

COPYRIGHT & CONSUMER PROTECTION: A NEW ROLE OR OXYMORON?

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May 26, 2005

ACIPA Copyright Conference

OVERVIEW

- Why © and consumer protection might seem orthogonal, wholly distinct
- Traces of consumer protection in © law and policy
- Recent anti-consumer developments
- Reasons why consumer protection may have a more significant role over time in or as to ©

WHY NO ROLE?

- Consumers are invisible in author's rights realm which focus on the natural right of authors to control their work
- Copyright laws grant exclusive rights to authors, none to consumers (in © owner view)
 - Goal: to induce authors to invest in creating and disseminating new works by allowing them to control commercially valuable exploitations of their works
- Copyright laws don't even mention consumers!
- Joe Liu: copyright lacks a coherent theory of the consumer

CONCEPT OF CONSUMER

- Role of consumers in © is largely assumed to be to purchase pre-packaged content to make the wheels of commerce turn & make authors and publishers rich(er)
 - Copyright protects the interests of consumers by supplying something for them to buy
- Of course, all authors are consumers of other works, and some of the limitations on © aim to give them breathing room for further creation (e.g., “transformative” fair use)
- Yet, © and consumer protection have some history

© HISTORY, CONTEXT

- Statute of Anne in 1710 wasn't exactly a consumer protection statute, yet it did protect consumer interests in several ways:
 - Expiration of © meant consumers could get price competition
 - Process for obtaining remedy for excessive pricing of books,
 - Required deposit of protected books with university libraries to enable public access
 - Required registration of © claim to give notice to others

MORE HISTORY

- Copyright laws had narrow exclusive rights
 - Print, reprint, vend as to maps, charts, books
 - US did not protect non-US authors for 1st 100 years (wanted public to have access to cheap books)
 - Notice requirement (until 1989) & other formalities meant that the public could expect a work to be in the public domain & available for all uses unless ©
 - Most exclusive rights until relatively recently did not extend to consumer behaviors
 - Most exclusive rights still only cover public acts

© & BENEFIT TO PUBLIC

- "The copyright law, like the patent statutes, makes **reward to the owner a secondary consideration**. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the **primary object** in conferring the monopoly lie in the **general benefits derived by the public** from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).
- If © is means to this end, then consumer interests should be taken into, as indeed they have been

CONSUMER PROTECTION IN ©

- First sale/exhaustion of rights rule
 - OK to resell your copy of a book or lend it to others
 - *Bobbs Merrill v. Straus*: refusing to enforce EULA
- Backup copying of software, adapting one's copy of software (e.g., fix bugs, interoperate with other programs)
- Fair use for research, study, other purposes
 - US: time-shifting, space-shifting, platform-shifting
- OK to alter or destroy architectural work, photograph a publicly visible architectural work and distribute photograph

CONSUMER-FRIENDLY CASES

- *Sony v. Universal*: fair use to make time-shift copies of television programming; public access to technologies with SNIUs
- *Galoob v. Nintendo*: fair use for consumers to use Game Genie to alter the play of Nintendo games
- *Sega v. Accolade*, *Sony v. Connectix*: fair use to reverse engineer to get information necessary to create interoperable game; consumers will have more choices of games for more platforms
- *Lexmark v. Static Controls*: denying 1201 claim vs. maker of compatible printer cartridges

CONSUMER PROTECTION LEGISLATION

- Some families want to watch movies but not view sex, strong language, and violence
 - Clear Play saw a market opportunity in filling this need, software bypasses these parts of movies
- Directors Guild charged Clear Play with © and trademark violations (Huntsman v. Soderburgh)
 - Plausible *Galooob*-like defense
- Congress passed law so not an infringement to use software that makes certain audio or video content imperceptible in private home viewing of lawfully acquired copy of content (DVD)

MANY UNREGULATED USES

- Taking notes in or on books for term papers
- Cutting up magazine to make collage
- Singing songs in the shower
- Playing sound recordings in one's car (even very loud so everyone can hear it)
- Private performances of "Vagina Monologues"
- Private displays of one's photographs of billboards of NYC
- Deliberately left unregulated to enable consumers to enjoy them

WHY MORE CONSUMER PROTECTION?

- © rights have gotten longer and stronger, implicate consumers more now than before
- Amateur creation, dissemination
- Mismatch of consumer expectations and terms on which some products available
 - Technically protected content
 - End user license agreements
- Lack of competition in some parts of © industries
 - Concern about overreaching in TPMs, EULAs

CASELAW BROADENED RIGHTS

- *MAI v. Peak*: RAM copy during repair/maintenance
- *Bridgeport Music v. Dimension Films*: illegal to sample sound recording (period!)
- *LA Times v. Free Republic*: website with critical commentary on newspaper articles not fair use
- *A&M Records v. Napster*: virtually all p2p file sharing is infringing (even space-shifting, sampling)
- *Universal v. Corley*: web journalist violated 1201 by posting and linking to DeCSS software in source & object code
 - Rejecting constitutional & statutory challenges and scoffing at fair hacking arguments
- *MGM v. 321 Studios*: software to allow consumers to backup DVDs violated 1201

BROADER BILLS

- File-sharing has led to anti-consumer bills
 - HR 5211: Berman bill to immunize © owners who attack file sharer computers
 - HR 2391: criminalizing reckless offering infringing materials for distribution
 - anyone who used file sharing technology with an all-files default mode for uploading would be a criminal
 - HR 4077: Give DOJ authority to bring civil suits, more resources for “education” and prosecuting file sharers
- Hollings bill: mandate technical protection measures (TPMs) in all digital media systems

CONSUMER EXPECTATIONS

- Consumers expect to be able to do at least as much with digital information as able to do with other content (e.g., time- and place-shift with VCR, analog records)
- Many expect to be able to do more with digital content (e.g., format-shift)
- TPM systems & EULAs may interfere with some or all of consumer expectations of this sort
- Mismatch may give rise to need for notice of TPM restrictions

PERSONAL USE EXPECTATIONS

- INDICARE Report and Mulligan et al. study
 - Make backup copy or archive
 - Time-, space-, platform-, and format-shifting (portability issues)
 - Interoperability (e.g., CD should work in all players)
 - Tinkering/reverse engineering (e.g., new tricks for Aibo dog—valuing user innovations)
 - Sampling, excerpting, bricolage (“new media”)
 - Continued access to content purchased
 - Loaning, reselling, giving as gift
- These can be restricted by TPMs or EULAs

EULA ISSUES

- License vs. (1st) sale for mass-marketed digital works
- Enforceability of particular terms that purport to override © limitations
 - Anti-reverse engineering clauses
 - Anti-backup copying, -format-shifting
 - Anti-benchmarking result dissemination
 - Anti-criticism, -parody provisions
- Caselaw on this is thin and somewhat mixed, but commentary suggests © policy should render many of these unenforceable
- Lofgren BALANCE bill would have limited enforceability of EULAs to override © limitations

TPM ISSUES

- If © allows backup copying or transfer of one's copy, should TPM be able to override it?
 - Reichman: reverse notice & take down for TPMs
- Are lawful purchasers of TPM products entitled to override (reverse engineer, hack) the TPM in order to engage in permissible uses?
 - Distinction between access & other controls in 1201 + some legislative history says yes
- EU Article 6: © owners who use TPM systems have obligations to enable certain exceptions
- Burk & Cohen: require fair use infrastructure as condition of eligibility for 1201 benefits

COPY-PROTECTED CDs

- Some new releases in 2002 wouldn't play on computers, walkman devices, or some CD players and wouldn't allow back-ups or other personal use copies
- Frustrated consumers who had purchased these CDs expected portability and personal use copying
- Many complained to retailers and manufacturers because consumers thought players were defective, also insisted on refunds (another retailer burden)
- Lawsuits in US and France challenged copy-protected CDs as "defective"
- To call a product a "CD," one is supposed to meet "red book audio" portability specifications
 - Philips thinks notice should be required if not meeting spec
 - Label will deter some buyers

HR 107 (108th Cong.)

- Digital Media Consumer's Rights Act of 2003
- Would have added sec. 24A to FTC Act
 - to prohibit commerce in mislabeled or falsely advertised digital music disc products
 - to remove or mutilate labels required by FTC rulemaking
 - FTC would have had to report to Congress on effects of law on market and on enforcement
- Brownback bill would have regulated TPM digital media products more generally
 - illegal to sell w/o notice of TPM restrictions

DMCA CONSUMER RULES

- DMCA anti-circumvention rules contain several consumer protection provisions
 - So-called “shopping privilege” for non-profits
 - Privacy protection privilege
 - Parental control privilege
 - LOC rulemaking: right to access if TM is broken
- So far, they are quite weak, but so is experience with DRMs
 - If greater experience brings abuses, more regulation may be the result (more likely if DRM mandated)

TPMs AND PRIVACY

- TPM systems have potential to collect, process, and transmit vast quantities of personally identifiable information (PII) about consumers' information usage patterns
- Intellectual privacy is important value in free society
 - Julie Cohen's "The Right to Read Anonymously"
- No general legal requirement at this point in US that © owners notify consumers of DRM usage monitoring
- EU Data Protection Directive does provide a comprehensive framework, but far from clear that © owners are embedding data protection principles in TPM systems

TPM MONITORING

- What information you access
- How long you access it
- Certain uses you make of the information
- What device and software is being used to render or enhance it, where you are
- The sequence of what you look at
- Patterns of use for different types of information
- Price sensitivity (if separately priced items)
- From this, profiles of users' preferences can be developed
- Useful for internal marketing (if you liked this, you'll like that) and as a marketable asset (other firms may want to market to you as well)

PRIVACY AS CONSUMER PROTECTION ISSUE

- Notice of DRM monitoring of digital usage should include
 - What information is being collected
 - For what purpose
 - How information will be processed
 - Whether information will be shared and if so, with whom for what purposes
 - What security measures are being taken to protect personal data from misuse
- Notice would enable consumers to decide whether to acquire information from this provider or from some other source
 - Would facilitate fair competition among providers
- 1201(h)(1) allows circumvention to protect privacy if user was not given notice of monitoring

CONSUMER PROTECTION

- What if DRM systems were forbidden from
 - engaging in monitoring of specific consumer's uses (e.g., had to respect privacy)
 - or in technical “self-help” (so controversial in Article 2B/UCITA)?
- What if DRM had to accommodate
 - Digitalconsumer.org “bill of rights” as to time-, place-, format-, platform-shifting, backup copying
 - fair use, first sale, other privileged uses?

© & CONSUMER PROT'N

- Some will object to building more consumer protection into © law
 - Don't clutter further this law with multiple & conflicting purposes
 - Maybe consumer protection authorities will occasionally have to oversee market, but that can be done without changing © rules
- Response: many consumer protections in © now, often directed at limiting monopoly to fulfill © purposes (e.g., fair uses)
 - Room also for other oversight from gov't agencies (such as FTC in US, similar agency in Australia)