Copyright Online: A short note on the proliferation of content distribution technologies online, its implications for the law and suggestions for the future

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Introduction

Barlow once claimed that the Internet would sound the death knell of copyright[1]. However, far from being dead in the online context, recent legislative changes in copyright law[2] seem to have tipped the balance, to an unjustified degree, in favour of the proprietors of copyright content. Bowrey and Rimmer argue that such changes will expand copyright owners' rights beyond the envisioned protective scope of copyright[3]. This article argues that theirs is a more accurate portrayal of the situation than Barlow's now outdated statements. It is then argued that copyright will survive online, but the current situation requires rethinking the level of protection the law should endorse for online content. The article concludes by suggesting that the online content protection that content owners have and are seeking can be appropriately modified. Such actions may, in the online context, go toward striking an appropriate balance between the law permitting hegemonic protection of content, and the law permitting fair use of such content.

Copyright in Physical Space

Copyright law justifies its existence as being the embodiment of the balance[4] between encouraging creativity via the incentive of temporary monopoly profits, and facilitating access to that creativity. In physical space, this balance was struck by allowing fair dealing defences[5], with users free to access and use works so long as their use fitted within one of the fair dealing purposes in the *Copyright Act* 1968 (Cth) (the **"CA"**)[6]. The only protection copyright content had was legal, a porous covering allowing fair users to pass through its regulatory net, and imposing sanctions upon those that sought to unfairly[7] appropriate the profit from the fruit of another's intellectual labor.

This worked because the cost of reproducing and distributing works in physical space is relatively high (e.g. making 100 copies of a book is tedious) and unlawful distribution is generally centralized, therefore easier to trace and regulate.

The Digital Millennium Copyright Act (US) 1998 and Copyright Amendment (Digital Agenda) Act 2000 (Cth): War at the Application Layer for control at the Content Layer[8]

The rise of Napster, and similar phenomena,[9] sparked a legislative reaction in the United States driven by the needs of 'commercial' content producers and distributors.[10] This led to the *Digital Millennium Copyright Act* (US) 1998 (the **"DMCA"**), and a roughly equivalent Australian Act, the *Copyright Amendment (Digital Agenda) Act* (Cth) 2000 (the **"CDA"**), followed. The Australian legislation, as characterized by Oi[11], approved a code based protection[12] on top of the legal protection accorded to copyright content[13], and added another layer of legal protection for the code to the protective package. The crucial point here is this: in the online context, law becomes **both** a source of protection **and** a justifier and endorser of the technology protecting copyright, as opposed to the real world, where copyright law **is** the **only** source of content protection.

Copyright in Cyberspace: Moat and Drawbridge

By allowing code based protection and mandating legally that such code cannot be circumvented, law allowed content owners to build moats around their content, granted them exclusive control of the drawbridge and allowed them to legally challenge those that scaled their walls without permission. Though fair use is incorporated, it is conditioned on permissible circumvention of the code, not independent of it.[14] This is the hindrance to fair dealing in the online context that many complain about.[15] Think of it as law allowing dictatorship at the content layer.

Online Copyright Cases

Traditionally, copyright required an identifiable target to render liable, hence where many procured pirated wares the supplier of those wares was liable and where many infringed copyright due to the direct involvement of another, that other was liable for infringement. This principle is what the courts sought to apply, and applied quite successfully[16], in *A&M Records Inc v Napster*[17] and *Universal City Studios v Corley*[18]. In both those cases, plaintiffs were able to trace liability to a central source directly involved in infringement.

The response then, would be to decentralize infringement, and that is what happened in *MGM v Grokster,*[19] where anonymous, decentralized file sharing technology exposed the limitations in laws premised on physicality and upon the assumption of a source to which infringement could be traced.[20] In *Grokster*, because no substantive source (in the sense of an organization or individual directly enabling infringement as opposed to an end user of the technology) directly involved in infringement was identifiable, liability could not practically be imposed.[21]

Bowrey & Rimmer and Barlow: Realists and Dreamer

Barlow posits a future where creative expression is stripped bare of even the

basic legal protection accorded it in physical space, a situation where all are free to take as and when they please.

Given *Grokster*, if technology is out of law's reach, and the 'digital commons'[22] will soon be littered with copyrighted content free for taking, does Barlow's vision bear weight? I think not.

Even if, as Barlow posits,[23] in such a world, creativity's interests were assured by relationship, convenience, interactivity, service and ethics, it would not change the fact that rights to access and modify content would not be legally limited. Such a reality is not feasible because a world devoid of copyright would be a world deprived of much culture; as persons may perceive the cost of creative effort as being outweighed by the risk of no guaranteed, legally secured returns. Even if Peer to Peer ("**P2P**") were to become a viable mode of content production, the creative expression embodied in P2P communications would need legal protection[24].

After Napster emerged new file sharing technologies that rely on no single source for their online existence, but exist collectively on the computers of the number of users of the technology online at any point in time. Thus, the network is dynamically changing and its parameters of operation are defined, not by the software of a central server acting as the conduit between users, but by the number and nature of users online at any time. Bowrey and Rimmer argue that such technologies lead to a disintermediation of control into the hands of users of file sharing networks, and get around the possibility of pinning responsibility for infringement on a centralised source.[25] That is certainly a credible argument. However, the court in *Grokster* suggested appropriate legislative action in order to fill the exposed lacuna,[26] and given the current trend, what with the DMCA and CDA, it is arguable that further code based regulation by content owners may be endorsed by law. This is unsatisfactory, for although Bowrey and Rimmer rightly say that the law should not consider file sharing technologies as being exempt from copyright law's purview[27], they also point out that content owners are being allowed to use the law to endorse their technology, and in doing so, are expanding the scope of copyright in the online context, beyond its physical space parameters[28].

The 'commons' reaction in cyberspace – due to experiences in physical space?

Perhaps the sheer volume and scale of infringement witnessed online via the use of file sharing software is indicative of a general discontent with the law of copyright. Perhaps we feel we are charged too much for works, that our access to them is too strictly regulated, perhaps we, the commons are expressing our discontent through our anonymous collective actions online. As Barlow argues, people's incentive to procure for free what they perceive as worth paying for is reduced if the price is perceived to be fair.[29]

Therefore, as Litman and Lessig posit, perhaps instead of racing to 'hermetically seal off' their online content[30], content providers and copyright owners should think of taking copyright 'back to its roots'[31] by drawing a distinction between commercial and non-commercial exploitation. Lessig also suggests limiting the term of copyright.[32] While these are both steps in the right direction, crucial to any redesign of copyright is a means by which fair prices can be agreed upon. This could be achieved by mediations between content providers and consumer interest groups.

Such measures may help re-instil public confidence in copyright as a fair system and thereby help maintain that belief online.

That is not to say that people will not take what is not protected. Unprotected copyright content online is vulnerable and is entitled to protection, but such protection must not build moats around the content and render it legally inaccessible. That would be a self-defeating step for the law, for people do not obey laws they do not believe in.[33] An example is the blatant disregard and violation of imposed alcohol prohibition laws in the United States.[34]

The Future?

Copyright ought to accord protection to online content, but by the same token code-based protections ought to become porous to allow fair dealing. Perhaps a starting point would be elevating, via legislation, the status of fair dealing to a right. Two further suggestions to achieve the above ideal may be:

(1) Content owners be required to disseminate circumvention codes to educational and other institutions with legislation requiring them to use the same in good faith[35] and for non-commercial fair dealing purposes allowed under the CA; or

(2) As broadband access penetrates the mainstream of Internet users and Internet Protocol numbers become fixed, fair dealing access be set up with the server on which the protected content is hosted.

Conclusion

Copyright did not willingly embrace cyberspace, it entered cyberspace in order to prevent being completely undermined.[36] Undermining copyright would have been easily achievable by an unbridled digitization and sharing of copyright content online, a fact made brutally clear in light of KaZaa[37] becoming the most downloaded software in history[38]. Copyright law's reaction to file sharing was perhaps too extreme to the extent that it can undermine the public interest in having fair dealing access to works.

The extent of online infringement can be seen as the voice of the commons against the belief in copyright as it is. I believe the solution is a redesign of copyright, not its abolition; an evolution by consensus, not a forced adaptation. Whilst I have suggested ways to achieve this ideal, such suggestions are not fool proof, rather they are intended as a catalyst to spark thought about how copyright can again strike the balance its creators intended, between the rights of those who give to us the fruits of their imagination, and those who seek to

enjoy those fruits. It would be unwise to lock away the harvested fruits of imagination and seek to extract high prices for their enjoyment; in the long run that would only guarantee rotten fruit.

1 As suggested by Barlow, see: Barlow J P, "The Next Economy of Ideas: Will Copyright Survive the Napster Bomb? Nope, but Creativity Will", WIRED News, Issue 8.10, Oct 2000 at 2 of 6, available at www.wired.com/wired/archive/8.10/download_pr.html (last visited 24th May, 2003)

2 This article will make reference to two such pieces of legislation, namely: *The Digital Millennium Copyright Act* (US) 1998 and the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth)

3 Bowrey K and Rimmer M, "Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law", *First Monday*, Vol 7, No.8, Aug 2002, available at: www.firstmonday.org/issues/issue7_8/bowrey/index.html

4 Biegel S, *Beyond our Control? Confronting the Limits of our Legal System in Cyberspace* (Massachusetts: MIT Press, 2001) at 284

5 See: Australia: *Copyright Act* 1968 (Cth) Pt III Div 3, 4, 4A, 5, 5A, 5B, 7; US: 17 USCS ss.106, 107

6 The common defences in Australia are: Fair Dealing for the purposes of: Research or Study (s.40); Criticism or Review (s.41); Reporting News (s.42); Judicial Proceeding or Professional Advice (s.43); Reproducing works temporarily for purposes of communication (s.43A); use by places of education (s.44)

7 I.e. Infringing Copyright: see CA: Pt III; Div 2 (Works), Div 7 (Artistic Works); Pt IV Div 6 (Infringement in other subject matter)

8 Borrowing from McTaggert's framework that posits the Internet as conceivable of comprising 4 distinct layers: physical, logical, transaction/content and application; see: McTaggert T, "A Layered Approach to Internet Legal Analysis" (Ver 2.1, Jan 2002) available at www.innovationlaw.org/cm/ilg2002/reading/layered1.pdf

9 For a good overview of Copyright content distribution systems see: Biegel S, *Beyond our Control? Confronting the Limits of our Legal System in Cyberspace* (Massachusetts: MIT Press, 2001), Ch 11; see also: Fisher W III, *Digital Music: Problems and Possibilities*, Oct 10, 2000, available at www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/Music.html (last visited 24/5/03)

10 I adopt this term from Benkler, who distinguishes between 'commercial' information and content (i.e. large media conglomerates) companies, as opposed to the digital economy information producers, which can, so he argues, exist autonomously in peer to peer networks, independent of markets or hierarchies. See: Benkler Y, "The Battle over the Institutional Ecosystem in the Digital Environment" (2001) 44(2) *Communication of the ACM* 84 at 86-87

11 Oi I, "American Copyright in Australian Cyberspace: Some Observations and Implications" (2001) 19(4) *Copyright Reporter* 105 at 105-106

12 'Code Based Protection' refers to content protection via specially designed software and/or hardware, e.g. specific software on a content provider's internet server may have installed software that is designed to disallow access to the requested content on that server without password authorization.

13 See: *Australia:* CA; ss.116A: Technology Protection Measures; 116B: Digital Rights Management and *US:* 17 USCS ss.1201 (a), (b); 1204 – Penalties for violations of s.1201

14 The DMCA does have fair use provisions but these are conditioned on permissible circumvention and not independent of it (See: 17 USC ss.1201 (a) (D), (c) (1)); the CDA incorporates fair dealing in s.116A (3), (7): fair dealing with respect to computer programs (Pt III, Div 4A; CA) and Reproduction and Communication by Educational and Other Institutions (Pt VB; CA)

15 see e.g. Benkler Y, note 10 at 86-87, 89; see also: Bowrey et al, note 3 at 3, 15-16

16 I use 'successfully' as meaning the court was able to pin liability on a specific party against whom a copyright owner could then recover

17 239 F.3d 1004

18 273 F.3d 429

19 243 F. Supp. 2d 1073, 2003 U.S. Dist. LEXIS 800 (C.D. Cal., 2003) (decided April 25, 2003)

20 Adapted from an argument in Lessig L, *Code and Other Laws of Cyberspace* (New York : Basic Books, 1999)

21 *A&M Records Inc v Napster* 239 F.3d 1004, see also *Sony* 464 US at 442-43, 104 S.Ct. 774 (The Betamax case), for an example of a case where the manufacturers of technology capable of infringing copyright was held not liable for any infringements that took place by use of such technology, since the manufacturer could not control the use of the technology once sold. The crucial point was that the technology was capable of non-infringing uses.

22 See: Lessig L, *The Future of Ideas: The Fate of the Commons in a Digital World* (New York: Random House, 2001) – "digital commons" is a term Lessig coins and is a theme he develops throughout the book. He uses the term to refer to the proportion of mankind online and actively part of the internet, being all those entitled to the 'fair use' of copyright content available online.

23 Barlow J P, note 1 at 3,4

24 See: Benkler Y, note 10 at 88

25 See Generally: Bowrey K and Rimmer M, note 3 above

26 *MGM v Grokster* at 243 F. Supp. 2d 1073, 2003 U.S. Dist. LEXIS 800 at 49 per Wilson J (statement of opinion)

27 Bowrey et al, note 3 at 2

28 Bowrey et al, note 3 at 20

29 Barlow J P, "The Economy of Ideas", WIRED News, Vol 2.03, March 1994 available at www.wired.com/wired/archive/2.03/economy.ideas_pr.html at 4 (of 16 pages)

30 Benkler Y, note 10 at 85

31 Lessig, note 22 at 258 citing Prof. Jessica Litman in Litman J, *Digital copyright : protecting intellectual property on the Internet*, (Amherst, N.Y. : Prometheus Books, 2001)

32 Lessig, note 22 at 258-259

33 Barlow, note 29 at 5 (of 16 pages)

34 see: Biegel S, note 4 at 102

35 The DMCA, s.1201 (d) allows this, but limits the use to making determinations as to whether to acquire the work and does not allow access if the work is available in non-digital form

36 Of course, media companies sought added protection realizing the potential cyberspace offered for the low cost distribution and marketing of content

37 A peer to peer sharing software based on the Gnutella protocol

38 Zeropaid News online: http://www.zeropaid.com/news/articles/auto/05232003a.php.