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Copyright and Technology: Deja Vu All over Again

Randal C. Picker

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RANDAL C. PICKER*

The history of copyright and technology is one of conflict as each new means of distribution has emerged.[1] We have seen this repeatedly with piano rolls, the phonograph, radio, TV, cable TV, and, perhaps most recently, the Internet. As has been noted before by me and others, copyright law establishes the framework in which new tools of distribution can be introduced.[2] Copyright can kill technology, as perhaps occurred with digital audiotape and the Audio Home Recording Act of 1992.[3] And copyright itself can be changed to make possible entry as occurred when statutory licenses were introduced to deal with Aeolian's possible piano roll monopoly and to make possible the rise of cable television.

Michael Carrier considers this pattern again in his piece, "Copyright and Innovation: The Untold Story," where he focuses on the rise and fall of Napster.[4] Through a series of interviews with industry participants, Carrier argues that the technology industry—meaning here the entrepreneurs and their venture capital financers—reduced its efforts at producing new music innovations in response to litigation over Napster.[5]

As noted above, the idea that copyright doctrine matters for innovation, especially innovation in the means of distributing copyrighted works, is reasonably well recognized. The underlying

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 James Parker Hall Distinguished Service Professor of Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. I thank the Sarah Scaife Foundation and the Paul H. Leffmann Fund for their generous research support.

1. *See* Randal C. Picker, *The Yin and Yang of Copyright and Technology*, 55 COMM. OF ACM 30 (Jan. 2012).

2. *See, e.g.*, Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423 (2002) (discussing the importance of new products and services for the economy and the role of copyright in establishing entry policy for new means of distribution, such as Napster, the digital video recorder, and Web radio); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281 (2003); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004).

3. Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–10 (2006)).

4. Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891.

5. *Id.* at 893–96.

property regime almost certainly matters for the path of development forward and that will be especially the case when access to a preexisting body of copyrighted work is important for the new distribution technology. A new distribution entrant wants access to the full body of copyrighted works and the new technology will frequently make possible activities that incumbents will see as infringing. That was certainly how sheet music publishers saw piano rolls, how record companies saw radio, and how television broadcasters saw cable TV. We are in the middle of another replay of this as Aereo is attempting to disrupt the television markets.[6]

Different intellectual property regimes are likely to result in different economic paths forward. Compare development in two different societies, say the current United States and an alternative society with a copyright jubilee. In that fictional alternative, end all past copyrights and have each work currently in copyright instantly enter the public domain. Allow new copyrights to arise but kill off all of the old ones in one moment. I think that there is little reason to think that economic development in the two societies would be identical. We might imagine that we would see a strong shift in economic activity, as measured by the flow of venture capital dollars or new products as entrepreneurs sought to take advantage of the new opportunities presented by the expansion of the copyright public domain.

The real question is not whether copyright matters for innovation; the entire history of copyright and distribution technology suggests that it does. Instead, we need to focus on a more nuanced way in which particular copyright settings can matter for innovation. "The Untold Story" does very little of that. So the article is critical of the efforts of music industry incumbents to protect their positions through litigation and also critical of possible reforms to copyright suggested by academics (including by me). But the article does not really say much about how one would write a copyright statute with distribution innovation in mind.

Focus on three different copyright rules that might matter for copyright-related distribution innovation: (1) duration, (2) secondary liability, and (3) statutory licenses. The duration of copyright—currently life of the author plus seventy years—is routinely criticized, but, at least in this particular case, seems relatively unimportant. I doubt that Napster would have mattered had it been restricted to music twenty-nine years old and older. That is, had Napster been released during an era in which U.S. copyright duration was a maximum of twenty-eight years and had Napster accurately filtered in-copyright and public domain content, there is little reason to think that Napster would have been important. The

6. *See WNET, Thirteen v. Aereo, Inc.*, No. 12-2786-cv, 2013 WL 1285591, at *5 (2d Cir. Apr. 1, 2013).

early adopters of Napster were the technically savvy, young people, interested mainly in their music and not the music of a prior generation.

Copyright's secondary liability rules are perhaps the most explicit point where we see an effort to shape copyright's innovation policy as part of the organic day-to-day copyright law. We see that in both the judge-made doctrines of secondary liability and the safe harbors built into the Digital Millennium Copyright Act (DMCA).[7] Exactly how those doctrines operate undoubtedly matters for distribution innovations like peer-to-peer technology. The consumer electronics industry has long asserted that the substantial noninfringing use test from *Sony Corp. of America v. Universal City Studios, Inc.*[8] created a key safe harbor for new product developers.[9] The *Sony* safe harbor meant both that a firm need not design its product to minimize copyright infringement and that it could hope not to face liability if a relatively minimal standard was met. The DMCA's safe harbor—set forth in 17 U.S.C. § 512—has a different structure but again provides a mechanism by which tech firms can innovate without needing to gain permitted access to the underlying copyrighted works.[10]

Consider the relationship between the contributory infringement rules and statutory license rules. However we set the terms of the contributory infringement rules, the basic structure of those rules is that the distribution entrant can invest resources in meeting the standard and thereby avoid liability. That means that the entrant need not negotiate for permission to enter and need not negotiate for access to the universe of copyrighted works. To be sure, the entrant will face risks in getting the legal standard wrong, and, as the interviews in "The Untold Story" suggest, those risks pose a substantial threat to an entrant in a world of uncertain lines and just-as-uncertain litigation results.

The critical question here is how we should calibrate the tradeoffs between copyright enforcement and open-ended innovation. Both *Sony*'s test and the DMCA safe harbors tilt in favor of innovation and sacrifice the enforcement of copyright. Defenders of those regimes often focus on precisely the way in which the safe harbors enable innovation. The classic vision of Silicon Valley innovation is two guys in a garage, not two guys with their lawyer. Critics of those regimes, and "The Untold Story" points to this work, want more tailored rules to better balance protection of copyrights and innovation, but the discussion is precisely

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7. Pub. L. No. 105-304, 112 Stat. 2860, 2877–86 (codified at 17 U.S.C. § 512 (2006)).

8. 464 U.S. 417 (1984).

9. *Id.*

10. *See* § 512 (2006).

about that tradeoff and the relationship between innovation and copyright has not been lost on anybody participating in that discussion.

One interesting aspect of the current safe harbor approach is that it does not tie the standards for meeting the safe harbor to the value of the underlying copyrighted works at issue. The *Sony* test just asks whether the technology is capable of substantial noninfringing uses but nothing in satisfying that standard turns on the value of the infringement facilitated.[11] The notice-and-takedown regime in § 512 establishes a mechanical procedure for a service provider to get the benefits of the safe harbor.[12] That process does not turn on some assessment of the value of the copyrighted works at stake. That contrasts with a second mechanism by which copyright addresses innovation, namely statutory licenses, such as the so-called mechanical license in 17 U.S.C. § 115.[13] Statutory licenses represent exercises in political dealing and political power enshrined in the statute, and are likely to be calibrated to some measure of the value of the underlying works.

Return to the idea of the copyright jubilee, an unexpected abrupt declaration that all prior copyrights are ended and all of the underlying works enter the public domain. That has all the feel of a pure thought experiment, but, in reality, the peer-to-peer (p2p) technology embodied in Napster, coupled with the easy ripping of CDs on networked PCs, came close to that for recorded music, especially for young, wired consumers of music. It was not as if U.S. copyright law itself was amended to declare such a jubilee, but Napster replayed a frequent pattern in U.S. copyright history. New distribution entrants armed with new tech tools almost always want to declare a copyright jubilee as to their technology, whether that technology is a piano roll or a p2p distribution technology such as Napster. The structure of the interaction between the entrant and the incumbents is quite routine: "our piano rolls actually serve to advertise your sheet music, so we certainly need not pay you; indeed, perhaps you should be paying us."

That pattern has been examined before and undoubtedly will be again as new distribution technologies appear. As a new technology emerges, we often see uses of copyrighted works that copyright holders can legitimately challenge as infringing given the difficulties of creating a copyright law to match all new situations. That means that copyright law will proceed in fits and starts, as it has done through judge-made doctrines like secondary infringement and in episodic efforts by Congress, such as the safe harbors of the DMCA and the situation-specific statutory licenses of our current copyright statute. In

11. *See Sony Corp. of America*, 464 U.S. at 442.
12. *See* § 512(g)(2).
13. *See* § 115.

each case, both the need to enforce copyrights and to enable innovation leading to new products and services will be on the table as we try to find the right balance between encouraging the creation of copyrighted works and enabling new distribution technologies.