COPYRIGHT

In the United States, federal copyright law confers on creators of original expressive works an attenuated property right in their creations. Like other forms of property rights, copyright serves important societal interests. It benefits not only creators but also consumers, who benefit from access to many works that might not have been created but for copyright protection. Thanks to the Internet, selling copies and licenses of those works is easier than ever. Yet so too is distributing them without authorization. Congress should therefore consider strengthening copyright laws to better protect creative works from infringement. At the same time, however, some protections afforded by copyright law actually inhibit consumers' ability to enjoy original works—and artists' ability to build on earlier works.

Congress should amend the U.S. Copyright Act to do the following:

- Provide a mechanism to deny foreign websites that facilitate copyright infringement but do not abide by the Digital Millennium Copyright Act's Section 512 safe-harbor access to the U.S. payments system.
- Proscribe tools that circumvent technological protection measures only if they are likely to undermine the value of the underlying creative works protected.
- Afford users of copyrighted works an affirmative defense to infringement if they could not find the copyright holder, despite conducting a good-faith, reasonable search for the owner.

Article I of the U.S. Constitution empowers Congress "[t]o 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." Since the nation's founding, Congress has enacted a series of federal copyright statutes—including, most recently, the Copyright Act of 1976 (Public Law 94–553, 90 Stat. 2541 [1976]; codified as amended at 17 USC §§ 101–810). For the most part, that regime works well, enabling artists to earn a living insofar as they create works that the public enjoys. From television to music to movies, the United States is home to many of the world's most celebrated artists and creative industries.

But the Copyright Act is not perfect. For instance, it contains an overbroad prohibition of tools that are designed to circumvent digital rights management (DRM). Although effective DRM can be invaluable, enabling content owners to better protect their expressive works from unlawful infringement, many legitimate and lawful reasons exist to circumvent DRM, such as making fair use of a creative work by removing digital copy restrictions. Yet Section 1201 of the Copyright Act bars technologies that are primarily designed to "circumvent a technological measure that effectively controls access" to a work or "circumvent[] protection afforded by a technological measure that effectively protects a right of a copyright owner" in a copyrighted work (17 USC § 1201).

Companies and individuals who sell or create tools that materially contribute to copyright infringement should be liable for those infringing acts—unless, that is, the tools are "capable of commercially significant non-infringing uses," to borrow a line from the U.S. Supreme Court's famous "Betamax" opinion in 1984 (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417). With regard to firms that distribute tools designed to circumvent technological protection measures, courts should assess case by case whether those tools are designed and marketed primarily to *infringe on the underlying work*, as opposed to merely facilitating noninfringing uses of the work—including fair uses (17 USC § 107).

Congress should also address the "orphan works problem," which affects tens of millions of copyrighted works. The Copyright Act protects each work for the life of its author plus 70 years, or for works of corporate authorship, for 120 years after creation or 95 years after publication, whichever endpoint is earlier (17 USC § 302–4). People die, and corporations are acquired or cease to exist. Therefore, for many works that remain subject to copyright protection, determining who holds the copyright to those works is difficult or even impossible. Companies that wish to monetize and distribute those so-called orphan works often forgo the opportunity, for they fear that the true owner might emerge out of nowhere and sue the company for copyright infringement.

To encourage copyright holders to come forward, and to protect firms that genuinely cannot find the owner of a work despite reasonable efforts to do so, Congress should amend the Copyright Act to create a new defense to copyright infringement lawsuits. A person who uses a copyrighted work should enjoy an affirmative defense to copyright infringement if he or she could not find the copyright holder despite conducting a good-faith, reasonable search for the owner. Although that statutory change would not resolve the orphan works problem entirely, it would mark a major step toward ensuring that consumers can enjoy the wealth of protected works whose owners are unknown.

Finally, Congress should address the problem of offshore rogue websites, such as BitTorrent trackers and certain cyberlockers, that facilitate piracy of copyrighted works on a massive scale with impunity. Specifically, Congress should "follow the money" and provide for a mechanism whereby the United States may petition a federal court to order U.S.-based payment systems and advertising networks to stop doing business with the rogue site. By passing narrow legislation that provides procedural due process to websites accused of facilitating infringement, Congress can make it harder for those sites to exploit creative works without compensating their owners.

Experts: Ryan Radia, Wayne Crews

For Further Reading

Jerry Brito and Bridget C. E. Dooling, "An Orphan Works Affirmative Defense to Copyright Infringement Actions," *Michigan Telecommunications and Technology Law Review,* Vol. 12 (2005): 75–113, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942052.

John F. Duffy, "The Marginal Cost Controversy in Intellectual Property," *University of Chicago Law Review,* Vol. 71, No. 1 (Winter 2004): 37, 42–46.

Ryan Radia, "Congress Isn't Ready for a Big Change. Here Are Some Smaller Ones," *Cato Unbound*, January 25, 2013, http://www.cato-unbound.org/2013/01/25/ryan-radia/congress-isnt-ready-big-change-here-are-some-smaller-ones.