Upgrade copyright law for digital age

By Pamela Samuelson

Did you ever imagine you could be held liable for copyright infringement for storing your music collection on your hard drive, downloading photos from the Internet or forwarding news articles to your friends? If you did not get the copyright owner’s permission for these actions, you could be violating the law. It sounds absurd, but copyright owners have the right to control reproductions of their works and claim statutory damages even when a use does not harm the market for their works.

The statutory damage rule of U.S. copyright law originally designed to provide some compensation to copyright owners when harm from infringement was difficult to prove. U.S. law authorizes judges and juries to award such damages in any amount between $750 and $300 per infringed work and up to $50,000 per work if the infringement is deemed willful—without proof of any actual harm. The statute says the award should be “just” but provides no guidance about what this means. In one extreme case, a jury ordered an individual file sharer to pay nearly $2 million in damages for illegally downloading 24 songs. Is that really “just”?

The statutory damage rule might have made sense in the 1960s, when the copyright law was drafted. Back then, copyright matters only to professional authors, publishers and the like and mainly was designed to deter commercial-scale infringements. The copyright landscape has, however, changed radically since then.

Copyright law today touches the lives of ordinary people in ways that were unimaginable in the 1960s because advances in computing and communications technologies have transformed how we use and access content, most of which is copyrighted automatically by law. Millions of ordinary people also are becoming authors of user-generated content, such as videos, digital photographs and blogs, which they share on Web 2.0 platforms. This makes them copyright stakeholders, although the law was not drafted with them in mind, and it does not meet their needs.

Moreover, virtually every firm today has some copyright asset it wants to protect, such as a logo, an advertising motif, software, databases or website content. They have become copyright stakeholders, too.

Technological advances have destabilized many traditional copyright industries sectors because the economies of creating, publishing and disseminating information-rich works have dramatically changed. Many copyright industry groups have been slower to see the problem than the risk of the new digital environment. Perhaps the most troublesome phenomenon of the current era is peer-to-peer file-sharing of commercially valuable music and movies. Although the recording industry has sued more than 30,000 individual file sharers and has succeeded in convincing courts that file sharing is illegal, the practice has not subsided. Several copyright experts have endorsed a licensing solution to this problem, but Congress has yet to seriously consider it.

Unfortunately, some entertainment industry executives are pressing for adoption of a “three strikes” policy under which people would be kicked off the Internet if they are caught infringing three times. That would be a bad idea. With so many new participants and technologies in the copyright system, it is time for copyright law to receive an upgrade. It must become more flexible to accommodate new uses and technologies. It must also become simpler, so that everyone who creates and consumes copyrighted works can understand and use the law effectively without having to call a lawyer every time they want to download a file from the Internet.

Pamela Samuelson is a distinguished professor of law and director of the Berkeley Center for Law & Technology at UC Berkeley School of Law. She convened a group of legal experts over the past three years to draft reforms to U.S. copyright law. The project’s proposals, in a report titled "The Copyright Principles Project: Directions for Reform,” will be released this week and can be seen at links.sfgate.com/ZKKK.
FROM THE COVER

COPYRIGHT'S
FUTURES

Law profs
draw on
comic talents

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The comic we are currently writing — "Theft: A History of Music" — from which these pages are adapted, is a 5,000-year-long history of music borrowing, written in the hope of bringing some historical perspective to today's music wars.

James and Jennifer research, write and design the comic, and our brilliant artist and fellow law professor, Keith Aoki, draws the panels.

James Boyle is William R. Reynolds Professor of Law at Duke Law School. His most recent book is "The Public Domain: Enclosing the Commons of the Mind."

Jennifer Jenkins is the director of the Center for the Study of the Public Domain at Duke Law School. She has written about the effects of intellectual property law on documentary film and on fashion.

Keith Aoki is a professor at the UC Davis King Hall School of Law and a cartoonist who overs the work of such names as Jaime Hernandez, Scott McCloud and Jack Kirby. He earned song, ago that "you can take the way away from the comics, but you can't take the comics out of the way."

TODAY'S HEATED DEBATES ON COPYRIGHT PRESENT TWO UNATTRACTIVE CHOICES.

ON ONE SIDE, THE CONTENT INDUSTRIES - MUSIC, PUBLISHING, FILM - CLAIM THEY NEED EVER FINER CONTROL OF OUR ENGAGEMENT WITH THEIR PRODUCTS AND OUR USE OF TELECOMMUNICATIONS TOOLS.

THE ASSUMPTION HERE IS SIMPLY TO MAINTAIN THE SAME LEVEL OF CONTROL OF THE MARKET AS THE COST OF COPYING FALLS. THE LEVEL OF LEGAL AND TECHNOLOGICAL CONTROL MUST INCREASE. TAKEN TO ITS EXTREME, WHEN COPYING COSTS HIT ZERO, CONTROL MUST BE ALMOST TOTAL. BUT RE-MAKING OUR NETWORKS AND DEVICES TO CONTROL THEM MORE TIGHTLY HAS WORRYING IMPLICATIONS FOR PRIVACY AND FREE SPEECH.

ART ACTA IS A TREATY THAT WILL CHANGE INTELLECTUAL PROPERTY RULES WORLDWIDE. ITS TEXT IS CLASSIFIED ON GROUNDS OF "U.S. NATIONAL SECURITY"

DRAININGS ADAPTED FROM THE MANUSCRIPT OF "THEFT: A HISTORY OF MUSIC," A GRAPHIC NOVEL EXPLI...
WILL IT BE A FUTURE OF DIGITAL REVOLUTION,
OF TOTAL LAWLESSNESS??

AUX ARMES, CITOYENS!

Rise up and take back our music!
And their music too!!!

Liberté, égalité, downloading!
Storm the firewalls!

I have, like, a human right to
listen to stuff you wrote!

THE ALTERNATIVE, WE ARE TOLD, IS A WORLD
OF DIGITAL ANARCHY,
WITH NO SUPPORT
FOR CREATIVITY.
NOT A GOOD CHOICE!

BUT MUCH OF THE
INDUSTRY AGENDA -
FOR EXAMPLE,
RETRIBUTIVE
COPYRIGHT TERM
EXTENSION -
DOES NOTHING
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IT IS EASY TO SLIDE
FROM LEGITIMATELY
PROTESTING
ILICIT COPYING
TO DEMANDING
THAT THE STATE
SUPPORT YOUR OLD
BUSINESS MODEL, OR
CRIMINALIZE NEW
TECHNOLOGIES THAT
MIGHT BE USED TO
INFRINGEMENT.

IN THE 21ST CENTURY,
COPYRIGHT LAW
AFFECTS EVERY CITIZEN.
IT CAN NO LONGER
BE WRITTEN AS A
CONTRACT AMONG
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THAT MEANS MORE
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OF THE FREE AND
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COMIC BOOK
DYSTOPIAS ARE NO
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RING THE HISTORY OF MUSICAL BORROWING FROM PLATO TO HIP HOP. HTTP://THEPUBLICDOMAIN.ORG/THEFT

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Copyright wars: Total control or digital anarchy?
Commentary and comics — Pages M5 and M6
Upgrade copyright law for digital age

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Perhaps the most troublesome phenomenon of the current era is peer-to-peer file-sharing of commercially valuable music and movies. Although the recording industry has sued more than 30,000 individual file sharers and has succeeded in convincing courts that file sharing is illegal, the practice has not subsided. Several copyright experts have endorsed a licensing solution to his problem, but Congress has yet to seriously consider it.

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Damage awards

Jammie Thomas-Rasset (left) was found guilty by a jury in Minnesota in 2007 of illegally sharing music files and in 2009 of violating several music copyrights.

"The Copyright Principles Project: Directions for Reform," of which Pam Samuelson is a co-author, explores 25 ideas for copyright reform. They include:

- Modernize copyright office: Instead of one registry for all copyrighted works, certify registries run by third parties for photos, films, computer programs and more. The model is akin to the domain name registration system.
- Refine scope of exclusive rights: Weigh commercial value when determining whether someone's exclusive right has been infringed. This shields non-harmful activity from the threat of highly punitive copyright claims and commercial harm.
- Limit damage awards: Guidelines for awarding statutory damages need to be consistent and reasonable.
- Reform judicial infringement tests: Courts apply different tests to assess copyright violations, leading to mixed interpretations of complex copyright law. Develop consistent tests to ensure greater coherence in rulings.
- Limit orphan works liability: Enable libraries and others to preserve a part of our cultural heritage by allowing greater use of orphan works—copyrighted materials whose owners can't be found.
- Create "safe harbors": Protect online service providers from excessive damage claims if they undertake reasonable, voluntary, measures to discourage peer-to-peer file-sharing. Providers that comply would be shielded from liability for user infringements.

Revamping copyright law
Copyright's Future

Law profs draw on comic talents

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Today's heated debates on copyright present two unattractive choices.

On one hand, the content industries -- music, publishing, film -- claim they need ever finer control of our engagement with their products and our use of telecommunications tools.

The assumption here is simple, to maintain the same level of control of the market, as the cost of copying falls, the level of legal and technological control must increase, taken to its extreme. When copying costs hit zero, control must be almost total.

But re-making our networks and devices to control them more tightly has worrying implications for privacy and free speech.

"ACTA is a treaty that will change intellectual property rules worldwide. Its text is classified on grounds of U.S. national security."

Copyright's Future

So it comes down to the future. Our future. The future of copyright, but which future will it be???

Will it be the world of Total Control?

Winston Smith!!

You tried to play a song on someone else's telescreen....

You sang a song in the shower....

That's three strikes, Mr. Smith. To receive your punishment...

Proceed to room 1201, Art required.

Not Room 1201!!

Also, ACTA doesn't change domestic law and we have always been at war.

DRA

Drawings adapted from the manuscript of "Theft: A History of Music," a graphic novel expl...
WILL IT BE A FUTURE OF DIGITAL REVOLUTION, OF TOTAL LAWLESSNESS??

AUX ARMES, CITIZENS!
RISUP AND TAKE BACK OUR MUSIC AND THEIR MUSIC TOO!!

LIBERTÉ, ÉGALITÉ, DOWLOADING! STORM THE FIREWALLS!

I HAVE, LIKE, A HUMAN RIGHT TO LISTEN TO STUFF YOU WROTE!

THE ALTERNATIVE, WE ARE TOLD, IS A WORLD OF DIGITAL ANARCHY, WITH NO SUPPORT FOR CREATIVITY. NOT A GOOD CHOICE!

BUT MUCH OF THE INDUSTRY AGENDA - FOR EXAMPLE, RETROSPECTIVE COPYRIGHT TERM EXTENSION - DOES NOTHING TO ENCOURAGE CREATIVITY.

IT IS EASY TO SLIDE FROM LEGITIMELY PROTESTING ILICIT COPYING TO DEMANDING THAT THE STATE SUPPORT YOUR OLD BUSINESS MODEL, OR CRIMINALIZE NEW TECHNOLOGIES THAT MIGHT BE USED TO INFERENCE.

IN THE 21ST CENTURY, COPYRIGHT LAW AFFECTS EVERY CITIZEN. IT CAN NO LONGER BE WRITTEN AS A CONTRACT AMONG INDUSTRY GROUPS.

THAT MEANS MORE DEMOCRATIC DEBATE, LESS SECRECY AND A GREATER ATTENTION TO THE BALANCE BETWEEN THE REALM OF THE FREE AND THE REALM OF THE CONTROLLED.

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