

Motivations behind a Role Play at CFP: Repeated Assaults on the Constitution by Extremist Property Rights Advocates

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Computer professionals have been arrested for violating the Digital Millennium Copyright Act, and some have refused to attend conferences in the United States or to publish current research because of the threat of arrest. Can we have free speech and unfettered scientific research while protecting digital content? Major players from all sides will present what's happened so far and what is likely to happen next.

This lead-in session is thirty minutes (starting at 3:45 pm) and sets the stage for the sessions that follow:

1. a panel discussion led by Barbara Simons, with

Panelists:

Alan Adler, Association of American Publishers (AAP)

Ed Felten, Professor, Princeton Univ., plaintiff in Felten v. RIAA

Robin Gross, EFF

Jessica Litman, Wayne State Univ. Law School

2. a Debate on the Future of Intellectual Property (5:30-6:30)

Debaters:

John Perry Barlow

Steve Metalitz, International Intellectual Property Alliance

LEAD-IN SESSION:

Hypothetical scenario:

At CFP2002, a role-playing scenario depicts an author from abroad starting to deliver his paper that describes a decryption algorithm that he has widely sold to individuals who have used it to break the digital-rights-management protections on various commercial software content and applications. He is arrested for violation of the DMCA. The U. S. attorney has been encouraged to make the arrest by a major industry publishing association. A well-known attorney with experience in high profile DMCA cases is engaged to defend the author. The publishing association says that it is not attacking speech but rather vigorously prosecuting violations of their intellectual property rights, and this should be a lesson not only to the arrestee, but also to the organization that sponsors the conference. A reporter for a major newspaper witnesses the whole event and interviews all the parties involved.

There is no doubt that intellectual property law is complex, subject to differing interpretations, and has numerous associated stakeholders with differing motivations and mindsets.¹ I was prompted to suggest this scenario to illustrate some of these features by the repeated and increasingly desperate actions of extremist advocates for (intellectual) property rights that attempt to stifle free expression and subvert the intent of the copyright clause of the U. S. Constitution², that was intended to protect what we now call intellectual property, but not for periods starting to approach perpetuity.

Contemporaneous examples of these actions (“panicked executives are hurling recriminations in all directions”³) include claiming ideas long since generally accepted and known^{4,5} and proposing impossible standards⁶ that clearly limit performance options (“For some material the proposed required information is simply no longer easily obtainable from the original form in which the material entered the stream of commerce. Say goodbye to ‘Oldies but goodies’ shows.”⁷) in order to prop up business models that need adjustment⁸ for the digital age.

There are real fears by those affected about the viability of an industry. “When 23 percent of surveyed music consumers say they are not buying more music because they are downloading or copying their music for free, we cannot ignore the impact on the marketplace,” according to Recording Industry Association of America president Hilary Rosen.⁹ But its spokespersons advocate only two options: agreeing “on the ingredients for creating strong protection for copyrighted films and then swiftly implement[ing] that agreement to make it an Internet reality” or else having Congress step in “to protect valuable creative works on the Net ...”¹⁰. In addition to running into counterarguments from an unswayed public,¹¹ they fail to appreciate that it is very difficult to build an uncrackable system (despite repeated demonstrations of cracking supposedly strong technical protection systems¹²) and that the incursions into free speech are becoming too strong to ignore. See, for example, the various ways of representing digital information about “cracking” the code used to secure content on DVDs¹³:

- ”C” source code

- Nonexecutable picture of the source code
- Source code in new programming language (like “C”, but for which a compiler does not yet exist. Is author liable once a compiler exists?)
- Plain English description:
- Haiku version
- Lecture notes on how the algorithm works
- Algorithm on T-shirt: Is wearing it “trafficking”?
- Dramatic reading
- Code set to music
- Code (coded) as music
- JPEG file with concealed version of algorithm

By aggressive “anti-piracy” campaigns, content owners are trying to turn all unauthorized uses into “piracy”, raising the question of “What ever happened to fair use?”¹⁴. One graduate student of mine piped up in a class discussion group posting: “I had dismissed most of these arguments as leftist, tree hugging mumbo jumbo partially because I do a lot of work with Microsoft products. However, I just found out about this issue with Windows Media Player, and it really infuriates me. ... They straight out lied in the beginning about what their media player was doing. ... In my eyes, Microsoft is trying to play “cybercop” on issues that really haven’t been decided in the courts yet. ...”

When many individuals with inclinations that would ordinarily have them lined up on the side of the property-rights holders decide that something has gone astray, it’s time to take notice. When even media giants, holders of copyrights, see a “bizarre and unhealthy state of copyright law”¹⁵, it’s time to take notice. And, indeed, recently the U. S. Supreme Court has decided to take a look at the topic.¹⁶ Courts have to date favored copyright holders over the right of public debate.¹⁷ But we may be at the beginning of the end of this period.

(Endnotes)

¹ National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age*, http://books.nap.edu/html/digital_dilemma/, 2000

² U. S. Constitution, Section 8, “The Congress shall have Power 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”, <http://www.usconstitution.net/const.txt>

³ Strauss, Neil, “Behind the Grammys, Revolt in the Industry”, New York Times, February 24, 2002, Page WK 3, <http://www.nytimes.com/2002/02/24/weekinreview/24STRA.html>

⁴ Steve Gold, “British Telecom Taking Prodigy To Court Over Hyperlinks”, December 18, 2000, Computer User, <http://www.computeruser.com/news/00/12/18/news19.html>

⁵ Laura Rohde, “British Telecom claims to have patent for hyperlinks”, InfoWorld, June 23, 2000, <http://www.infoworld.com/articles/hn/xml/00/06/26/000626hnbtpatent.xml>

⁶ Federal Register: February 7, 2002 (Volume 67, Number 26), Proposed Rules, pages 5761-5767, LIBRARY OF CONGRESS Copyright Office, 37 CFR Part 201, [Docket No. RM 2002-1]- Notice and Recordkeeping for Use of Sound Recordings Under Statutory License”, <http://www.loc.gov/copyright/fedreg/2002/67fr5761.html>

⁷ “Copyright Office NOPR, reporting requirements under DMCA ” <http://lists.elistx.com/archives/>

interesting-people/200202/msg00216.html

- ⁸ Anya Kim and Lance J. Hoffman, “Pricing Napster and Other Internet Peer-to-Peer Applications”, The George Washington University, Cyberspace Policy Institute, Report CPI-2001-02, <http://www.cpi.seas.gwu.edu/library/docs/cpi-2001-02.pdf>
- ⁹ Reuters, “Home Piracy Sends Music Business Into Funk”, Mon Feb 25 2002, 7:36 PM ET.
- ¹⁰ Jack Valenti, “Movies Get Framed”, Washington Post, February 25, 2002, Page A23
- ¹¹ “Threatened by the Net”, letters to the editor, the Washington Post, Saturday, March 2, 2002; Page A21
- ¹² “DRM Defeating Technology”, Digital Rights Management Page, Electronic Privacy Information Center, <http://www.epic.org/privacy/drm/#technology>
- ¹³ David Touretzky, DeCSS for Linux and DVD, <http://www.cs.cmu.edu/~dst/DeCSS/>
- ¹⁴ Jessica Litman, *Digital Copyright*, Prometheus Books 2001, www.digital-copyright.com
- ¹⁵ “Copyright Forever”, Washington Post editorial, March 5, 2002, page A18
- ¹⁶ Linda Greenhouse, “Justices to Review Copyright Extension”, *New York Times*, February 20, 2002, <http://www.nytimes.com/2002/02/20/national/20RIGH.html>
- ¹⁷ Pamela Samuelson and David Post, “Tutorial on Intellectual Property Law”, Computers, Freedom, and Privacy Conference, www.cfp2000.org, April 4, 2000.