Santa Clara University
School of Law

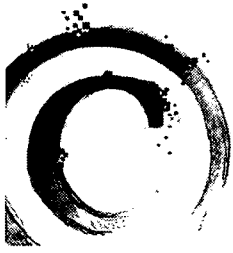
Santa Clara High Technology Law Journal

Volume 20 | Issue 4 Article 3

2004

Symposium Review: The Digital Challenge to Copyright Law

the Digital Challenge to Copyright Law



SANTA CLARA
COMPUTER & HIGH TECHNOLOGY
LAW JOURNAL

2004 SYMPOSIUM REVIEW

Each year the *Santa Clara Computer & High Technology Law Journal* presents a symposium devoted to emerging trends in the area of intellectual property and technology-related law. The 2004 symposium, entitled "The Digital Challenge to Copyright Law," focused on leading issues in the area of copyright law. The event was held February 5–6, 2004 and attended by over one hundred and fifty (150) legal practitioners, scholars, faculty, and students.

The symposium opened with a keynote address on the evening of February 5th by the Honorable Judge **Richard C. Tallman** of the Ninth Circuit Court of Appeals, and continued the following day at Sun Microsystems Santa Clara Conference Center.

Professor **Peter S. Menell** of the University of California, Boalt Hall, presented the lunch keynote address focusing on modern technology's effect on copyright laws. The program included four moderated panels: (1) an overview of the pros and cons of copyright; (2) peer-to-peer file sharing of digital music; (3) fair use and the challenge of new technologies; and (4) anticircumvention under the Digital Millennium Copyright Act (DMCA).

The Pros and Cons of Copyright

The first symposium panel, "The Pros and Cons of Copyright," discussed the effects of copyright law in the digital age on incentives to create and whether copyright law provides too much protection. The Honorable Judge **Andrew J. Wistrich** of the United States District Court for the Central District of California moderated the panel. Both **Ralph Oman**, the Registrar of Copyrights from 1985 to 1994, and **Gary A. Watson**, an entertainment lawyer and Of Counsel at Huron, Maki & Johnson LLP, spoke in favor of maintaining copyright protection. Professor **Raymond Ku** of Case Western Reserve University School of Law presented the opposing viewpoint.

Judge Wistrich posed the question of copyright scope by introducing articles from the popular media about copyright protection. Mr. Oman argued for a return to the constitutional grant of a truly exclusive right relying on comparisons to real, personal, and patented property. Mr. Oman also discussed the evolution of the fair use doctrine and compulsory licenses in response to market failure. Mr. Oman advocated a market approach for copyright holders and device manufacturers. Mr. Watson used film writers and movie studios as a case study to illustrate the workings of copyright law. Mr. Watson spoke in favor of maintaining current copyright law and allowing the market to address the new challenges to copyright. Professor Ku was "the one contrarian

on the panel." Professor Ku discussed the interests of the author, the printer and the public in copyrightable work, advocating the concept how technology has created the ability to "sell the wine without the bottles" without the need to use the traditional printer to disseminate copyrightable works. Arguing against monopoly prices and distributor bottlenecks, Professor Ku opposed government action protecting distributors, and instead supported greater compensation to the creator of works.

Digital Music: What Does the Future Hold?

The second symposium panel, "Digital Music: What Does the Future Hold?" addressed the continued challenges to copyright protection of music in digital environment. **Jeffrey G. Knowles** of Coblentz, Patch, Duffy & Bass, LLP offered three approaches to protect digital music: consumer education, legal alternatives that compensate, and deterrence. In addition, Mr. Knowles discussed the impact of the *In Re Verizon* decision limiting subpoena use to identify alleged infringers—through cumbersome John Doe suits. Finally, Mr. Knowles distinguished peer-to-peer file sharing services from products with a substantial non-infringing use, on the basis of the ongoing relationship file sharing service providers maintain

with their users. Mr. Knowles remarked in closing, "existing law will suffice if we just let the courts work it out."

Gerard J. Lewis, Jr., Senior Counsel and Chief Privacy Officer of Comcast Cable Communications, humorously offered the Internet service provider's ("ISP") perspective by using the tune of "Stuck in the Middle with You." Mr. Lewis noted three main difficulties in responding to subscriber identification subpoenas issued under the DMCA: (1) user identification; (2) significant costs; and (3) uncertainties. Moreover, Mr. Lewis found that such an assertion of the DMCA did not serve anyone's interests because it placed the copyright owners and the ISPs at odds with their customers. Mr. Lewis posed the following question to drive re-envisioning of copyright law: "How does one grow a business out of all this?"

William E. Growney, General Counsel of Roxio/Napster, emphasized the need for content and clarity of the law in order for business models to be developed. Mr. Growney believes that legitimate online services can compete with free and illegal file-sharing insofar as they provide better art, meta-data and encoding quality and are safer, faster and legal. To increase the music selection provided, Mr. Growney called for legislation to modernize compulsory licensing law, under Section 115 of the Copyright Act of 1976, and for the Recording Industry Association of America's assistance to convince publishers to embrace such changes.

Wendy Seltzer of the Electronic Frontier Foundation observed a "music copyright crises" in which copyright and control stifle public culture, invade privacy, deny rights to speech and anonymity, and impede and stifle new technologies that could allow for better music enjoyment. Ms. Seltzer noted that the variety and flexibility founded on technology that permits the sharing of individual music libraries do not always exist in "DRM [Digital Rights Management] wrapped devices." In response, Ms. Seltzer suggested a system of blanket licensing to compensate artists, in which individual users pay a fixed rate to a collecting entity to compensate artists.

Fair Use and the Challenge of New Technologies

The third symposium panel, "Fair Use and the Challenge of New Technologies" addressed the Fair Use Doctrine in light of new digital environments. Professor **Tyler Ochoa** of Santa Clara University School of Law moderated the discussion concerning the challenges new technologies place on the law. The panelists, **David Anderman**, **Andrew P. Bridges**, and **Michael Ramsay**, each represented a different background and viewpoint, which led to a lively and entertaining debate.

Mr. Anderman is the director of corporate business affairs at Lucasfilm, Ltd. Mr. Bridges is a partner at Wilson Sonsini Goodrich & Rosati LLP and currently represents ClearPlay, Inc. in a copyright and trademark suit challenging ClearPlay's DVD player control software. Mr. Ramsay is Chairman and CEO of TiVo, Inc. and has tried to balance the needs of consumers with the needs of the industry in providing TiVo users with the broadest range of fair use features.

Professor Ochoa set the tone of the discussion by asking the panelists if the *Sony Betamax* case still applied to the digital video environment. One major theme emerged from the various responses. Michael Ramsey first pointed out that there is a "line in the sand" when dealing with the industry. It is ambiguous and subjective, and difficult to navigate when

trying to stay on the safe side. For example, when consumers fast forward commercials they can still see them, but if they automatically skip them, then you cross that line where the industry gets upset, as was the case with Replay TV.

Mr. Bridges agreed that there was definitely a line in the sand where the industry was concerned, and emphasized that *Sony Betamax* remains good law. He looked at *Sony Betamax* in terms of familiar technology—as people are more familiar with technology, that technology is found to constitute fair use.

The "line in the sand" applies to another context—that of edited versions of copyrighted works. This concept is unsettled and the panelists squarely debated. Andrew Bridges made the argument that ClearPlay technology automates what people can do with their remote controls by muting or skipping certain objectionable scenes. Mr. Bridges argued that fair use is not implicated because ClearPlay does not infringe since a derivative work is not created. However, Mr. Anderman pointed out that if the consumer sees the edited version every time he watches the movie, it should be considered a derivative work. In addition, Mr. Anderman asserted the First Amendment rights of the creators of the original works, and emphasized George Lucas' desire for his films to be seen as he created them.

Another minor theme emerged that is common among technology-driven industries—"adapt or die." Mr. Anderman expressed his belief that this was not a viable option. Companies that are built on intellectual property like Lucasfilm, Ltd. must have an outlet where they can make money in order to continue to create movies. There is a benefit to investing in the creation of creative content. Mr. Ramsay countered this statement by questioning why the movie industry should be treated differently than other maturing industries. All companies have to adapt, especially industries driven by technology.

Anti Circumvention Under the DMCA: A Threat to Innovation?

The fourth symposium panel, "Anti-Circumvention Under the DMCA: A Threat to Innovation," discussed the DMCA and its ban on circumvention and the production or distribution of technologies useful in circumvention. The panel focused on the anti-circumvention provisions codified in §1201 and how they gave creators too much power—the power to control not only content, but also the means of access as well. Professor **Theo Bodewig** of Santa Clara University School of Law moderated the panel. The panelists in favor of the DMCA's anticircumvention provisions were: **Michael B. Ayers**, President of Digital Transmission Licensing Administrator, Toshiba America; **Gerow D. Brill**, former General Counsel of Reveo, Inc. and former Director of Intellectual Property at Macrovision, Inc.; and **Melinda J. Demsky**, Vice President of Content Protection Litigation, Fox Entertainment Group. Professor **Jennifer Urban** of the University of California, Boalt Hall, presented the opposing view.

On October 27, 1998, President Clinton signed into law legislation implementing the World Intellectual Property Organization Copyright Treaties, known as the DMCA. The DMCA provides remedies, both civil and criminal, against those who circumvent technological safeguards and tamper with copyright management information. The issue raised in

this panel was whether the DMCA has become a threat to copyright's stated goal of promoting science because of its zeal to protect copyrighted matter. Messrs. Ayers and Brill, along with Ms. Demsky, argued that the DMCA is necessary in order to protect creative works in the United States. These panelists emphasized the fact that the DMCA fosters innovation and assures that creators can generate their best content for consumers without having their work illegally copied. Professor Urban, on the other hand, was not as optimistic about the DMCA. She argued the DMCA would suppress the flow of information needed by the scientific and educational communities. In particular, Professor Urban is concerned that the DMCA's anti-circumvention provisions would obstruct encryption research, prevent legitimate reverse engineering and chill expressive activities.