Copyright Ruling Rings With Echo of Betamax

Sandra Day O'Connor was a deciding vote in a 1984 Supreme Court decision that permitted people to tape television shows.

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Before Napster and LimeWire, before Megauploads and the Pirate Bay, media companies’ epic struggle against copying, piracy and generally losing control over their creations can be traced to a legal fight more than 30 years ago over a device that has long since passed on to the great trash heap in the sky: the Sony Betamax.

When the Betamax videocassette recorder hit American living rooms in 1976, consumers, for the first time, could tape their favorite TV shows and watch them later. Hollywood hated it.

“The VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone,” Jack Valenti, the garrulous head of the Motion Picture Association of America, told Congress.

The Supreme Court almost bought the argument that...
because it was illegal to copy shows without the copyright holder’s consent, the Betamax must be an accessory to crime. At the last minute, however, Justice Sandra Day O’Connor changed her mind. In a 5-to-4 ruling in 1984, the technology survived.

Foiling another attempt by studios to control the emerging videocassette market, Congress refused to forbid the renting or reselling videotapes of movies for profit. Blockbuster, Netflix and Redbox would be protected by copyright law’s doctrine of “first sale.” If they had bought it, they owned it.

The decisions had enormous implications for the media economy. The VCR gave way to the DVD player and the digital video recorder. Videotape gave the kiss of life to the low-budget independent film. From “Rip. Mix. Burn.” to YouTube, every step of the evolution of digital media has been affected by that decision.

Last week, the Supreme Court made another call that could have equally far-reaching implications. The ruling referred only to printed books, another technology that predates the Internet. Yet it, too, is likely to reshape the information economy in unexpected ways.

In a 6-to-3 decision, the court took sides with Supap Kirtsaeng, a Thai math student at Cornell who generated roughly $900,000 in revenue reselling in the United States cheap textbooks that his friends and relatives sent from Thailand.

John Wiley & Sons had argued that Mr. Kirtsaeng was infringing on its copyright by importing the books without permission. The publisher said this short-circuited its ability to segment markets by price — selling the books more expensively to American students than to poorer Thai students who could otherwise not afford them.

But the court held that the publisher’s right to ban imports was trumped by Mr. Kirtsaeng’s right of first sale. He might not be able to make unauthorized copies of the books. But as with old library books or secondhand Gucci bags at a flea market, if the books had been bought legally, whether imported or sold originally in the United States, Mr. Kirtsaeng could sell them.

The decision picks at the scab of an argument that has raged since the first copyright law was enacted in 18th-century Britain: how to balance the interest of copyright holders to profit from their creations — giving them an incentive to create more — against the social goal of promoting access to the movies, books and software programs they create.

Like the Betamax decision in 1984, the Supreme Court’s ruling last week underscores the challenges placed by globalization and information technology on the very idea of protecting intellectual property. It adds to a maze of laws, legal decisions and technological barriers governing what companies and people can do with their stuff in the new economy. And it will probably change the way companies deliver media.

Is the decision good or bad?

Probably both. It depends who you are.

“`The decision is a major victory for American consumers because it allows them to shop worldwide for their copyrighted content,” wrote Gary Shapiro, the chief executive of the Consumer Electronics Association. “If the reasoning extended to pharmaceuticals, for example, Americans would no longer be the chumps who pay the highest prices in the world simply because they’re not allowed to shop overseas where prices are lower.”

Others were not so elated. “Software authors will have little incentive to price their
programs for foreign markets if they can simply be resold in the United States, and thereby undercut the price of the domestic version,” said the Business Software Alliance in a brief to the court. “Foreign consumers will be deprived of a product that would be useful to them and authors will have fewer resources to innovate for both domestic and foreign markets.”

Besides cheap textbooks on Craigslist and e-Bay, the decision will probably bring a bunch of imports to the aisles of Target and Costco, said Keith Kupferschmid, vice president for intellectual property policy and enforcement at the Software and Information Industry Association.

More than two years ago, after Justice Elena Kagan’s recusal, the court deadlocked on whether Costco could claim a first-sale right to resell imported Omega watches against Omega’s will. Now we know it can go ahead.

Publishers may abandon segmentation and start selling at the same price everywhere. Or they may find other ways to segment markets — perhaps printing foreign books on cheaper paper.

More profoundly, the decision might even hasten the near-demise of print — spurring publishers into a digital world where they can license their books rather than sell them, adding some bells and whistles while gaining some protection from the first-sale clause.

The decision does not automatically let entrepreneurial Americans import any cheap stuff they find overseas for resale at home. Drugs, for instance, are protected by patents rather than copyright. Re-importation is also barred by other regulations. Yet if the Betamax decision serves as precedent, the repercussions are likely to extend beyond the publishing industry.

Studios use software locks to ensure that a DVD sold in one market won’t play on another’s machine. The Digital Millennium Copyright Act forbids tampering with the locks, in the name of combating piracy. Yet this could be challenged as a violation of the doctrine of first sale.

Items that are provided under license — a list that includes songs on iTunes, e-books for the Kindle and most software packages — could also be vulnerable to the new reasoning as the concept of a license is tested in courts.

In the summer, a German court ruled that first sale did apply to licensed Oracle software. In its brief, the Business Software Alliance said that the argument that software licenses were shielded from first-sale rights “does not provide any meaningful comfort.”

And while digital products today are supposedly not covered by the first-sale provision, a Web site called ReDigi already runs a secondhand market for digital content. Capitol Records has sued ReDigi, a Massachusetts start-up, in a New York court. A decision is pending, but the judge refused to grant an injunction that would have closed down the site. Amazon has gotten a patent for a secondhand digital marketplace. And Apple applied for one earlier this year.

Some potential changes are worrisome. If publishers drop market segmentation by price, revenue will decline and books may become unaffordable in many countries, reducing legal access and encouraging piracy.

“The first potential losers are the students and educators around the world who lose access to American educational materials,” said Tom Allen, head of the Association of American Publishers.

The appearance of secondhand markets for digital goods may encourage creators to create digital products that degrade over time. Technological locks may keep some services out of some markets entirely.
But on the bright side, resales of digital products could expand access to the digital economy for lower-income Americans. And the move toward licensing over sales will lead to more innovative, customized digital products and services that are not easily pirated or resold.

The publishing, media and software companies that are now in so much of a tizzy over the Supreme Court’s decision may even find a way to profit from the new world. Despite Mr. Valenti’s fears, by 2000, half of Hollywood’s revenue came from the sale and rental of prerecorded videos and DVDs.

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