



# ON COPYRIGHT

## Copyright in the networked world: copyright police

Copyright in the networked world

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### Abstract

**Purpose** – The purpose of this column is to look at how copyright enforcement is handled.

**Design/methodology/approach** – Legal issues in enforcement are examined, as well as the initiatives of organizations like the Recording Industry Association of America (RIAA).

**Findings** – Some rights owner organizations are taking a vigilante approach to enforcement.

**Originality/value** – Copyright decisions are often a matter of risk assessment, and understanding enforcement procedures is a part of that assessment process.

**Keywords** Copyright law, Risk assessment, Law enforcement

**Paper type** Research paper

### Introduction

This article looks broadly at copyright enforcement issues. These include the role of police and of private organizations, economic issues involved in changing people's behavior, legal alternatives, liability issues, clandestine enforcement solutions, international enforcement, and why enforcement matters for libraries. Libraries must consider how enforcement is done whenever they make a risk assessment, whether that has to do with the use of an orphaned work or a fair use.

### Copyright police

Consider an episode of the Disney Channel's animated cartoon *The Proud Family* . . . In her first two weeks of employment, Penny [the 14 year old daughter] takes an after-school job in a music store. In her first two weeks of employment, Penny spends more on CDs than she earns. She then meets an older, subtly menacing boy who introduces her to file-sharing and the philosophy of "free-music." After Penny goes home and installs the software, all hell breaks loose. The music store goes out of business, city services begin to fail because of lost tax revenue, and the cops finally come knocking at Penny's door. In the end, civilization – from its retail sales to curbside trash pickup – is restored only after Penny removes the file-sharing programs from her computer (Hilton, 2005).

In the USA police do not ordinarily take part in copyright enforcement, though they may well act on a judge's orders if an action for infringement comes to the courts. This cartoon may be seen as propaganda rather than as a representation of reality.

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Michael Seadle is not a lawyer, and nothing in this column should be considered legal advice.



Enforcement in most western countries takes place almost exclusively by rights holders or their legal representatives. That leads to some unusual features.

If, for example, the driving laws were enforced in a manner similar to copyright, it would mean that the police would not ride the highways looking for speeders, but anyone (or their representative) who felt another driver had infringed on their safety by speeding could take that driver to court.

Speeding in the USA is ubiquitous today, and if enough drivers felt annoyed or endangered, they might set up a vigilante group that called itself something like Car Commuters Association of America (CCAA). The CCAA might then take enforcement into their own hands, hire lawyers, and threaten expensive lawsuits against everyone whom their members thought they had seen speeding. That could mean a lot of lawsuits. The state police where I live have relatively high standards for evidence, and have enough legal training not to bring frivolous cases to court. The same is always not true for vigilante groups.

### **Private enforcement**

Private enforcement is the chief protection against copyright infringement today. Groups like the Recording Industry Association of America (RIAA) act on behalf of private rights holders. They are trying to change people's behavior by bringing or threatening to bring lawsuits against relatively large numbers of citizens, whom they believe have infringed against their members' copyrighted materials:

Every year, by assisting in criminal trials and initiating civil litigation, RIAA wins hundreds of guilty pleas from, or convictions of, music pirates, plus scores of settlements and judgments. RIAA is also pioneering copyright enforcement on the Internet. . . . Although RIAA vigorously pursues those intentionally breaking the law, it prefers to educate all citizens so they know what is legal and illegal (RIAA, 2003).

Many of these cases are settled outside of court. In most cases it is probably because the defendants know they are guilty. Many defendants may also lack the financial means and legal advice to fight the RIAA in court. The fact that someone has a file on his or her computer containing copyright-protected material does not necessarily prove that an illegal act has occurred. In the USA copying may be legitimate in certain situations under the "fair use" statute (17 USC 107). But few individuals, students especially, have the resources to fight a case in Federal Court, and that makes the threat of court action almost equivalent to an automatic judgment against them.

Despite the fact that the RIAA has made news with its aggressive tactics, it has not eliminated what it views as a major problem.

### **Measured enforcement**

Changing people's behavior can be expensive. Any group that sets out to do that needs to consider:

- how much enforcement is necessary; and
- how cost-effective are different levels of deterrence?

An article by Daniel Nagin *et al.* (2002), in the *American Economic Review* looked at the rates at which call-center personnel reported untrue pledges to increase their own bonuses. In the experiment, the call center management checked up on 25 percent of the

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calls for untrue reporting, but told employees about, and penalized them for, only a portion of the untrue pledges to see how the varying levels of enforcement that affected their behavior. This scenario is roughly comparable to RIAA's efforts to change behavior by letting people know that they will catch at least some percentage of possible copyright infringements.

In general Nagin's results support the assumption that more enforcement leads to less cheating among some people:

The results indicate that a sizable fraction of employees behave roughly in accordance with the "rational cheater model": employees respond to a reduction in monitoring by quickly and sharply increasing the rate at which they engage in malfeasance (Nagin *et al.*, 2002).

But reduced enforcement does not mean that everyone will take greater advantage of the situation:

We also find, however, that many other employees do not exploit reductions in monitoring to their own advantage (Nagin *et al.*, 2002).

Equally important, if not surprising, is the indication that a very little monitoring makes a very large difference in cheating, and more monitoring makes relatively little difference (Nagin *et al.*, 2002, see table 4). The study as a whole suggests that a modest amount of enforcement has a noticeably positive effect, but that the benefits of significantly more enforcement may have considerably less economic value. This justifies part of the RIAA's tactics, since the public is now more aware that they might get caught. Whether it justifies the scale of their enforcement efforts is less clear.

### Legal alternatives and liability

Threats are only one way to change behavior. Even though casual attitudes toward illegal file sharing persist, offering legal alternatives appears to have had some positive effect:

A survey conducted last fall at the University of Rochester, which has offered Napster for more than a year, suggests that many students still see it as an accompaniment, not an alternative, to pirating music. While 58 percent of the respondents said they had used Napster, 56 percent said they still used peer-to-peer programs, including KaZaA, LimeWire, and Direct Connect, to download material illegally. But the survey did indicate that illegal music-swapping may have diminished somewhat since the legal alternative made its debut (Reed, 2005).

Just as some municipal authorities have tried devices like speed bumps and traffic circles to slow down the general flow of traffic, some universities have provided clandestine speed bumps in the form of bandwidth restrictions for dormitories with an unusual amount of outbound traffic (often an indication of peer-to-peer file sharing). This is important because of a growing concern among universities about how much liability they have for providing network-based disincentives to discourage potential infringement. The US Supreme Court decision in the *Grokster* case (*Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*) heightened this concern:

... a "little hidden implication" in that decision is actually more troubling to campus officials, said Mr. Phelps, of Rochester: "When I first read the case, I noticed a line mentioning that Grokster could have put filters to block piracy on its network, but that they didn't do so. I wonder if that may be a slippery slope for campus networks as Internet-service providers." ...

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It is conceivable, he said, that the entertainment industry could use that clause to try to hold colleges liable for file-sharing if they do not demonstrate that they have offered students an alternative (Reed, 2005).

Involving institutions like universities too deeply in preventing copyright infringement could, however, recreate the *in loco parentis* situation that existed on US college campuses before the late 1960s, when colleges were supposed to enforce sexual mores that many students no longer accepted. Once the students no longer believed in the rules, enforcement became impossible, regardless of the institution's good faith efforts and any potential liability.

Making universities liable for the illegal behavior of students using their networks has many troubling implications. Students who break the copyright laws are generally violating both university regulations and the use-agreements that they probably accepted when first signing onto the network. Universities are not pro-infringement. But neither are they enthusiastic about becoming copyright police.

### Secret enforcement

Secret police are generally among the most disliked, and secret copyright enforcement is not significantly better loved. Sony's recent rootkit-based copyright protection software was not only largely invisible, but also implemented rules written by Sony, not by Congress:

The rootkit element of the software is used to hide virtually all traces of the copy protection software's presence on a PC, so that an ordinary computer user would have no way to find it. The software acts to limit the number of copies that can be made of the CD and prevents a computer user from making unprotected MP3s from the music (Borland, 2005).

Sony's software seems to assume that "fair use" (17 USC 107) no longer applies, and any copying beyond the limit they set is illegal. And because of the secrecy, a user with a legitimate reason for making an extra copy might well not even know why the copying process failed.

While making any extra copies could violate the terms of a click-through contract, such contracts are a legal slight-of-hand. Few people read such contracts or understand their provisions. That does not make them any less binding in a strict legal sense, but a significant number of customers would probably not agree to the terms if they knew them before purchase, or if they had an alternative. In any case the US legal system does not generally enforce simple commercial contracts when violations occur in a purely private place like the home and when they have no external (financial) consequences for the vendor.

Invasiveness and secrecy represents only a few of the problems with Sony's copyright protection system. It also exposed Microsoft operating systems to viruses:

Computer security companies had been predicting such exploit code in the wild for weeks, since an independent developer had exposed the presence of a "rootkit" tool on the Sony CDs. The rootkit technology hid the copy protection from view, but also left open a hole that could hide other software. Virus writers quickly took advantage of that hole, modifying an old Trojan horse to take advantage of the powerful inadvertent shielding provided by the Sony software. On Friday, Sony responded to the furor and announced that it will suspend production of CDs that contain this particular copy-protection technology and take a second look at its digital rights management strategy (Borland, 2005).

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The furor over the rootkit's vulnerability to viruses has, to some degree, masked the issue of its invasion of privacy.

This form of copyright protection may be analogous to preventing persons from driving a car up their own privately owned driveway when they have no proper driver's license. A license is necessary to drive on public roads but not on purely private ones. It may be an indication of intent to break the law when persons without a license drive on their own private property, but it is not illegal in most states in the USA.

### **International enforcement**

Copyright enforcement in the internet is automatically international, and not all countries limit their police in the same way as the USA does. While copyright protection and enforcement is traditionally weak in third world countries, the police may in fact play a greater role. Nigeria offers an example:

The Nigeria Police is to join forces with the Nigeria Copyright commission in setting an enforcement team to check copyright infringement in the country (AllAfrica, 2005).

Police involvement does not necessarily make the enforcement more effective. Different languages and different legal traditions can also complicate enforcement:

"If a US marshal walks into a Russian-language store, how is he to understand who owns the rights?" asked Oleg Sulkin, the film critic for *Novoye Russkoye Slovo*, New York's main Russian-language newspaper. "When it's Paramount, it's easy enough – it's registered in the Library of Congress. But the Russian market is a jungle. Piracy thrives in ethnic enclaves" (Fishman, 2005).

Private organizations like the RIAA have a potential enforcement advantage over the police because they violate no international treaties in taking private action to bring potential infringers to court in countries other than their own. In practice, however, there appears to be little private effort going into international enforcement.

### **Physical piracy**

Enforcing the copyright laws against physical piracy is easier, both for the rights holders and for the police. This form of infringement is surprisingly prevalent, even in the USA:

The RIAA reported a 58 percent increase in seizures of counterfeit CDs, the authentic CD look-alikes with high-quality artwork and packaging that make the product appear legitimate. Working together, local law enforcement agencies and RIAA investigators seized 1.2 million counterfeit discs in 2004 (RIAA, 2005).

Physical copies of copyright-protected materials are easy to identify in part because they are often imperfect. Questions about which is a legally purchased original and which is a fake can be resolved in straightforward ways that are impossible with computer files. Universities seems to have relatively little trouble with physical copyright piracy, and it is not for lack of access to the equipment to burn CDs or create the artwork to make them look genuine.

The point of physical piracy is to make money. Most of the infringement from internet file-sharing seems to be to avoid spending money. The difference may seem unimportant to rights holders who are losing out in either case, but the difference is

significant in term of how the infringing parties view their behavior, and seems likely to be significant in terms of how courts would assign punishment.

### Why enforcement matters to libraries

Enforcement matters to libraries because the vast majority of institutional copyright decisions come in the form of risk assessment, which means not merely evaluating whether a work has protection, but whether a use will:

- expose the institution to legal action;
- deprive the rights holder of legitimate income;
- fit a legitimate “fair use” (17 USC 107) or TEACH Act (17 USC 110) situation.

Risk assessments are necessary because infringement is not a simple binary algorithm in which a work is protected or not. The majority of copyright-protected materials are either unpublished or out-of-print works, and it can be difficult or impossible to locate a putative rights owner, which is the heart of the orphaned copyright problem.

The example I used in writing Michigan State University’s comment about orphaned copyrights to the Library of Congress (Seadle, 2005) was a 1973 article from the *Journal of Children’s Mathematical Behavior*. The publisher was the Curriculum Laboratory at the University of Illinois. Clearly the University of Illinois continues to exist, but the NSF-funded Curriculum Laboratory seems not to, and all records about who owned the copyright vanished with them. The authors also could not be found.

At the time (before the TEACH act) we withheld permission to use this article on a class website. Today we might not make the same decision, for a variety of reasons. Even though the article clearly had copyright protection, there was no mechanism to find an appropriate price or to pay someone for permission. We could also reasonably guess that no one would enforce the copyright. If the article were actually multimedia, an organization like RIAA could be expected both to enforce the rights and to provide a payment and permissions mechanism, but for academic articles, no comparable organization exists.

This does not mean that we or other libraries should become active infringers. Libraries in general are zealous about requesting and paying for permissions whenever possible. When that is not possible, understanding the enforcement mechanism for copyright protection lets us make an economically rational decision about how far to go to attempt to find a rights holder, and when to take a calculated risk to provide service for our patrons.

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