly expend great energy on extending the legal

monopoly granted by copyright. This is the widespread criticism of the Sonny Bono Act, in that new protections were given *retroactively*. The middleman—and heirs—continue to want to be paid, an impulse having little to do with Walt Disney's initial inspiration to invent Mickey Mouse (which himself resembles Felix the Cat).

Anger at the middleman (or heirs) is understandable: People are annoyed that Walt borrowed Grimm's Fairy Tales from the public domain, but no one can now borrow Mickey.

And if one happens to be exploring and sampling, say, roots-country music, you're not wild about paying BMG/RCA for the privilege, especially when artists have been dead over sixty years.

While decisions about copyright terms inevitably will be arbitrary, there seems little reason to provide retroactive legal protection decades after a creator is dead.

More consciously adhering to the Constitution's goal of promoting the progress of science and useful arts—rather than promoting unnecessary government monopoly—seems a sensible course. Copyright laws that instead extend terms of protection to benefit a middleman do little to “incentivize.”

Another suggestion comes from Wayne State University law professor Jessica Litman, who calls for revisions to “recast ...copyright as an exclusive right of commercial exploitation.” She would focus less on whether copies were made of a work, and instead focus more narrowly on assuring that copyright holders retain the sole opportunities for commercial exploitation of their work.

Under this model, she points out, individual trading of song files wouldn't be actionable, but perhaps Napster's facilitating of large-scale sharing would be because of its significant interference with rights-holders' commercial opportunities. Such an approach would put the law back in line with the public's typical understanding of the copyright bar-

gain and fair use.

The essential step to establish common ground is to reject any urge to either *ban* or *impose* new technologies or business models to solve copyright or patent problems. This is rampant in Washington today. In the raging file-sharing dispute, creators want the government to ban or restrict file-sharing technologies that reduce copyright control.

Meanwhile, those who eagerly share copyrighted files often condemn experimental DRM technologies by which copyright holders hope to shield works from reproduction, such as digital watermarking, enhanced encryption, or other kinds of technological locks.

As noted, some regard such efforts as threats to free expression (which is ironic given that many in the next breath will assert that encryption or watermarking can always be cracked—and so far, it's been true). Examples are the Music Online Competition Act and the Consumers Digital Rights Act.

Policymakers shouldn't ban any category of technology as the marketplace works through these difficult issues.

In other words, don't ban the VCY or Kazaa—but also don't ban industry self-help.

It helps if we break up intellectual property into “A-B-and-C” components. A is what's in the public domain. B is the stuff protected now, that we're fighting over. C is what hasn't been created yet. We can allow market mechanisms to take over C. And over time, C and A will dwarf B.

In other words, there may be ways of lessening the reliance on government.

Avoiding interference with technology through misguided legislation is the first step. For example, digital rights management—while it will never fully prevent copying—can make it inconvenient enough so that cracking encrypted songs may not be worth the trouble.

At the very least, content industries will need to stop putting out millions of unprotected masters.

Most won't go to the extreme of the White Stripes in putting out a vinyl record rather than a CD; rather, the industry will embrace downloads on their own terms.

Alongside, new pricing models are coming into play. Perhaps a 19-cent download, certified *virus-free*, that also includes liner notes, lyrics, photos, and discount coupons on merchandise and concerts is a better deal than a free song.

Two of the licensed services, for example, Listen.com and Rhapsody, dropped price down to 49 cents in February 2002. That means a subscriber can burn a whole CD for \$6.37, far better than the \$16-plus that many CDs cost.

As it stands, most music is still sold at Wal-Mart. Thus companies haven't really been forced to act. Broadband will increasingly change that, and we'll see the industry better exploit the technology.

Other industry factors change. ISPs like AT&T/Comcast are looking at download caps, or charging more to those who endlessly use up bandwidth by downloading music or movies. One opportunity for the future, then, is that content providers may share in those ISP usage charges.

DRM and new pricing models promise a market-based regime that creators might employ to protect their content, thus enabling what Chapman law school professor Tom Bell has called a “flight from copyright law.” One can legitimately reduce protections for what's created if creators opt-out of traditional legal arrangements prospectively. That should be an option.

And the fair use issue may not be as thorny as some expect. First, it is not in the interest of profit-maximizing companies to restrict intellectual output and software research. In striking the balance, companies face market-induced incentives to avoid devising copy protection schemes so inconvenient or cumbersome that they go beyond the goal of deflecting piracy.

For example, while one isn't necessarily entitled to a perfect digital

copy as a matter of fair use, record companies are nonetheless experimenting with putting multiple versions of songs on CD as a way to alleviate fair use concerns and give people the portability or “space shifting” they want.

Meanwhile, as the market works out these issues, legislators should not make the opposite error and *mandate* copy protection, as some in Congress, at the behest of Hollywood, would do. On top of the general problems with technology mandates, this amounts to an attempt to force industry partners to come to one’s aid—turning them into enemies rather than partners.

Again, it is legitimate for creators to keep their work secret; or to limit their speech to the best of their abilities. They don’t have to make it easy for copies. Free speech also implies a freedom *not* to speak to the extent of one’s abilities, if one so chooses.

Even so, that doesn’t imply that fair use will be harmed. As University of Texas professor Stan Liebowitz notes, while digital rights management technologies won’t prevent all copying, the imperative is to prevent massive unauthorized duplication. With respect to fair use, Liebowitz argues that, given technologies such as micropayments, digital rights management will not restrict the output of intellectual property at all as pricing is perfected.

Thus, just as government shouldn’t ban technologies, whether for sharing or for copy protection, it should not forcibly “aid” the sharing of IP either. There need be no so-called “consumer bills of rights” with regard to content someone else created.

The extreme we see now are emerging calls for the extension of compulsory licensing requirements on record companies. Such forced “contracts,” with their accompanying government-set royalty fees (read: price controls) and regulatory interference, must be rejected for the sake of health of a nascent industry that needs to embrace voluntary deals. Markets can succeed at

securing what we otherwise call fair use if given the opportunity.

That old order of compulsory licensing rests upon a notion of *market failure*. Digitization, at the very least, presents an opportunity to rethink whether such market failure even exists before extending the compulsory model. Compulsory licensing is especially dangerous in an age of peer-to-peer computing and file sharing. Things are *already* being shared!

For example, as an example of a market response, consider the Global Release Identifier, which allows the monitoring of usage of content via a “tracking tag,” much like a bar code. Such tags may be a prerequisite for comfort with digitization on the part of content owners like the RIAA. Whether they take the opportunity to use it in a favorable way to satisfy customers remains to be seen.

Over-reliance on legal solutions can impede these market approaches, and can lead to unforeseen issues as well. With an issue like intellectual property, we also must consider the impact of regulation on other priorities. Consider privacy; Verizon has been commanded to hand over the identity of one of its users.

Also, an anti-DRM stance conflicts with encryption, privacy, and the ability to protect your personal, private correspondence.

Consider even cybersecurity: Howard Berman’s bill would give a pass to content owners to “hack” computer hard drives, by limiting their liability. Self-help, like hosting dummy files on computers to trick pirates might make sense, but to authorize invasion of others’ computers goes too far.

Such vigilantism won’t succeed, anyway. Especially as broadband proliferates, users will be able to save bits of songs on one another’s hard drives, such that no one person has anything resembling a copyrighted song even if his computer is seized by the authorities.

Emphasis on markets and technological experimentation may offer

artists and inventors the option of “opting-out” of the IP legal regime entirely and instead rely upon new technologies and unique business models to protect their property and receive compensation for it.

Digital distribution even gives producers and artists the option of avoiding the existing music companies and movie studios. A backdrop to this debate is the fact that artists often claim to be ripped off, which is another fight within the within the wide-ranging copyright debate of today. (MP3.com was one of those options: artists-direct-to-the-customer model.)

Of course, if artists rather than middlemen control their copyrights, it won’t end disputes over length of protection, but it could remove one layer of the dispute.

Given all these complexities, all sides should avoid injecting government coercion into the copyright resolution process as “Napsterization” proceeds. Perhaps technology can be a better means of managing copyright, in some applications, than can law—even if law is in place as a backup.

Finally, to lessen the reliance on traditional copyright protections, policymakers should ensure that unintentional government barriers don’t stand in the way of private efforts by individuals to protect their intangible creations.

For example, regarding licensing, overzealous antitrust enforcement might hamper collective private efforts to license songs, like the MusicNet and Pressplay services. Restrictive contracts that antitrust law might eye suspiciously could in fact benefit consumers by ensuring returns for producers, preserving their incentives to create.

Indeed, some academics have suggested that regulation such as antitrust law may force the “need” for more intellectual property law and enforcement than would otherwise be warranted.

Conclusion

At the same time it creates serious problems for rights holders, the Internet invites new perspectives on