WHY THE ENTERTAINMENT INDUSTRY'S COPYRIGHT FIGHT IS FUTILE

By Peter K. Yu

Introduction

U.S. Representative Howard Berman introduced a bill in July 2002 that, if enacted, would strengthen copyright protection in an extraordinary way. The bill would allow movie studios and record companies to hack into personal computers and peer-to-peer file-sharing networks if they suspect that infringing materials are being circulated.

Although this bill is controversial, it is hardly surprising to those who follow the entertainment industries closely. Rather, it represents the latest attack—or defense—by the motion picture and recording industries in the ongoing copyright war.

So far, the industries have been winning. Among their trophies include the enactment of the Digital Millennium Copyright Act, which imposes civil and criminal liability for the circumvention of copy-protection technologies; Vivendi-Universal's purchase of MP3.com; the movie studios' victory in litigation over DeCSS, a software tool that allows the copying of encrypted DVDs; and the recent bankruptcy of Napster (and its earlier acquisition by Bertelsmann).

Notwithstanding these victories for the entertainment industries, the war is expanding and has become even more difficult for the industries to fight than it was a year ago. Today, copyright law is no longer a complicated issue that is of interest and concern only to copyright lawyers, legal scholars and technological developers. Rather, it is a matter of great significance to the general public, affecting all of us in our daily lives.

As a result, the ground has shifted. If the entertainment industries do not pay attention to the public and if they continue to use their ill-advised battle strategies, they might eventually lose the war.

Battle Strategy No. 1: Lobbying

The copyright industries have faced challenges from "new" technologies in the past—think, for example, of their early opposition to videocassette recorders. Today, however, digital technology is different. Unlike analog technology, digital technology enables consumers to make exact replicas of the copyrighted work without losing any quality. Thus, rather than dealing with low-quality, amateurish cassette tape recordings, copyright infringers can now produce exactly what CD stores offer.

In light of this challenge, copyright holders are understandably concerned about their continued ability to control and exploit creative works. To protect themselves, the entertainment industries lobbied Congress heavily for special protection for works disseminated on the Internet.

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), which strengthens copyright protection in the digital medium. It includes a provision prohibiting the circumvention

of encryption technology copyright holders use to protect their creative works. It also includes a provision preventing others from releasing information about how to defeat copy-protection technologies.

Since its enactment, the DMCA has been used to prevent the posting on the Internet of information about how to circumvent encryption technology and to prevent researchers from disseminating their latest research in the area. For example, the publisher of hacker magazine 2600 was enjoined from posting on his website the computer code that cracked the encryption technology used in protecting DVDs. Likewise, a Russian cryptographer was arrested after giving a presentation on his company's software that removed security protection from Adobe e-books. (Although the charges against the programmer later were dropped, his company still faces prosecution.)

Moreover, the statute has created a chilling effect. For fear of prosecution under the statute, several scholars and researchers have decided not to give presentations about their latest research on how to circumvent encryption technologies.

In sum, the DMCA has raised concerns about free speech, corporate censorship and the statute's ability to stifle innovation. Small wonder that the law is now facing heavy criticism from legal scholars, college researchers, cryptographers, technology developers and civil libertarians—many of whom would hardly be considered pirates. Even some in the technology industry, which originally supported the legislation, have expressed regret and disappointment over the development and interpretation of the DMCA. In short, this law seems to satisfy only the entertainment industries.

Battle Strategy No. 2: Litigation

Apart from lobbying, the copyright industries have been actively taking—or threatening to take—legal action against those who infringe upon their rights granted under the copyright statute. Although it is difficult and expensive to go after individual pirates, the industries have had phenomenal success in lawsuits against companies operating file-sharing networks, forcing most of them into shutdown, sale or bankruptcy.

For instance, the recording industry successfully sued MP3.com, which allowed patrons to play a CD over any computer—not just the one on which its contents were saved—as long as the patrons demonstrated that they owned—or borrowed—the relevant physical CD. To make this service possible, the site created an MP3 library by copying music into its servers, from which users could access a copy of the same songs they already owned and stored elsewhere.

Ultimately, MP3.com lost the case, on the theory that it reproduced copyrighted sound recordings without the authorization of the copyright holders. Shortly after its defeat in court, MP3.com was taken over by Vivendi-Universal, one of the major plaintiffs in the MP3.com litigation.

In another well-known lawsuit, the recording industry sued Napster for contributory and vicarious copyright infringement. The case against Napster was more complicated than the case

against MP3.com because Napster did not reproduce copyrighted works itself. Rather, it facilitated unauthorized copying, downloading, transmission and distribution of the copyrighted works by others.

Napster lost the case in the district court and appealed to the U.S. Court of Appeals for the Ninth Circuit. Although the Ninth Circuit found that Napster was capable of commercially significant noninfringing uses, it affirmed the district court's decision. On remand, the district court ordered Napster to police its system and to block access to infringing material after it was notified of that material's location. Unable to do so, Napster shut down its service in July 2001. It was subsequently purchased by Bertelsmann and recently filed for bankruptcy protection.

On the surface, the copyright industries seem to be winning the war. As many commentators noted, the MP3.com and Napster litigation signified the end of the Wild Wild West era.

However, if one looks further, the Wild Wild West is even wilder than it was a year ago. True, the recording industry is no longer dealing with MP3.com and Napster. However, a whole host of engines and services—such as gnutella, Madster (formerly Aimster), KaZaA, AudioGalaxy, Morpheus/MusicCity, Grokster, iMesh, Filetopia, BearShare and LimeWire—has emerged, and these "successors" can be used for the very same purposes as Napster.

Even worse, from the industry's perspective, unlike MP3.com and Napster, many of these engines and services do not have centralized servers. Rather, they allow people to transfer files among various locations. Thus, enforcement has become a major problem, and the outcome of these battles becomes even harder to predict. Napster could be forced to shut down its server, but what exactly can be done to deal with gnutella and its uncountable successors?

Battle Strategy No. 3: Copy-Protection Technologies

The final strategy the entertainment industries use is the deployment of copy-protection technology. By encrypting copyrighted works, the industries can prevent the general public from reproducing their products without authorization. After all, it takes a tremendous amount of skill and time for an ordinary user to crack the copy-protection technology.

The problem, though, is that once hackers defeat the technology, the general public can take advantage of the hackers' breakthrough and make copies without the copyright holder's permission. To prevent the public from doing so, the copyright holders must constantly upgrade their encryption technology. Such upgrading would, in turn, attract even more attention from hackers, who are just too eager to crack the latest encryption technology available.

Ultimately, this battle strategy would create a vicious cycle in which the entertainment industries and the hacker community are engaged in an endless copy-protection arms race. Instead of devoting resources to develop artists and improve products, the industries would, instead, invest their resources in developing encryption technology and in preventing consumers from accessing copyrighted works. This strategy hurts artists, the industry and consumers.

Moreover, the increased use of encryption technologies to protect copyright has sparked concerns among consumer advocates and civil libertarians. An encrypted CD may not function the same way as a conventional CD. Previously available functions, including those to which consumers may have a legal right—under the "fair use" privilege in the copyright law—may no longer exist. Even worse, an encrypted CD might not be playable on car stereos, some PCs, and old CD players, forcing consumers to buy new ones they do not otherwise need or cannot afford.

Thus, it is not surprising that the recording industry has encountered a highly negative response—including a lawsuit by two California consumers—when Sony released Celine Dion's latest album as an encrypted CD. Indeed, some commentators have even gone so far as to argue that the recording companies need to label the CD carefully to avoid confusion and to allow consumers to choose away from these encrypted CDs.

The Futility of a Multi-Front Copyright War

Today, because of the emergence of digital technology and the Internet, peer-to-peer file-sharing networks have caused major headaches for artists, songwriters, photographers, publishers, film producers, software developers and other copyright holders. To fight pirates and protect their economic interests, the entertainment industries have deployed various battle strategies, including lobbying, litigation, and the use of copy-protection technologies.

However, instead of directing their energies toward the pirates, the copyright industries are fighting battles everywhere—against legal scholars, college researchers, cryptographers, technology developers, civil libertarians, hackers and ultimately consumers. What began as a war on piracy has now become a war against the whole world.

As historians have often noted, no country has ever won a war by fighting battles on all fronts. The copyright industries should take heed of this advice. Rather than using every weapon in their arsenal, they might be well advised to reconsider where and how they fight their battles. Of course, there is another alternative: The industries can always change their business model.

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