

RE-IMAGINING CULTURE IN THE ERA OF DIGITAL CREATIVITY AND COPYRIGHT LAW

The Statute of Anne enacted in the year 1710 by the British Parliament, can be called as the first copyright protection offered to authors. This statute for the first time made the government the regulatory body and the authors, the owners of their works. With the evolution of society, the legal protection afforded to intellectual works has also evolved. But has the copyright system and its stakeholders been able to evolve and adapt to the digital world? This paper analyses the action and reaction of the copyright system and its stakeholders towards the digital world, networked society and the changing culture surrounding the use and dissemination of copyrighted works.

THE TECHNOLOGY

In 1968, Joseph Licklider and Robert Taylor, the developers of ARPANET published a paper where they claimed that networked communication is more than merely sending and receiving data. They wanted networked communication to be where the users were active participants where they would add value to the existing information. Like prophesied, cyberspace has created what we call today as “living information”. It has become a place where users are creators and at the same time, consumers of information.

With the advent of networked computers, sharing of files through the network started gaining popularity. Till this, the main method for sharing files had been through removable storage which was a cumbersome and limited reach. Networks enabled a user on one side of the world to access the files of another user across the globe. Computer programmers started exploiting the infinite possibilities of this capability. Platforms such as Bulletin Board Systems (BBS) and Internet Relay Chat (IRC) were the first that enabled users to distribute files over the network. The release of Napster which offered a peer to peer method of file-sharing, was a huge leap for networked file-sharing. Napster offered a never before platform for searching and downloading music which though later was held illegal, was extremely popular.

The Advisory Committee on Enforcement of World Intellectual Property Organization (WIPO)¹ claims that reputed studies published in renowned peer-reviewed journals show that piracy has a negative impact on sales. One of the reasons that users are increasingly using file-sharing to access copyrighted content might be because the internet offers a better channel for accessing content. The internet has provided greater access to content. This has resulted in the consumers being much more demanding due to the increased awareness. A music lover located in India might be interested in a music band which performs and sell their creations only in their particular country, say Iceland. A brick and mortar shop in the consumer’s country would not be able to provide the music created by that band due to unavailability or possible lack of demand even if they manage to stock it. This causes consumers to increasingly rely on the internet to access the content impacting the existing business models of the music industry which largely rely on physical sales.

Sandvine, a leading networking solutions company releases Global Internet Phenomenon Report which analyzes internet traffic of several continents. The report shows that Real-Time Entertainment

¹ WIPO Advisory Report, http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf (last visited April 12, 2016)

like Netflix, YouTube and Spotify is gaining popularity over the years while P2P traffic, mainly is declining. The 2011 report ² showed that in North America, Real-Time Entertainment accounted for 49.2% while in 2015 report ³ the traffic has significantly increased to 70%. Peer to Peer traffic has reduced from 18.8% in 2011 to 5% in 2015. This reason could be attributed to the two factors. First, availability of Real-Time Entertainment at affordable prices catering to the demands of the consumers. Second, high speed, reliable and cheap internet services. Without the second factor, a consumer would not be able to enjoy Real-Time Entertainment due to high buffering delay.

Latin America though has a higher share of Peer to Peer traffic compared to North America, is also witnessing decline while Real-Time Entertainment is increasing.

Real-Time Entertainment offers copyrighted content over the internet, thereby allowing users to view copyrighted content for a fee. As the business model offers copyright licensed material, the copyright owners and artists receive their royalties. This business model offers global reach to copyrighted materials at a fraction of a cost compared to physical sales through brick and mortar stores. This because of digital delivery of goods over the internet and reduced manpower involved the production and delivery chain. This attracts most of the cash-strapped consumer who otherwise depended on illegal file-sharing.

This clearly shows that if cheap and feasible options are available to consumers, then it would deter them from illegal methods. But this requires a combined effort from the Government, ISPs, copyright holders and other interested parties.

LAW & TECHNOLOGY

Technological innovations and copyright laws have always been at loggerheads for decades. One of the first issues was when Sony Corporation came out with Betamax which was a form of Video Cassette Recorder (VCR). Betamax allowed one to record soaps and movies which were telecasted on their televisions. The film industry viewed Betamax as a potential large-scale copyright infringement tool and therefore sued Sony Corporation. In *Sony Corporation of America v. Universal City Studios*⁴, the Supreme Court of United States ruled that recording amount to fair use and therefore does not constitute copyright infringement. The Court held that recording of telecasted programs for watching it later is “time shifting” and the same would fall under fair use, which is permissible under copyright laws.

Jack Valenti, President of Motion Picture Association of America (MPAA) at the time of Betamax case considered home taping to the American film producer and the American public as the Boston Strangler to the woman home alone. After the lawsuit, video cassettes gained a huge popularity that video rentals became a substantial revenue for the film industry.

² Sandvine Global Internet Report 2011, http://www.wired.com/images_blogs/business/2011/05/SandvineGlobalInternetSpringReport2011.pdf (last visited April 12, 2016).

³ Sandvine Global Internet Report 2015, <https://www.sandvine.com/pr/2015/12/7/sandvine-over-70-of-north-american-traffic-is-now-streaming-video-and-audio.html> (last visited April 12, 2016).

⁴ 464 U.S. 417 (1984).

The Betamax case can be considered as the beginning of the copyright industry's fight against technological innovations. The next attack was against music file-sharing system called Napster. Napster utilized the internet to enable free music sharing between its users. All the user needed to do was install Napster's software, after which one could search, upload and download music files between the users. The music industry took Napster to court claiming Napster was offering a platform for willful copyright infringement. The Court held Napster to be willfully facilitating copyright infringement. One of the controversies in this judgment was when the

Napster was the beginning of peer to peer file-sharing systems which later evolved into decentralized versions like Gnutella and the extremely popular BitTorrent. The BitTorrent protocol which is highly associated with online piracy is now used extensively by many as a cheap and efficient alternative to sharing and distribute files. Facebook and Twitter use BitTorrent protocol for transferring files within their organization. Popular game World of Warcraft uses BitTorrent protocol for sending updates to users. Even the UK Government and NASA used BitTorrent protocol to share large files to a large audience.⁵

In 1998, Diamond Multimedia came out with one of the first portable digital audio player now known popularly as MP3 Players. The Recording Industry Association of America (RIAA) sued Diamond Multimedia for violations of Audio Home Recording Act. The law required manufacturers of Digital Audio Recorders and Media to pay a royalty to the Copyright Office. In this case, the Court formulated a concept called "space shifting" which was similar to "time shifting" in the Betamax case. The Court held that the users of Rio Players were only shifting audio files from their computers into the device which very well was a personal use. Therefore, it fell into the exceptions allowed under copyright law.

Till now we saw the major conflicts of copyright law with technology and innovation. One instance where the copyright regime used technology to its advantage but to the disadvantage of the users was the introduction of Digital Rights Management (DRM).

DRM is a method through which copyright owners control how a user of a copyrighted DRM enabled content, uses it. This control can be the usage, modification and sharing of the content. Sometimes, copyright owners through DRM decide on which devices the particular content can be viewed. It is pertinent to note that DRM restriction is employed on a copyrighted content that is legitimately purchased. DRM functions as the copyright owner's own copyright scheme. If the owner wishes that one can view the content only on a particular day of the week, then the user can view only on that day. If the user's MP3 Player or DVD Player is not allowed by the copyright owner, then he will not be able to view the content or has to buy a supported machine. There have been instances where the DRM software employed in the content turned obsolete causing the content itself to become useless. In 2009, Amazon used DRM to remotely delete two books from Kindle without the users' knowledge, even though they had purchased it.⁶

RE-IMAGINING CULTURE IN THE ERA OF DIGITAL CREATIVITY

⁵ <http://www.makeuseof.com/tag/8-legal-uses-for-bittorrent-you-d-be-surprised/> (last visited April 12, 2016).

⁶ Amazon Apologizes, <https://www.fsf.org/news/amazon-apologizes> (last visited April 12, 2016).

With the advent of digitization, one of the key changes was in the areas of accessing the content. In pre-digitization era fiction was in the form of books, music in vinyl tapes or CDs, movies in Video Cassettes or CDs. For anyone to obtain, all they had to do was walk into the respective brick and mortar store and purchase the same. But this business has drastically changed primarily due to its inherent incapability to meet the global reach of the online stores. Even the form of distribution of copyrighted material has changed. Today, anyone who wishes to publish a book can sign-up on Amazon Kindle Direct Publishing Platform, upload the manuscript and once it is approved, your book is published across the globe. Anyone with a Kindle or a computer can purchase and enjoy your work. Amazon offers 35 and 70% royalty options⁷ while the other publishers offer a measly 10-20%⁸. In the era digital publication, it is rare for one to be rejected like J.K Rowling by twelve publishing houses. iTunes revolutionized music sales by introducing a pay per song model. Each song was sold at a flat 99 cents. This allowed users to purchase the track they like from a particular album instead of the entire album. Spotify, Netflix and YouTube enabled online streaming of music and videos. Independent film makers are now able to publish and monetize their work with minuscule costs but at the same time with high returns encouraging them to create more content.

It is natural for any author to desire for maximum revenue from his work. The primary role of revenue is to incentivize the author for his next work. The digital world offers various avenues for monetizing creation of culture. Due to the decrease in distribution costs, online publishing platforms are able to offer higher royalty rates compared to offline platforms. Due to their global reach, the royalties offered are higher than offline platforms. Crowdfunding has become a popular option for projects requiring an initial capital.⁹

The increasing popularity of online platforms is evident from the increasing internet traffic to these sites and their revenue. The data has proved Real-Time entertainment to be a valid alternative to illegal file-sharing.

STRIKING THE BALANCE

It is a fact that technology and copyright are inseparable. In fact, it is innovations in technology that propelled the changes in copyright law. The technological progress has now made it difficult to protect author's rights. It has become difficult to balance the author's rights and cultural production. To balance this, copyright industry and government have resorted to banning or taking down platforms like Piratebay and Sci-Hub. They have also introduced copyright extension laws which delayed the content coming into the public domain by several years. Online piracy being in the nature of a hydra it is an impossible task to stop them. The only method is to beat them at their own game. Develop convenient and cheaper means of access to consumers. If such alternatives are provided, then

⁷ <https://kdp.amazon.com/help?topicId=A30F3VI2TH1FR8> (last visited April 12, 2016).

⁸ How to publish a book, <http://www.lawctopus.com/how-to-publish-a-book-on-kindle-gehna-banga-author-of-run-your-fingers-through-my-soul-answers/> (last visited April 12, 2016).

⁹ Crowdfunding and Independent Filmmakers, <http://www.dnaindia.com/lifestyle/report-why-crowdfunding-is-a-hit-with-india-s-independent-filmmakers-2117406> (last visited April 12, 2016).

consumers would gradually move into it from online piracy.¹⁰ This is evident from the rise of platforms like YouTube, Netflix, Spotify, Amazon Kindle and iTunes.

The real balance that should be kept is between “right of everyone to promote scientific progress”¹¹ and author’s rights.

¹⁰ WIPO Report, http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf (last visited April 12, 2016).

¹¹ ICESCR, Article 15.