

## **Recent Developments In U.S. Copyright Law: Does Copyright Law Impede Innovation?**

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In January of this year, the U.S. Supreme Court issued its ruling in the famous *Eldred v. Ashcroft* case. The court decided that the 'Sonny Bono Copyright Term Extension Act,' a law that extended the term of copyright protection for another 20 years, is constitutional. The 1998 law was widely referred to as the 'Mickey Mouse Act,' since it came into existence upon persistent lobbying efforts by the powerful Hollywood lobby. The extension of the copyright term was considered important for the movie industry, since many of the cartoon characters, such as Mickey Mouse and Donald Duck that were created in the 1920s were soon bound to fall into the public domain. In addition, a variety of classic movies produced in this era stood to fall victim to the same future. In light of the fact that the European Union had extended the term of copyright protection before the United States, the Hollywood lobby found itself in the fortunate position of being able to claim that it was not only representing its own interests, but also those of U.S. musicians and authors, who – in the absence of corresponding legislation – would find themselves in a competitive disadvantage towards their European peers.

The Supreme Court's decision was considered a landmark success for the media corporations and entertainment industry, and a defeat for those opposing the continuing expansion of copyright protection. In particular, since the increase in commercial Internet use, there has been a fierce debate in the U.S. regarding the question of whether the U.S. copyright regime has begun to impede innovation by providing copyright owners with ever increasing rights to monopolize their creations. The proponents of more limited copyright protection argue that in order to create new original works, one has to be able to build upon the works of others. Thus, if access to prior works is denied or too restricted by law, the advancement of science, innovation and creativity will be significantly decelerated.

The court's decision was also regarded as supporting Hollywood's battle for more control over new technologies. The so-called 'peer-to-peer' file sharing, which enables Internet users to easily share music, movies and other digital files, with other Internet users, presents of course a significant threat to the traditional film and music business. In the meantime, the music industry has prevailed in a suit against 'peer-to-peer' icon 'Napster' by successfully asserting that the company was a contributory copyright infringer. Napster has since gone bankrupt, and a number of other 'peer-to-peer' companies, such as Kazaa and Morpheus, are very likely to face the same future.

Most recently it became clear that the Recording Industry Association of America (RIAA) is no longer only focusing its battle against peer-to-peer providers, but has since widened its litigation efforts to also include individual users of file sharing technologies. The RIAA recently succeeded in procuring a preliminary injunction against the Internet Service Provider Verizon, requiring the company to disclose the identity of an Internet user who allegedly distributed pirated copies of songs over the Internet.

In addition to peer-to-peer technologies, there are numerous other technologies troubling the content industry. For example, the Directors' Guild Association (DGA) and a number of movie studios have recently sued the Utah company ClearPlay, Inc., which offers a software product that enables DVD player owners to filter-out unwanted language or sex scenes from movies. Another technological nuisance to the industry is a new generation of digital video recorders, such as TIVO or ReplayTV, which – through so-called "time-shifting" – record TV programs and then enable viewers to bypass commercials. This of course presents a major threat to TV networks, since their traditional business model is premised on a constant stream of

advertising revenue. Thus, ReplayTV was also recently sued for contributory copyright infringement.

However, the battle for more control over content is not only taking place in front of U.S. courts. With the support of the content lobby, a number of legislative initiatives were submitted to the U.S. Congress, which – among other things – are aimed at requiring electronics manufacturers to design software, computers and other electronic products in a way, that provides for efficient tracing methods of non-authorized copying. Parallel to their efforts in the U.S. Congress, representatives of the media and entertainment industries are now increasing lobbying efforts towards the European institutions for expansion of copyright protection. Unexpectedly it appears as if that the EU decision-makers are at times less inclined to resist the demands of the content industry than U.S. decision-makers. This tendency is surprising in light of the fact that European and U.S. copyright law stem from different backgrounds. While European copyright law was developed from an author's right (*droit d'auteur*) tradition, which covers both personal and economic rights, American copyright law emerged from a utilitarian tradition, which emphasized primarily economic rights.

The request for the expansion of copyright protection incorporated in some of the most recent legislative proposals extends beyond what has already been accomplished by the Digital Millennium Copyright Act (DMCA). Critics of the very controversial DMCA, which was passed in 1998, have repeatedly warned, that the law would put a muzzle on scientists and journalists, keep foreign scientists from pursuing research in the U.S., and would undermine legitimate uses by private individuals as well as libraries. In addition, it has been argued that an increasing number of companies are using the DMCA to control the after-market of their products. A recent lawsuit by printer manufacturer Lexmark against a company producing less expensive cartridges for Lexmark printers appears to provide an illustration of this effect. In fact, a large proportion of companies quickly resort to a DMCA-action, such as Sony, which sued a hobbyist, who published additional programs for Sony's electronic puppy, Aibo. In the meantime, DMCA critics have found support by the chief of cyber-security Richard Clarke, who at the end of last year declared, that DMCA actions could impede legitimate work in the field of Internet-security.

In many instances, new technologies do in fact present a real danger to the content industry. However, in numerous occasions they also unveil opportunities to develop new sources of revenue. A frequently cited example of this is the action brought by the movie studios against Sony in the early 1980s. At that time Sony was sued for contribution to copyright infringement, which was allegedly committed by owners of the newly marketed video recorders. Ironically not long after the Supreme Court had concluded that the sale of video recorders was in fact legal, the video rental business began to flourish, which added a strong source of revenue to the film industry. Today, the video rental business greatly outperforms the theatrical release business.

There is no doubt that it is a great challenge for any legislator to create a legal framework, which protects the legitimate interests of authors and publishers while leaving enough room for innovation. The European version of the DMCA, the European Copyright Directive, has recently been implemented in Austria. Whether it will provide a fair balance of interests between those of authors, media and entertainment industry on one hand and technology companies, users of new technologies and the public at large on the other, remains to be seen.

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