

COPYRIGHT, DRM, & CONSUMER PROTECTION

Pamela Samuelson, UC Berkeley
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OVERVIEW

- Why © and consumer protection seem orthogonal, wholly distinct
- Traces of consumer protection in © law and policy
- DRM and anti-consumer developments
- Reasons why consumer protection may have a more significant role over time
- Consumer protection in or as to ©

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WHY NO ROLE?

- Consumers are invisible in author's rights realm: natural right of authors to control their work
- Copyright Act of 1976 grants exclusive rights to authors, none to consumers (in © owner view)
 - Goal: to induce authors to invest in creating and disseminating new works by allowing them to control commercially valuable exploitations of their works
- Copyright law doesn't even mention consumers!
- Joe Liu: copyright lacks a coherent theory of the consumer

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CONCEPT OF CONSUMER

- Role of consumers in © is largely assumed to be to purchase pre-packaged content to make the wheels of commerce turn & make authors and publishers rich(er)
 - Anti-consumer view thinks of © as protecting interests of consumers by supplying something for them to buy
- Of course, all authors are consumers of other works, and some of the limitations on © aim to give them breathing room for further creation (e.g., “transformative” fair use)
- Yet, © and consumer protection have a history

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© HISTORY, CONTEXT

- Statute of Anne in 1710 protected consumer interests in several ways:
 - Expiration of © meant consumers could get price competition
 - Process for obtaining remedy for excessive pricing of books,
 - Required deposit of protected books with university libraries to enable public access
- US copyright law long had narrow exclusive rights
 - Print, reprint, vend as to maps, charts, books
 - US did not protect non-US authors for 1st 100 years
 - Gave American readers cheaper access to foreign books
 - Notice requirement (until 1989) & other formalities meant that the public could expect a work to be in the public domain & available for all uses unless ©
 - Most exclusive rights under pre-76Act did not cover consumer behavior, most 76 Act exclusive rights cover only public acts

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© AS MEANS TO BENEFIT PUBLIC (CONSUMERS)

- "The copyright law, like the patent statutes, makes **reward to the owner a secondary consideration**. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the **primary object** in conferring the monopoly lie in the **general benefits derived by the public** from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).
- If © is means to this end, then consumer interests should be taken into, as indeed they have been

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CONSUMER PROTECTION IN ©

- First sale rule (OK to resell your copy of a book or lend it to others) (sec. 109)
 - Bobbs Merrill v. Straus: refusing to enforce EULA
- Backup copying of software, adapting one's copy of software (e.g., fix bugs, interoperate with other programs) (sec. 117)
- Fair use (e.g., time- and space-shifting) (sec. 107)
- OK to alter or destroy architectural work, photograph publicly visible architectural work (sec. 120)

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CONSUMER PROTECTION

- Making or distributing useful article depicted in copyrighted work (sec. 113(b))
- Use of ideas and information in copyrighted works (sec. 102(b))
- Performance of certain works by students and instructors in nonprofit schools, by others in churches or religious assemblies, horticultural fairs (sec. 110)
- Counter-notice & privacy rules in DMCA safe harbors (sec. 512)

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CONSUMER-FRIENDLY CASES

- *Sony v. Universal*: fair use to make time-shift copies of television programming; public access to technologies with SNIUs
- *Galoob v. Nintendo*: fair use for consumers to use Game Genie to alter the play of Nintendo games
- *Sega v. Accolade*, *Sony v. Connectix*: fair use to reverse engineer to get information necessary to create interoperable game; consumers will have more choices of games for more platforms
- *Lexmark v. Static Controls*: denying 1201 claim vs. maker of compatible printer cartridges

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CONSUMER PROTECTION LEGISLATION (S. 167)

- Some families want to watch movies but not view sex, strong language, and violence
 - Clear Play saw a market opportunity in filling this need, software bypasses these parts of movies
- Directors Guild claimed Clear Play infringed © and TMs (*Huntsman v. Soderburgh*)
 - Plausible *Galoob*-like defense
- Family Entert. & © Act: Not an infringement to use software that makes certain audio or video content imperceptible in private home viewing of lawfully acquired copy of content (DVD)

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MANY UNREGULATED USES

- Taking notes in or on books for term papers
- Cutting up magazine to make collage
- Singing songs in the shower
- Playing sound recordings in one's car (even very loud so everyone can hear it)
- Private performances of "Vagina Monologues"
- Private displays of one's photographs of billboards of NYC
- Deliberately left unregulated to enable consumers to enjoy them

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WHY MORE CONSUMER PROTECTION?

- © rights have gotten longer and stronger, implicate consumers more now than before
- Amateur creation, dissemination
- Mismatch of consumer expectations and terms on which some products available
 - Technically protected content
 - End user license agreements
- Lack of competition in some parts of © industries
 - Concern about overreaching in TPMs, EULAs

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BROADER RIGHTS

- *MAI v. Peak*: RAM copy during repair/maintenance
- *Bridgeport Music v. Dimension Films*: illegal to sample sound recording (period!)
- *LA Times v. Free Republic*: website with critical commentary on newspaper articles not fair use
- *A&M Records v. Napster*: virtually all p2p file sharing is infringing (even space-shifting, sampling)
- *Universal v. Corley*: web journalist violated 1201 by posting and linking to DeCSS software in source & object code
 - Rejecting constitutional & statutory challenges and scoffing at fair hacking arguments
- *MGM v. 321 Studios*: software allowing consumers to backup DVDs held to violate 1201

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BROADER BILLS

- File-sharing has produced numerous anti-consumer bills
 - HR 5211: Berman bill to immunize © owners who attack file sharer computers
 - HR 2391: criminalizing reckless offering infringing materials for distribution
 - anyone who used file sharing technology with an all-files default mode for uploading would be a criminal
 - HR 4077: Give DOJ authority to bring civil suits, more resources for “education” and prosecuting file sharers
- Hollings bill: mandate technical protection measures (TPMs) in all digital media systems

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CONSUMER EXPECTATIONS

- Consumers expect to be able to do at least as much with digital information as able to do with other content (e.g., time- and place-shift with VCR, analog records)
- Many expect to be able to do more with digital content (e.g., format-shift)
- TPM systems & EULAs may interfere with some or all of consumer expectations of this sort
- Mismatch may give rise to need for notice of TPM restrictions

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PERSONAL USE EXPECTATIONS

- INDICARE Report and Mulligan et al. study
 - Make backup copy or archive
 - Time-, space-, platform-, and format-shifting (portability issues)
 - Interoperability (e.g., CD should work in all players)
 - Tinkering/reverse engineering (e.g., new tricks for Aibo dog—valuing user innovations)
 - Sampling, excerpting, bricolage (“new media”)
 - Continued access to content purchased
 - Loaning, reselling, giving as gift
- Any of these can be restricted by TPMs or EULAs

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EULA ISSUES

- License vs. (1st) sale for mass-marketed digital works
- Enforceability of particular terms that purport to override © limitations
 - Anti-reverse engineering clauses
 - Anti-backup copying, -format-shifting
 - Anti-benchmarking result dissemination
 - Anti-criticism, -parody provisions
- Caselaw on this is thin and somewhat mixed, but commentary suggests © policy should render many of these unenforceable
- Lofgren BALANCE bill would have limited enforceability of EULAs to override © limitations

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TPM ISSUES

- If © allows backup copying or transfer of one's copy, should TPM be able to override it?
- Are lawful purchasers of TPM products entitled to override (reverse engineer, hack) the TPM in order to engage in permissible uses?
 - Distinction between access & other controls in 1201 + some legislative history says yes
- EU Article 6: © owners who use TPM systems have obligations to enable certain exceptions
- Burk & Cohen: require fair use infrastructure as condition of eligibility for 1201 benefits

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USER INNOVATION: AIBO DOGS

- Sony charged \$800-3000 for robot Aibo dogs
- Many purchasers were technically sophisticated, able to program their dogs to do different tricks
 - No notice of potential DMCA liability if they did this
- Aibohack.com site provided Aibo hackers an opportunity to trade programs they had written to make their dogs do new tricks
 - also provided better tools (for free) than Sony's \$150 kit
- Sony threatened legal action under DMCA
 - Reverse-engineering the dog software = 1201(a)(1)(A)
 - Making a program to enable dog to do new tricks = violation of 1201(a)(2)
 - Website enabling Aibo users to share new trick programs = violation of 1201(a)(2)

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USER INNOVATION: TECMO

- Tecmo made videogames for Xbox
- Greiling and friends bought Tecmo games
 - Wanted to be able to add "new skins" to game characters
 - Reverse engineered software to make "new skins"
 - RE also to play games on modified Xbox devices (> memory & power)
 - Wanted to share new skins via message board on the Internet
- Tecmo's license forbids reverse engineering and modification
- Greiling might have known he was at some risk of being found in violation of a license term
 - although a good lawyer might have said license term was questionable
- But he and 100 John Does were sued for direct and indirect © infringement and direct & indirect violation of DMCA anti-circumvention rules
 - Isn't this like the kids who used Galoob's game genie to enhance their experience of Nintendo games?

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COPY-PROTECTED CDs

- Some new releases in 2002 wouldn't play on computers, walkman devices, or some CD players and wouldn't allow back-ups or other personal use copies
- Frustrated consumers who had purchased these CDs expected portability and personal use copying
- Many complained to retailers and manufacturers because consumers thought players were defective, also insisted on refunds (another retailer burden)
- Lawsuits in US and France challenged copy-protected CDs as "defective"
- To call a product a "CD," one is supposed to meet "red book audio" portability specifications
 - Philips thinks notice should be required if not meeting spec
 - Label will deter some buyers

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HR 107 (108th Cong.)

- Digital Media Consumer's Rights Act of 2003
- Would have added sec. 24A to FTC Act
 - to prohibit commerce in mislabeled or falsely advertised digital music disc products
 - to remove or mutilate labels required by FTC rulemaking
 - FTC would have had to report to Congress on effects of law on market and on enforcement
- Brownback bill would have regulated TPM digital media products more generally
 - illegal to sell w/o notice of TPM restrictions

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DMCA CONSUMER RULES

- DMCA anti-circumvention rules contain several consumer protection provisions
 - So-called “shopping privilege” for non-profits
 - Privacy protection privilege
 - Parental control privilege
 - LOC rulemaking: right to access if TM is broken
- So far, they are quite weak, but so is experience with DRMs
 - If greater experience brings abuses, more regulation may be the result (more likely if DRM mandated)

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TPMs AND PRIVACY

- TPM systems have potential to collect, process, and transmit vast quantities of personally identifiable information (PII) about consumers' information usage patterns
- Intellectual privacy is important value in free society
 - Julie Cohen's “The Right to Read Anonymously”
- No general legal requirement at this point in US that © owners notify consumers of DRM usage monitoring
- EU Data Protection Directive does provide a comprehensive framework, but far from clear that © owners are embedding data protection principles in TPM systems

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TPM MONITORING

- What information you access
- How long you access it
- Certain uses you make of the information
- What device and software is being used to render or enhance it, where you are
- The sequence of what you look at
- Patterns of use for different types of information
- Price sensitivity (if separately priced items)
- From this, profiles of users' preferences can be developed
- Useful for internal marketing (if you liked this, you'll like that) and as a marketable asset (other firms may want to market to you as well)

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PRIVACY AS CONSUMER PROTECTION ISSUE

- Notice of DRM monitoring of digital usage should include
 - What information is being collected
 - For what purpose
 - How information will be processed
 - Whether information will be shared and if so, with whom for what purposes
 - What security measures are being taken to protect personal data from misuse
- Notice would enable consumers to decide whether to acquire information from this provider or from some other source
 - Would facilitate fair competition among providers
- 1201(h)(1) allows circumvention to protect privacy if user was not given notice of monitoring

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CONSUMER PROTECTION

- What if DRM systems were forbidden from
 - engaging in electronic monitoring of use (e.g., had to respect privacy)
 - or in technical “self-help” (so controversial in Article 2B/UCITA)?
- What if DRM had to accommodate
 - Digitalconsumer.org “bill of rights” as to time-, place-, format-, platform-shifting, backup copying
 - fair use, first sale, other privileged uses?

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AS TO cf. IN ©

- Some will object to building more consumer protection into © law
 - Don’t clutter further this law with multiple & conflicting purposes
 - Maybe consumer protection authorities will occasionally have to oversee market, but that can be done without changing © rules
- Response: many consumer protections in © now, often directed at limiting monopoly to fulfill © purposes (e.g., fair uses)
 - Not to say that © should be converted to consumer protection
 - Room for other oversight too (e.g., FTC)

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BERKELEY CONFERENCE

- March 9-10, 2007
- Business models enabled by DRMs
- Private initiatives to accommodate some privileged uses (e.g., Sun's DREAM)
- Role of government in regulating DRMs
- Interoperability issues
- US and EU approaches to Sony BMG
- FTC Commissioner, British Library CEO as keynotes; many industry, policy, & professors

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