Intellectual Property Law & Interactive Media

FREE FOR A FEE

Edward Lee Lamoureux
Steven L. Baron
Claire Stewart

Introduction

Shifting from Public to Private Interests

The following paradox captures the tone of the "new media environment" as it relates to intellectual property law: "Nothing has changed; everything has changed."

In many ways, relatively little about intellectual property law has changed in the last two hundred years or so. For example, the 1976 revision of the 1909 revision of the 1790 *Copyright Act* (amended in 1802, 1831, 1856, and 1870) kept in place, for the fruits of creative labor, a regime of protection like that afforded to real property.[1] In America, copyright laws preserve the rights of those who produce creative works or those who have acquired said rights via purchase, lease, or inheritance. The laws apply to artists and content producers by constraining them from copying the protected works of others. The laws also apply to corporate entities such as distributors to keep them from profiting by selling "illegal" copies of the protected works. The 1998 *Digital Millennium Copyright Act* (*DMCA*) clarified the application of "current" law to new media works, as well as adding a few principles specific to digital works (for example,

specifying that electronic means of protecting copyrighted works should not be circumvented). The primary producers and owners of intellectual property have long been, and continue to be, large corporations. These multinational entities play a major role in the development of the legislation that affects the creation of mediated products and their distribution.

In other words, nothing has changed. Artists and writers create content that is protected by federal and state laws once the material meets the threshold requirements for protection appropriate to the form of the content. Those rights can be assigned to or be acquired by others, either freely or via economic exchange. If one violates intellectual property law by copying or otherwise using protected materials, one can be noticed, served, arrested, prosecuted, fined, and—in some cases—imprisoned.

In many other ways, virtually everything about intellectual property law has changed. Computational technologies (computers, networks, and other new media aspects) enable "every-person" to create and distribute content in ways that were heretofore the province only of professional and corporate creative producers and distributors. These technologies enable the easy copying and redistribution of content in ways that compromise the integrity of the intellectual property law system in America and, to a greater extent, globally. The sheer amount of published material has increased exponentially and crosses global jurisdictions. The in-place standards and practices of intellectual property law have not and cannot keep pace with the rate of technological change. In America, virtually every citizen who uses computational resources could probably be found to be, in one way or another, guilty of intellectual property violations, and the legal system (and the corporations attempting to leverage it) has no way to keep up with the potential case load. When everyone is a criminal, the legal system and public policy are deeply compromised.[2]

In other words, everything has changed. The laws have not kept up with the development of technology, and in many cases their enforcement is at best ineffective or at worst either non-existent or draconian. In general, citizens don't understand (or agree with or follow) the laws. The laws protect the vested interests (especially) of old media to the degradation of the development of new technologies, and the laws cannot be efficiently enforced across geographic borders such that the global interconnectivity provided by the Internet and the World Wide Web obviates most strictures. In short, the intellectual property law system is overwhelmed, overrun, and virtually helpless in the face of the new media environment. Nothing has changed. Everything has changed.

This complex situation is further exacerbated by a number of specific (and relatively recent) changes in law and technology that combine to transform the

digital media landscape. Six such changes will be introduced here and will appear among the topics covered in this volume.

First, the *Copyright Act of 1976* modified the requirement for copyright holders to re-register works for which protection had expired and for which the rights owner wanted continued protection; ratification of the *Berne Convention* in 1988 ended the registration requirement. As a result of this revocation of the traditional requirement to renew, there is no longer a material difference, with regard to rights protection, between works in which rights holders retain an interest and those in which that interest has waned. As a result, when the term of copyright protection is extended, orphaned works (those in which no living person has an identifiable economic interest in the protections afforded by intellectual property law) receive the same protections as do works that are still generating return for owners. Under this practice, even works in which owners are uninterested do not enter the public domain.[3]

Second, the *Copyright Extension Act of 1998* (the so-called "*Sonny Bono Act*") added, in general, twenty years to the terms of all copyrights. In itself, this extension was not remarkable; Congress had previously extended copyright terms a number of times.[4] However, this extension came at the historical moment at which the early works of modern mass media were scheduled to come into the public domain. As the era in which radio, television, and other electronically recorded materials were beginning to come into the public domain approached, large media interests pressed for political action that led to the extension and raised concerns that in the new media environment a series of extensions are sure to follow. Roughly speaking, then, anything made after 1923 for which protections were about to expire (read: virtually all of the work in the modern media era) had its protection extended another twenty years. When combined with the 1976 and 1988 removal of the registration requirement, the *Extension Act* virtually locked the public domain for twenty years. While this situation might be reasonable for some works (for example, the early Disney drawings and animations), the result also applies to all printed works, whether or not they are orphaned, leading to an enormous amount of material being blocked from entry into the public domain. The degree to which large corporations like Disney (which took much material out of the public domain and transformed it in order to build their empires but do not want any of their materials to enter the public domain) deserve for their works to be forever protected is highly contestable.

Third, the *Digital Millennium Copyright Act of 1998* (*DMCA*) contains anti-circumvention requirements that trump many traditional fair-use provisions. An activity that has been traditionally protected by fair use may now be

illegal due to the *DMCA*. Take, for example, the case of backing up a legally purchased movie for private use: Owners can't "crack" DVDs in their collections to make back-up copies. While making back-ups taken from videotape (an analog source) is legally protected by fair use, making the same back-ups from a DVD (a digital source) is illegal, as doing so constitutes a *DMCA* anti-circumvention violation. Just as the public domain promotes the public's interest in developing and furthering research and creative production, so fair use produces the same palliative effect on the ability of citizens to use otherwise protected intellectual property under certain conditions and following specific protection principles. The dual losses of the public domain and of fair use at the hands of the legislative and legal systems in the current era cause many to wonder if corporate entities have gained too much of an upper hand to the detriment of the public interest.

Fourth, a number of court cases have validated "click through/shrink wrap agreements." These implied contracts and the court actions supporting them allow contract law to trump intellectual property law protections (including those in the otherwise draconian *DMCA*). So, for example, while the *DMCA* and the *Copyright Act of 1976* both protect reverse engineering, the courts have said that if the usage agreement (the click/shrink wrap) says that opening the software package engages the user in a contract with the provider/producer and the contract says you can't reverse engineer, then one can't reverse engineer after agreeing to the contract by opening the product (even in cases in which that agreement is not displayed on the outside of the container). The outcome stifles technological innovation and competition based on reverse engineering, a protection that is supposed to be built into the affirmative protections of intellectual property law.

Fifth, the specter of increased control over property rights management through digital rights management (DRM) regimes appears to threaten that every sort of digital material will be watermarked as proprietary so that the controls suggested in points one through four, above, will be strictly enforced, perhaps at the code level (in the background, within machines and networks), rather than at the content level (where users encounter the material). Software makers and entertainment media providers are collaborating in pushing digital rights management protocols, ostensibly as a way to combat piracy and illegal downloading. However, the implications of the technologies threaten a sort of prior restraint that might very well have been illegal in the analog/offline world.

Sixth, and finally, our elected officials generally want little part in efforts to alleviate these matters on behalf of the general public, though many politicians

are more than enthusiastic about further protecting the rights of corporate interests. There are obvious reasons why politicians don't like advocating in favor of the public in these matters. The media provide both campaign support (through corporate donations and by providing access to celebrities who are under contract and who are willing to fundraise on behalf of politicians) and access to media in a direct way through news coverage (or the lack of it). Politicians do not want to "mess with" big entertainment or big information (news). Additionally, the details of intellectual property law in the new media environment are highly technical. Historically our so-called representatives have turned over the task of drafting legislation to working groups of industry representatives (usually via their stables of intellectual property lawyers). As a result, players who are the current holders of intellectual property advocate the crafting of laws that favor their positions, and the laws are written in ways that protect their interests and appeal more to high-level legal wrangling than to everyday common sense about right and wrong.[5]

Taken together, these practices disturb the traditional balance between promoting creativity via distribution to the public domain and protecting the economic interests of creative producers and their sponsors and distributors as a way to support further research and/or creativity. The balance is now strongly in favor of corporate producers and the regime of control. Laws that are written by and for elite corporate interests apply to every person, every day. The system is strained almost to the breaking point. [ELL]

Property Law Governing Products of the Mind

Rapid advances in technology have challenged the legal system to apply traditional legal constructs to new problems of ownership of intellectual property. More to the point, the digitizing of property and the ease and speed with which that digitized property can be copied, transmitted, and shared across the globe has posed pressing legal problems for both traditional owners and those who desire to share information freely. This tension is played out nearly daily in the court system and, increasingly, in the media. As reflected in *The Wall Street Journal, The New York Times, The Washington Post*, or virtually any major news source, the amount of coverage generated by disputes about intellectual property has multiplied in recent years. Some of the cases arise when competitors in highly specialized industries battle over technologies. But as the recent Supreme Court decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* demonstrates, some cases involve the rights, directly or indirectly, of