

Culture, Content & Copyright

ESD.68, Spring 2006

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Clarification: Compulsory License

- Original: phonorecordings
(1909 law; fallout from White-Smith case)
 - First license to composer to make recording is a negotiated price between the composer and the recorder
 - Thereafter, all recordings are licensed at statutory rates
- Subsequently extended to other domains
 - Cable TV, satellite broadcasting, digital radio
- No performance rights in recordings until 1995, and only for certain digital recordings

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It's Not Just About PaP/Music

- Digital technology has led to many new opportunities
- But certain constructions of the law are turning those opportunities into a stranglehold on freedom & culture
 - Image removed for copyright reasons. Editorial cartoon, with person labeled "RIAA" saying "Beware, YOU might be next."
- How far do we want to go to protect this construct?
- What do we get out of it?

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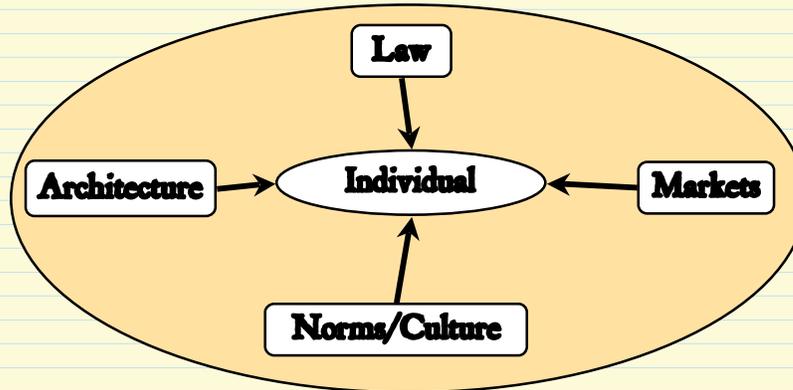
The Views At Conflict

- Content drives the development of the internet	- Content drives the development of the internet
- Content providers need to retain classical forms of control to support the economics of creativity	- The economics of internet distribution change the business of content distribution radically
- The law should protect those controls	- These economic benefits are a sufficient incentive to provide content
- And technology should be managed to maintain these controls	- Technology & law need not change dramatically
- Then, and only then, will content providers participate fully	- Only those willing to adapt to these changing economics will survive

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Control - Lessig's "New" Chicago School



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Responses To Loss Of Control

- Legal Initiatives
 - Lawsuits, Legislative & Regulatory Changes
- Technological Initiatives
 - "Digital Bottles", Copy protections, New Formats (SACD, Audio DVD, etc.)
- Economic Initiatives
 - Price reductions, Distribution channels with control
- Behavior/Norm Initiatives
 - Education programs

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Process Of Copyright Legislation

- Not Quite As Outlined In Simple Civics Books
- Small, But Vocal Constituency With Each Rewrite
 - Whose Ox Is Gored?
- Congress Largely Referees The Making Of The Legislation
- Actually Written By Committees Composed Of Affected Members
 - Publishers
 - Distributors
 - Others As Specified By Congress
- A Negotiated Document

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Evolution Of The Governing Principle

- Early Copyright
 - Protection of Distribution
 - Assurance of Dissemination of Ideas; "Learning"
 - Enrichment of the "Intellectual Commons"
- Distribution Has Increasingly Been The Focus
 - Lots Of Money To Be Made
- Increasingly, Copyright Arguments Have Suggested The Need To Provide Economic Incentives For Innovation and Innovative Works
 - Subtle Change That Changes The Nature Of The Debate
 - At The Margin, A More Protective Scheme Will Always Add A New Innovator
 - Loss Of "Intellectual Commons"

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Expansion of the policy scope of ©

A Working Thesis

- Copyright == compromise with ideals of free speech and open competition
 - *Worked well for almost 300 years*
- Entrenched industries act to reinforce that which has worked for their business model in the past
 - *Less free speech*
 - *Less competitive markets*
- **A failure to recognize that changes to serve their (benign) purposes generate a context that can service less benign ones**

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"Architecture" Changes

- | | |
|--|--|
| <ul style="list-style-type: none">□ Proprietary Client/Server & Formats<ul style="list-style-type: none">▪ RealNetworks▪ Windows Media□ Encrypted Content -- DRM and Variants<ul style="list-style-type: none">▪ eBook▪ CSS for DVDs▪ Copy protection<ul style="list-style-type: none">➢ <i>SDMI/Macrovision/Safe Audio/Midbar for CDs</i> | <ul style="list-style-type: none">□ Trusted Server/Identification Systems<ul style="list-style-type: none">▪ Hailstorm / Passport / Palladium/NGSCP□ Hardware Initiatives<ul style="list-style-type: none">▪ CPRM▪ TCPA▪ SDMI Detection▪ Blocking Digital Output |
|--|--|

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Lots of Incarnations

- Any guesses as to why this pattern can be found on euros? Other currency?
- Ever try to scan one?
- Edit one in PhotoShop?
- Print one on a color printer?
- You might be surprised....



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Digitization - Argument for Control

- Perfect communication has become perfect copy
 - Fundamental (intentional?) misunderstanding of what happens
- DMCA and its related laws only a start
 - Alienation - end run on fair use via access
 - A Second Enclosure Movement
- Several key issues building upon this set of concerns/initiatives

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© -- Intervention at the Logical Layer

- Copyright law protects copyright owner's rights to interfere with the transparency of the logical layer
 - The "end-to-end" network
- Lessig's Code: Choices of architecture influence the opportunities that the "built space" affords

Content Layer

Logical Layer

Application/Services

Application Protocol
Transport
Network
Link

Physical Layer

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Working Metaphors for Policy

- "End-to-end" (Lessig) - Policies should be undertaken to ensure that the network stays "dumb"
 - Intelligence at the edges, not in the middle
- "Layers model" (Solum) - Policies should be undertaken to ensure that the integrity of the layers is maintained
 - Nothing that requires regulation across layers

Content Layer

Logical Layer

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“End-to-End” - Creative Context

- Framework for innovation
 - In hardware
 - In applications
- Unlike previous communication networks
 - “Smart” versus “dumb” networks
- No need to ask permission to try something new
 - Agreements among users, rather than between network operator and innovator

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The CueCat Scanner

- A “free” bar code scanner
- Scan “cues,” get directed to “deep” WWW links
- Market research instrument
- Hackable; despite C&Ds
- Unable to defend; failed business model

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DirectTV and Smart Card Technology

- ❑ Presumptively illegal technology by DirectTV
- ❑ Customer lists acquired and sued (or threatened with suits)
- ❑ Eventually relented, after EFF and others challenged

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Complaint Letters

“Business records recently obtained by this office show that you purchased illegal signal theft equipment to gain unauthorized access to DIRECTV programming. We are contacting you because your purchase and use, or attempted use, of illegal signal theft equipment to access DIRECTV programming violated federal and state laws.”

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Jon Johansen and DeCSS

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Touretzky's DeCSS Gallery

<http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/index.html>

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Academic Research - SDMI Challenge

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Text from SDMI.org document "Click-Through Agreement for the SDMI Public Challenge."

Website detailed academic research into the challenge: <http://www.cs.princeton.edu/sip/sdmi/index.html>.

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Static Control Corp. v Lexmark

- Static Control wants to sell remanufactured printer cartridges for Lexmark printers
- "Smart" chip to signal state of cartridge; needs resetting when cartridge refilled
- Lexmark sues; claims the following:
 - "SCC's chip copied the Toner Loading Program in violation of the federal copyright statute"
 - "SCC's chip violated the DMCA by circumventing a technological measure designed to control access to the Toner Loading Program"
 - "SCC's chip violated the DMCA by circumventing a technological measure designed to control access to the Printer Engine Program"

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Summary Judgment for Lexmark Overturned

- Copyrightable -- NOT
 - “Merger” -- cannot copyright when something can only be done one way (toner program authentication)
 - “Optimality” v “originality” -- showing must be made
 - Compatibility requirements (checksum)
- DMCA circumvention
 - “Access” not via software; rather, via purchasing the printer/cartridge!



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Chamberlain v. Skylink

- Skylink’s garage door opener shouldn’t work with Chamberlain’s garage doors! They’re digital and coded! Image removed for copyright reasons.
- Court rejects, pointing out there really ought to be something that looks copyrightable involved
- Also, Court indicates that DMCA shouldn’t mean “no fair use”
 - No change in the fundamental landscape of copyright
 - Purchase, again, gives some rights that can’t be taken away

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Copyright Terms, Jurisdiction, Chilling Effects

- Project Gutenberg, Australia
- © term in Australia - 50 years after the death of the author
 - Public domain in 1999 Image removed for copyright reasons.
- Mitchell estate threatens lawsuit Book cover for *Margaret Mitchell's Gone with the Wind*.
 - Proj Gutenberg removes their online copy in Australia
- US and EU fights over recordings and © term

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Permission Culture: Consequences

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Book covers for: Margaret Mitchell's *Gone with the Wind*; Alice Randall's *The Wind Done Gone*; and Alexandra Ripley's *Scarlett*.

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Remix Culture - Not Just Music

- Where does “art” come from?
- How much of past art goes into building new culture?
- Who gets to control access?

Why?

Image removed due to copyright reasons.

- <http://illegal-art.org>
- <http://detritus.net>
- <http://www.negativland.com>

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Some New Developments

- MPAA lawsuits
- BitTorrent (now eDonkey) and P2P traffic

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MPAA's "Illegal Downloading: Inappropriate for All Ages" logo; traffic volume graphs.

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Sony BMG and DRM

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Amazon.com webpage for Cyndi Lauper's The Body
Acoustic, with text describing Sony's product recall
due to XCP issues.

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Amazon Tags & Reviews

"Evil" and "scumware" were among the tags
attached to the country duo Johnny and Donnie
Van Zant's "Get Right with the Man" - the
first album identified by the blogosphere as
containing Sony BMG's doomed D.R.M. software.
And "rootkit" is now a tag attached to many
Sony BMG titles.

"Do not buy" is another.

Among the customer "reviews" posted under the
Van Zant album last week was this
observation: "Regardless of the legendary
family name or anything the group does from
here on out, they will forever be remembered
for releasing this album."

"It's kind of unfair to us," Johnny Van Zant
said of the whole affair,
[...]

Text and graphics removed for
copyright reasons.

Zeller, Tom, Jr. "Railing at Sony
BMG, Disguised as a Review."
New York Times, November 21,
2005.

"Railing at Sony BMG, Disguised as a Review," Tom Zeller, Jr.; NYTimes; 2005 Nov 21
<http://www.nytimes.com/2005/11/21/business/21link.html>

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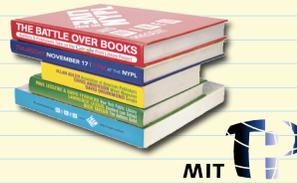


Google Book Search

Image of Google(TM) book search Beta page removed for copyright reasons.

- Lawsuits by publishers and authors
- “Content with value being used, without permission, to increase Google’s cash flow.”
- “In fact, *copies* are being made.”

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Negativland iPod

- ❑ Francis Hwang - artist
 - ❑ eBay sales
"Commemorating" a specific fight between U2 and Negativland
 - ❑ Apple complained; eBay blocked the trade
- Photo removed for copyright reasons.
Box for the U2 vs. Negativland iPod.

<http://fhwang.net/art/uiuvnse/>

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Some Other "Illegal Art" Examples

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Screenshots of various "illegal art" video spoofs.

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Some Issues For Discussion

- How far should the grasp of the technological innovator extend? Is IP the right instrument?
- How to balance the need to motivate creativity with the need to sustain an environment of innovation?
- How can we avoid/mitigate the “Lessig dilemma?”
 - How to articulate the problem in a way to get past the “piracy” rhetoric?
- What kinds of checks might be appropriate? How might they be implemented?

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