

The ABCs of copyright protection

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Created 2002-10-01 23:00

The 'Napsterisation' of just about everything digital has created a crisis of incredible proportions. Politicians have proposed everything from allowing record and movie companies to hack our computers, to mandatory copy protection built into every computer to protect intellectual property (IP).

This debate is thorny because two important principles collide: legal protection for intangible works against the free expression, and exchange of ideas.

A good argument can be made that, in a world without IP protection, some individuals would be discouraged from producing important goods or ideas (consider pharmaceuticals or genetically-altered foods to feed hungry populations).

On the other hand, the 'protect-everything-under-the-sun' advocates go too far when they lobby for excessive terms of protection – which go beyond any possibility of motivating creators, who often are deceased (think Mickey Mouse and the debate over the publication of The Wind Done Gone [1]) – and seek to expand what is covered by copyright and patent law in the first place. One begins to believe that record companies would assert the right to copyright the 12-bar blues chord progression if they could get away with it.

So how does one balance artistic and entrepreneurial incentives with the interests of the larger community of users who enjoy free, unhindered exchange of ideas and products? There are no easy answers, but the following principles can help guide the debate and perhaps create some common ground.

Conceptually, it helps if we break up intellectual property into A, B, and C components: A is what's in the public domain; B is the stuff protected now, that we're fighting over; C is what hasn't been created yet.

If we allow market mechanisms to take over C then, over time, C and A will dwarf B. So how do we make C grow? Adhering to a few principles will help.

Give the market time to work

Reasonable people can legitimately debate the appropriate duration for IP protection. But copyright protection that extends far beyond the life of the originator provides diminishing incentives for that person to innovate (even if one assumes the innovation is on behalf of yet-born descendants). Thus, terms of protection need to be rethought. Indeed, a new Supreme Court case is currently challenging the 1998 Copyright Term Extension Act, which extended copyright protection terms to the life of the author plus seventy years (up from fifty years). Some call it the 'Mickey Mouse Protection Act'.

Under the recently passed [Digital Millennium Copyright Act](#) [2] in the US, the intent to infringe is not relevant. Rather, a person engaged in the development or distribution of circumvention technology, even for a benign purpose such as research or archiving, is at risk of being held criminally or civilly liable. There is no defence under the Act, even if there is no underlying copyright infringement. This is excessive.

New technologies or business models should not be banned to solve copyright problems. In the raging piracy dispute, one side wants to ban or restrict file-sharing technologies that reduce copyright control. Meanwhile, those who eagerly share copyrighted files often condemn experimental technologies by which copyright holders hope to shield works from reproduction, such as digital watermarking, enhanced encryption and attempts to incorporate digital rights management (DRM).

But perhaps DRM – while it will never fully prevent copying – can make it inconvenient enough so that cracking encrypted songs may not be worth the trouble. Perhaps a \$0.20 download that also includes liner notes, lyrics, photos, and discount coupons on merchandise and concerts is a better deal than a free song. This doesn't mean government should mandate DRM technologies, as some in Congress want to do. They would effectively ban any digital device that doesn't incorporate a government-certified anti-copying technology.

Policymakers shouldn't ban any technology – whether for copying or copy-protection – as the marketplace works through these difficult issues. Just as government shouldn't ban technologies, it should not forcibly 'aid' the sharing of IP either. We see this in emerging calls for the extension of compulsory licensing requirements on record companies. Such forced 'contracts', with their accompanying government-set royalty fees (read 'price controls') and regulatory interference, should be rejected.

Digitisation, at the very least, presents an opportunity to rethink whether such market failure even exists before extending the compulsory model. Compulsory licensing is especially dangerous in an age of peer-to-peer computing and file sharing. Things are already being shared, after all.

The bottom line is that both sides should avoid injecting government coercion into the copyright resolution process as Napsterisation proceeds. Perhaps technology can be a better means of managing copyright, in some applications, than law – even if law is in place as a backup.

File-sharing technology clearly creates a problem, but arguably a transitory one involving the existing body of copyrighted work. New methods exist for distributing and pricing intellectual products. Technology can increasingly serve as a partial replacement for copyright law for the artists and creators of tomorrow – and today – if they embrace it.

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