Online Music and Intellectual Property in the Digital Age

Frank Field
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(Online) Music Sharing - Napster et al.

- What Is It?
  - A Criminal Act?
    - Or Not?
  - An Unprincipled Taking?
    - Or Not?
  - An Unethical Practice?
    - Or Not?

- What Is Going On?

- “Ice-T’s Take On Napster, the Law and Morality;”
  Laura Holson; New York Times; August 7, 2000
Plan of Attack

- Given The Current Rhetoric, Start With the Legal Domain
  - Copyright Law
  - Origins, History and Policy Basis
- Music and Online File Sharing
  - The Market
  - The Business
  - The Technology and Its Role
- Framing The Problem
  - Lessig's Architecture Paradigm
  - Policy Questions

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Intellectual Property - Copyright - Title17, US Code

- Chapter 1: Sec. 102. Subject matter of copyright: In general
- (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
  - (1) literary works
  - (2) musical works, including any accompanying words;
  - (3) dramatic works, including any accompanying music;
  - (4) pantomimes and choreographic works;
  - (5) pictorial, graphic, and sculptural works;
  - (6) motion pictures and other audiovisual works;
  - (7) sound recordings; and
  - (8) architectural works.
- (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.
A Closer Look At What It Covers

- Title 17; Chap. 1; Sec. 102. Subject matter of copyright: In general
  
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What An Odd Idea - Why Does It Exist?

- Not A Natural Right
  
  > Note: Continental concept of “droit d’auteur”

- The Right To Intellectual Property Is A So-Called “Legislated Right”
  
  > Exists Only As A Matter Of Law
  
  > Among the Most “Strictly Constructed” of Rights

- Has Led To An Interesting History

- Inextricably Tied Up In Technology, Starting With The Printing Press

- Also Inextricably Tied Up In Concepts Of Distribution

- Finally, A Construct Of Government Policy
  
  > In Fact, Derives Specifically From A Specific Constitutional Mandate

- All The Elements!!!
Historical Context - Where Does Copyright Come From?

- Printing Invented: 1445; Gutenberg press
  - Wide dissemination of ideas;
  - not always those that supported the government or the church
- Middle of 16th century - Legislation to prevent the publication and distribution of seditious, heretical or treasonable works
  - 1547 - Edward VI grants monopoly to King's printer for certain works
  - 1556 - the Stationer's Company established
    - Charter granted monopoly over printing and powers to enforce
    - Inspection of content, customs officials, etc.

Historical Context - (continued)

- 1637 - codification of printing by Star Chamber
  - Registration of works
  - Certification of legitimacy and lack of heretical content
  - Attribution of author and publisher
  - Copies of the book must be supplied to Bodley Library at Oxford
- 1694 - expiration of monopoly grant
  - Collusion among the Stationer's Council to limit output, what was printed
- 1707+ - External Competition from the Scots to break the monopoly
- New law - English Copyright - Statute of Anne - 1709/10
Innovations in the Statute of Anne

- Legal protection for consumers of copyrighted works
  - Curtailment of the term of copyright
    - (Stationer’s Company Essentially Held Copyright In Perpetuity)
    - Effective Monopoly On What Would (and Could) Be Published
  - Creation of a "public domain" for literature
    - Copyright Only For New Works
    - Limited Term
    - Limited Copyright To Power To Print, Publish and Sell
      (i.e., control of the copy is relinquished once sold)
  - Copyright Belonged To The Author/Creator

- Final Legal Challenges Resolved - Donaldson v. Beckett, 1744

- Essential Principles Maintained To Date

Intellectual Property - Basis In US Constitution

- Section. 8. The Congress shall have Power
  - To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; ....;
  - To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,...

- Note The Utilitarian Language
  - Contrasts With Continental Concept of “droit d’auteur”
Founding Fathers - George Washington

The advancement of agriculture, commerce, and manufactures by all proper means will not, I trust, need recommendation; but I can not forbear intimating to you the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad as to the exertions of skill and genius in producing them at home, and of facilitating the intercourse between the distant parts of our country by a due attention to the post-office and post-roads.

Nor am I less persuaded that you will agree with me in the opinion that there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impressions so immediately from the sense of community as in ours it is proportionately essential.

First State of the Union Address

Founding Fathers - Thomas Jefferson

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.

Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

... The exclusive right to invention [is] given not of natural right, but for the benefit of society
Copyrights - Title 17, US Code - Table of Contents

Chapter 1--Subject Matter and Scope of Copyright
Chapter 2--Copyright Ownership and Transfer
Chapter 3--Duration of Copyright
Chapter 4--Copyright Notice, Deposit, and Registration
Chapter 5--Copyright Infringement and Remedies
Chapter 6--Manufacturing Requirements and Importation
Chapter 7--Copyright Office
Chapter 8--Copyright Arbitration Royalty Panels
Chapter 9--Protection of Semiconductor Chip Products
Chapter 10--Digital Audio Recording Devices and Media
Chapter 11--Sound Recordings and Music Videos
Chapter 12--Copyright Protection and Management Systems
Chapter 13--Protection of Original Designs

Code of Federal Regulations
Title 37 -- Patents, Trademarks, and Copyrights
Chapter II - Copyright Office, Library of Congress

Subchapter A--Copyright Office and Procedures

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<td>Mask work protection</td>
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<td>Protection of vessel hull designs</td>
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Subchapter B--Copyright Arbitration Royalty Panel Rules and Procedures

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<td>260</td>
<td>Use of Sound Recordings in a Digital Performance</td>
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Title 37, Part 255: Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords

- Sec. 255.3 Adjustment of royalty rate.
  - (a) For every phonorecord made and distributed on or after January 1, 1983, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 4.25 cents, or 0.8 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (b) through (m) of this section.
  - (b) For every phonorecord made and distributed on or after July 1, 1984, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 4.5 cents, or 0.85 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (c) through (m) of this section.
  - (c) For every phonorecord made and distributed on or after January 1, 1986, the royalty rate payable with respect to each work embodied in the phonorecord shall be either 5.0 cents, or 0.95 cent per minute of playing time or fraction thereof, whichever amount is larger, subject to further adjustment pursuant to paragraphs (d) through (m) of this section.

From A Small Dictum, A Mass Of Laws and Legislation

- Copyright Is Older Than The US
- Would Expect It To Be Complicated
- The Complexities, However, Come From A Surprising Number Of Sources
- As A Legislated Right, Formal Declarations Are Required
What Is Covered?

- 1790 - Books, Maps and Charts
- 1802 - Prints
- 1831 - Music
- 1865 - Photographs
- 1870 - Drama, Paintings, Drawings and Sculpture
- 1912 - Movies
- 1964, 1976 - Computer Programs
- 1971 - Records and Tapes
- 1976 - Dance
- 1990 - Architecture
- 1998 - Boat Hull Designs

Key Copyright Rights

- 1790 - Right To Copy
- 1790 - Right To Distribute
- 1870 and 1909 - Right to Make Derivative Works
- 1856 and 1897 - Right to Public Performance (what is public)
- 1976 - Right to Public Display
- 1990 - Rights of Attribution and Integrity
- 1994 - Fixation and Trafficking in Sound Recordings and Music Videos
- 1998 - Right to Incorporate Technological Protection Measures
- 1998 - Right to Include Copyright Management Information
Infringement Remedies

- 1790 - Forfeiture of Infringing Copies
- 1790-1909 - Fixed Fines
- 1819 - Injunctions
- 1897 - Criminal Liability
- 1909 - Lost Profits
- 1909 - Infringer's Profits
- 1831 - Costs of Lawsuits
- 1909 - Attorney's Fees
- 1909 - Discretionary Remedy

Limitations, Exclusions and Compromises

- Nonprofit Musical Performances
- Radio Musical Performance in Restaurants and Small Businesses (1976)
- Compulsory Licenses (a taking of works for a predetermined fees) - music
- “Works of utility” (a chair)
- Expressions of fact (phone books)
- Ideas vs. Expression of Ideas
- Fair Use
  - Originally a judicial exception
  - Written into the statute
- Parody and Commentary
- Compromises
  - Betamax Case (Home VCR)
Why Is Copyright Law So Tortuous?

- History Is Vital To Understanding
- First US Copyright Law - 1790 - “maps, charts and books”
- 1831 - Sheet music added
  - ➤ Player Pianos (White-Smith vs Apollo - 1908)
- 1897 - exclusive right to perform
- 1909 - Compulsory licensing
  (First sale vs. subsequent)
  - ➤ Radio - for profit?
- 1923 - Bamberger case - ASCAP
  - yes, for profit
- 1972 - Recordings can be copyrighted
  - “phonorecordings” (versus “music”)
- 1984 - Digital recordings
- 1992 - Fair use; fees on digital recording media and devices
- 1994 - Internet Issues

A race between legislated rights and technological advance!

Another Reason - Process Of Copyright Legislation

- Not Quite As Outlined In Simple Civics Books
- Small, But Vocal Constituency With Each Rewrite
  - ➤ Whose Ox Is Gored?
- Congress Largely Referees The Making Of The Legislation
- Actually Written By Committees Composed Of Affected Members
  - ➤ Publishers
  - ➤ Distributors
  - ➤ Others As Specified By Congress
- A Negotiated Document
Consider, for example, Copyright Terms

<table>
<thead>
<tr>
<th>Year</th>
<th>Term</th>
<th>Mickey Mouse</th>
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<tbody>
<tr>
<td>1790</td>
<td>14; maybe 28</td>
<td>n/a</td>
</tr>
<tr>
<td>1831</td>
<td>42</td>
<td>n/a</td>
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<tr>
<td>1909</td>
<td>56</td>
<td>n/a</td>
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<td>1962</td>
<td>59</td>
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<td>1965</td>
<td>61</td>
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<td>1967</td>
<td>63</td>
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<td>44</td>
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<td>1974</td>
<td>70</td>
<td>46</td>
</tr>
<tr>
<td>1976</td>
<td>75</td>
<td>48</td>
</tr>
<tr>
<td>1998</td>
<td>95</td>
<td>70</td>
</tr>
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Corporate Influences: Lobbying and Negotiation

- “Steamboat Willie,” Debut of Mickey Mouse, 1928
- Note importance of ~25 years in these trends
- May have been latent at outset
- Pattern became too obvious to miss
- 1998 Statute: “Sonny Bono Copyright Term Extension Act”
  a/k/a
  “Mickey Mouse Protection Act”
Evolution Of The Governing Principle

- Early Copyright
  - Protection of Distribution
  - Assurance of Dissemination of Ideas
  - Enrichment of the “Intellectual Commons”

- Distribution Has Increasingly Been The Focus
  - Lots Of Money To Be Made

- Increasingly, Copyright Arguments Have Suggested The Need To Provide Economic Incentives For Innovation and Innovative Works
  - Subtle Change
  - Changes The Nature Of The Debate
  - At The Margin, A More Protective Scheme Will Always Add A New Innovator
  - Loss Of “Intellectual Commons”

ARL US Copyright Timeline

- 1790 - 1st Ace - US Constitutional Mandate
- 1841 - "Fair Use" - Folson v Marsh
- 1909 Revision - "authorship", compulsory license, extension of term
- 1973 - Photocopies litigated and found OK given dissemination of information
- 1976 Revision - Preempted earlier acts to meet Berne Convention - Fair Use made a part of the law - photocopying for scholarship okayed - libraries a focus
- 1976 - Not In law, but agreement that classroom/educational copying okayed
- 1976 - CONTU Process - New technologies and fair use
- 1990 - Prohibition of commercial lending of computer software
- 1991 - Basic Books v Kinko’s - classpack photocopying for profit is not fair use
- 1991 - Feist v Rural - copying information from one phone book to make another is not infringement
- 1992 - Copyright renewal automatic
- 1994 - Parody upheld as fair use
- 1996 - Princeton v. Michigan Document; overruling Basic Books v Kinko’s - photocopying coursepacks for profit is fair use
- 1998-Digital Millenium Copyright Act
  - Anti-circumvention
  - Digital Copies
The Maze Of Copyrights

- First Distinction
  - A "Song"
  - A "Sound Recording"

- Second Distinction
  - Reproduction Right
    - Making Copies
  - Public Performance Right
    - Owned By the "Song" Owner
    - Not Owned By the "Recording" Owner
    - Changed in 1995 to add "digital audio transmission"

- Compulsory License (Section 115)
  - If a recording has been distributed in the US,
  - The owner of a song must license the use of the song at a legislated rate
  - (No rate has been yet set for digital phonorecordings)

US Code: Title 17, Section 106 (as of 1/23/2000)

Sec. 106. Exclusive rights in copyrighted works
Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, Including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. (added Digital Performance Rights in Sound Recordings Act of 1995)
The Actors

- Record Companies
  - Contracts With Recording Artists
  - Financing, Promotion and Distribution of Recordings
  - Royalty Payment To Artists
- ASCAP/BMI/SESAC
  - “Performance Rights Societies”
  - Representation of Publishers and Songwriters wrt Performance Licensing
  - “Songs” not “Song Recordings”
- Music Publisher
  - Contracts With Songwriters
  - Commercial Exploitation of Songs
  - Licensing for
    - Recordings
    - Sheet Music Printing
    - Public Performances, Live and Recorded
- Harry Fox Agency
  - Licensing Agency
  - Specifically To Record Companies for Music Publishers
  - For Reproduction of “Songs” as Phonorecordings
  - Compulsory Licensing Arrangements

The Actors (continued)

- Recording Industry Association of America
  - Trade Association
  - Promotion of Record Company Interests
  - Current Head: Hillary Rosen
  - Aggressive Anti-Piracy and Intellectual Property Protection Efforts
- The Recording Artists Themselves
  - Prince
  - Courtney Love
  - Janis Ian
  - Don Henley & The Recording Artists Coalition
  - Metallica
A Complex Structure of Relationships

- Creators of Intellectual Property
  - Composers
  - Performers
  - Arrangers
- Distributors of Intellectual Property
  - Music Publishers
  - Phonorecording Manufacturers
  - Performers
  - Broadcasters, etc.
- Consumers of Intellectual Property

Music Licensing Structures - Current Non-Digital

(“simplified”, focus on music delivery & mechanical reproduction)
Music Licensing Structures - Digital Phonorecord Issues

- Record Companies — Digital Copies, Persistent Or Otherwise, Are As Good As The Original - Could Displace CD Sales - Added To The 1995 Law
- Harry Fox — Digital Copies, Persistent Or Otherwise, Are “Mechanical Reproductions” - Thus, Copying Licenses Must Be Paid
- ASCAP/BMI/SESAC — Digital Distribution Is A “Public Performance” - Thus Performance Licenses Must Be Paid

Why All These Extra Lines?