
Will Copyright Survive in the Digital Age?

BARRY F. IRWIN
IRWIN IP LLC

Executive Summary

- Copyright Law is designed to protect Copyrightable Works from being copied without authorization
- Purpose of Copyright Law is to encourage creation of Copyrightable Works
- While unauthorized copying has proliferated, historically, Copyright Law has provided a means to eliminating this infringement
- Whether certain uses of Copyrightable Works “should” be considered an infringement is subject to much debate
- Whether the law should prohibit unauthorized copying of works of authorship is subject to debate
- If so, revisions to the Copyright Law are probably appropriate

Copyrightable Works

Original Work of Authorship In a Tangible Medium of Expression, including

- Songs
 - Composition – underlying music and lyrics
 - Sound Recording – specific captured performance of a composition
- Literary Works
 - Books
 - Poems
- Motion pictures and audio-visual works
- Pictorial, graphic and sculptural works

Exclusive Rights Recap

Except for sound recordings, a copyright owner has exclusive rights to:

- reproduce (ie copy) and distribute
- prepare derivative works
- publicly perform
- display

Sound recording copyright owners have exclusive rights to:

- reproduce (ie copy) and distribute
- remix, rearrange actual sounds (not all derivative works)
- publicly performance by digital audio transmission (not all public performances)
- display

Exclusive Rights Create Revenue

Compositions:

- Derivative Works – Harry Fox administers mechanical licenses to other performers for copyrights, distributed \$450 million to song writers in 2005
- Public Performance – ASCAP, BMI and SESAC collect and distribute US public performance royalties, distributed over \$2 Billion to song writers last year

Sound Recordings:

- Copy and Distribute – Record companies pay for creation and distribution and pay royalties to performers
- Digital Audio Public Performance – Sound Exchange licenses the digital audio public performance right, distributed approximately \$600 million last year

Arguments For Open Access

Making copyrightable works freely transferable from one person to another will enhance my revenue

- Hear this argument from a few music performers – not many song writers, photographers, painters, cinematographers
- The revenue enhanced is largely revenue generated via copyright
 - “There is the question of how I'll get [money](#) from all this. My personal experience confirms audiences are generous and want to support artists. Surely there's a way for this to happen without centrally controlling every transaction. The old business model of coercion and extortion is failing. New models are emerging, and I'm happy to be part of that. But we're still making this up as we go along. You are free to make money with the free content of Sita Sings the Blues, and you are free to [share money with me](#). People have been making money in [Free Software](#) for years; it's time for [Free Culture](#) to follow. I look forward to your innovations.” Nina Paley, Questioncopyright.org

Subconscious copying is unavoidable

- Fair use
- Rarely see cases of this type

Cost of Global Illegal Music Downloads

US economy loses \$12.5B in economic output annually

Over 71,000 US jobs lost in recording industry or downstream retail

Over \$400M in annual US taxes lost

Loses from illegal motion picture piracy are twice those of illegal music downloads

Stephen E. Swiwek, The True Cost of Sound Recording Piracy to the US Economy, Report 188, Institute for Policy Information (2007).

Effectiveness of Copyright Law

Playboy v. Frena (1993):

- Frena operated digital billboard (think Tumbler).
- Found liable for infringement even though he never posted anything because he had control over the bulletin board and was violating the copyright owners exclusive right to display the images publicly

Sega v. MAPHIA (1994):

- MAPHIA operated a site where people could upload video games that other people could then download and play.
- Found “Even if Defendants do not know exactly when games will be uploaded to or downloaded from the MAPHIA bulletin board, their role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement.”

Grokster (Supreme Court)(2005)

“One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement”

There was direct evidence that Grokster sought to encourage infringement

SJ for Grokster was reversed; case remanded

Online Service Provider (OSP)

Liability Limitations, 17 USC § 512

Reduced the ability of Copyright Law to prevent unauthorized copying

Creates four possible "safe harbors" for OSPs:

1. Conduits
2. System caching
3. System storage (YouTube)*
4. Linking (Google)*

Generally,

- Must develop, implement and disseminate a policy for terminating repeat offenders, and
- Must accommodate protection measures

System Storage Safe Harbor

Innocent (infringement not known or apparent) and automatic storage of information at the user's direction, if

- Act expeditiously to remove infringements
- When control is exercised over infringing activity, no direct financial benefit from infringement
- Designates agent for infringement notifications

Linking Safe Harbor

Innocent linking of users to infringing web sites by means of search engines, directories, hyperlinks, etc. if

- Act expeditiously to remove infringements
- No direct financial benefit from infringement
- Designates agent for infringement notifications

RIAA Enforcement Efforts

Recording Industry Association of America (RIAA) suits began in 2003

RIAA sued or threatened suit against 30,000

- 1.92M judgment against a single mom for downloading 24 songs (Capital v. Thomas (Minn. 2008))
- 675k judgment against a college student that downloaded 30 songs

End result: ISPs work with Center for Copyright Information (CCI) to identify file sharers without dealing with courts or subpoenas. If you are illegally sharing, you may receive a Copyright Alert

Viacom Int'l Inc. v. YouTube, Inc.: District Court

Launched in December 2005; sold in November 2006 for 1.6B of Google stock

YouTube terms and conditions precluded uploading copyright works unless owned by the person uploading them

YouTube also swiftly removed any infringing items upon receipt of notice

Issue was whether YouTube qualified for DMCA safe harbor in light of their “general awareness of” and “welcoming” of the posting of infringing material

Both sides moved for summary judgment

Viacom Int'l Inc. v. YouTube, Inc.: District Court

In ruling for YouTube, the Court held:

- General awareness of rampant infringement is not enough to disqualify ISP from protection,

plaintiff must be “aware of facts or circumstances from which specific and identifiable infringement is apparent
- If copyright owner notifies ISP of infringing work, ISP must take down that copy, but is not responsible for locating additional copies of the same work

Viacom Int'l Inc. v. YouTube, Inc.: Second Circuit

Affirmed holding that, absent actual knowledge, a defendant must be aware of facts or circumstances making ***specific and identifiable*** apparent

But, reversed the lower court's grant of summary judgment: "***the record raises material issues of fact regarding YouTube's actual knowledge or 'red flag' awareness of specific instances of infringement.***" *Id.* at *8.

- YouTube surveys estimated 75-80% of all streams contained copyrighted material, suggesting YouTube was conscious of infringement. *Id.*
- Internal YouTube communications referred to specific clips, some of which pushed for delaying removal. *Id.*

Reasonable juror could find actual knowledge or awareness that specific clips were infringing; if so, no safe harbor if clips were "in-suit." *Id.*

Viacom Int'l Inc. v. YouTube, Inc.: Second Circuit

Willful Blindness: Also held that the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.” *Id.* at *10.

- Difference between saying policing is not required, and saying you can bury your head in the sand
- Whether defendants made a “deliberate effort to avoid guilty knowledge” is a fact question to be considered on remand. *Id.* at *11.

DMCA Safe Harbor Overview

No affirmative duty to police users.

Safe Harbor protection lost when service provider fails to act when it is **“aware of facts of circumstances from which specific infringing activity is apparent.”**

§ 512(c)(1)(A)(ii).

Willful blindness may also result in loss of Safe Harbor protection

Copyright Laws Evolution with Technology

1972 Amendment granted limited copyright protection to sound recordings in light of the proliferation of high quality duplication

1992 Home Audio Recording Act enacted in light of even better technology

1995 Amendment extended sound recording rights to digital audio transmissions in light of technology advancements that could undercut record sales

1998, DMCA created a notice-and-takedown procedure for copyright owners and online intermediaries, a corresponding safe harbor from liability, and legal protection for technological protection measures.

Time for a Revision?

Last substantive change was fifteen years ago

The Courts have struggled with existing statutory language.

In several cases the courts have commented on the need for legislative change.

People around the world increasingly are accessing content on mobile devices, and fewer and fewer of them will need or desire the physical copies that were so central to the nineteenth and twentieth century copyright laws

Revisions Proposed by Copyright Registrar

Expand public performance right

Address incidental copies

Enhance enforcement mechanisms

Provide guidance on statutory damages

Expand first sale doctrine

Deal with Orphan Works

Opt Out System

Expansion of Public Performance Right

Public performance right afforded to classes of works other than sound recordings

SR PPR provided for in virtually all industrialized countries around the globe

Lack of SR PPR creates disparity in economics between radio stations and businesses that offer sound recordings over the Internet.

Addressing Incidental Copies

Not all reproductions are equal in the digital age. Some copies are merely incidental to an intended primary use of a work, including where primary uses are licensed, and these incidental copies should not necessarily be treated as infringing.

Enhancing Enforcement Mechanisms

Prosecutors may pursue felony charges in the case of illegal reproductions or distributions, but are limited to misdemeanor charges when the work is streamed, even where such conduct is large scale, willful and undertaken for a profit motive.

Eliminate exclusive federal court jurisdiction for small claims.

Statutory Damages

Substantial debate as to whether statutory damages are too high, too low, too easy or too hard to pursue.

Provide guidance to the courts (e.g., in considering whether exponential awards against individuals for the infringement of large numbers of works should bear a relationship to the actual harm or profit involved)

Digital First Sale

Section 109 of the 1976 provides that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”

In 2001, the Copyright Office recommended against applying the doctrine to electronic copies, noting that transmission of works interfered with the copyright owners’ control, but acknowledged that the issues may require further consideration.

Dealing with Orphan Works

Life of the author plus seventy years—is long, and the length has consequences.

The Copyright Office's 2006 orphan works proposal suggested limiting remedies when copyright owners cannot be found.

Perhaps the law could shift the burden of the last twenty years from the user to the copyright owner, or perhaps requiring owner's to register with the Copyright Office

Opt Out Systems

Reverse the general principle of copyright law that copyrighted works should be reproduced or disseminated only with the prior approval of the copyright owner.

Extended collective licensing allows representatives of copyright owners and users to mutually agree to negotiate on a collective basis and then to negotiate terms that are binding on all members of the group by operation of law. It has the potential to provide certainty for users and remuneration for copyright owners (for example, in mass digitization activities) but would provide some control to copyright owners wanting to opt out of the arrangement.

Conclusions

- As Copyright Law evolves, it must strike a balance between protecting the owner's work and overprotection that stifles the creativity of those who seek to build on the ideas of others.
- Money incentivizes people to create. If people cannot profit from their works, then they stop creating. Copyright Law must remember this critical incentive and adjust accordingly.
- As we have seen, the law has changed, but slowly.
- The growth of technology in the digital era has further complicated the ability of Copyright Law to keep up with these advances, but that does not excuse Congress from its duty to reform the law in ways that overcome these challenges.

About the Authors: Barry F. Irwin

Founder of Irwin IP LLC

Former Kirkland & Ellis Equity Partner

Board Member Lawyers for the Creative Arts

birwin@irwinip.com

About the Authors: Megan McKeown

Notre Dame Law School, J.D. 2016

Mississippi State University, B.A. 2013

mmckeown@nd.edu