

Global IT Law
Digital Copyright
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Copyright

- Creation of statute
- Striking the balance in the public interest:
 - Incentives to create
 - Access to knowledge
- National vs. Global
 - Berne, WIPO Internet treaties, ACTA, TPP
 - National implementations

Basics of Copyright

- Copyright protects expression not ideas
- Copyright requires originality and some modicum of effort
- Copyright protects for a limited term
 - life of the author + 50 years/70 years
 - Sound recordings 50/70 years
- Basket of rights
 - right to reproduce the work
 - right to perform the work
 - right to translate the work
- Rights of Enforcement
 - Statutory damages

Exceptions: Fair Dealing/Use

- Fair use vs. Fair Dealing
- Permits use of a portion of work without permission
- Extent of copying depends on use, amount of the work
- Essential aspect of the law for many IT/Internet companies

Exceptions: Fair Dealing/Use

- Canadian purposes:
 - research
 - private study
 - news reporting
 - criticism
 - Review
 - Education
 - Parody
 - Satire
- Subject to six factor fairness analysis
- In addition, many other subject-specific exceptions + de minimis analysis

Exceptions: Fair Dealing/Use

- Israel adopted fair use in 2007 shifting from fair dealing
- Purposes now “such as”
- Include:
 - Criticism
 - Review
 - Journalistic reporting
 - Quotation
 - Private study
 - Research
 - Instruction and examination by educational institution
- Subject to four factor test

Digital Copyright

Digital Locks
Safe Harbours
Copyright Innovation

Copyright Case Study

Steph Lanz is a mother of two young children who love nothing more than to sing and dance. One day, as the kids were dancing in the living room to *Let It Go* (from the popular movie *Frozen*), she opened her phone and began recording. The dancing and music was so great that she decided to post the three minute video on YouTube. A friend saw the video and remarked that the dancing brought back great memories from the movie. Lanz decided to make a second version of the video. This version mixed video of the kids dancing with clips from the *Frozen* movie DVD (she used a software program to disable the copy-protections). She uploaded the second movie to YouTube and made both available for download in her Dropbox account. Lanz's videos were purely non-commercial. She did not sell them nor allow advertising to appear alongside them.

Both videos became viral hits and soon came to the attention of lawyers from Disney. They were unwilling to "let it go." The lawyers sent takedown notifications to YouTube and Dropbox and sent a demand letter to Lanz, accusing her of copyright infringement and seeking \$50,000 in damages.

Copyright Case Study

Lanz seeks your help:

1. Does the first Lanz video infringe copyright?
2. Does the second Lanz video infringe copyright?
3. What defences or arguments might Lanz raise?
4. Should YouTube and Dropbox be required to take down the videos?
5. If there is infringement, should Lanz be subject to damages?

Anti-Circumvention Rules (Digital Locks)

Three Layers of Protection

1. Copyright protection
2. Technological protection
3. Legal protection of the technology

Devil in the Details

- Copy controls
- Access controls
- Exceptions
- Unintended consequences
 - Garage door openers
 - Printer ink cartridges

How to create a global
rule?

US Domestic Pressures

- Green paper (1994)
- White paper (1995)
- WIPO (1996)
- DMCA (1998)
- Bi-lateral Pressures (1998 – present)

WIPO Internet Treaties

Legislative History

- Anti-circumvention rules developed over two year period from 1994 - 96
- No reference in early preparatory meetings which started in 1989
- Four preparatory meetings + Diplomatic conference
- Extensive records and minutes on all of these meetings

Legislative History - 4th prep meeting (Dec 1994)

- U.S. raises protection for copy protection systems
- No specific language proposed
- Emphasis on trafficking in circumvention devices
- Need to protect lawful uses discussed
- Chair notes no agreement - floats prospect of general provision on circumvention and leave to countries to implement

Legislative History - 5th prep meeting (Sept 1995)

- Still no specific language
- U.S. stresses urgency of addressing the issue
- Other countries express concern:
 - South Korea fears interference with normal exploitation of a work
- Business raises concern as well - electronics industry on implications for fair use and innovation

Legislative History - 6th prep meeting (Feb 1996)

- Specific language proposed:
 - U.S. proposes provision on trafficking in devices
 - Brazil & Argentina propose provisions on trafficking and circumvention of copy controls (no access controls)
- Delegation responses:
 - South Korea seeks mandatory exceptions
 - Denmark favours general principle with flexible implementation
 - Thailand opposes any TPM protection
 - China seeks further study
- Chair's summary notes lack of consensus

Legislative History - 7th prep meeting (May 1996)

- Specific language proposed:
 - EU adds proposal on trafficking in devices (but adds a knowledge requirement)
- Delegation responses:
 - Canada says it cannot support any proposal
 - Singapore says it goes too far and interferes with legit uses
 - Thailand says it goes too far and would create confusion
 - South Korea concerned about harm to public interest
 - China expresses doubt that it fits within copyright
 - Ghana fears impact on developing world and should be reconsidered
 - Nigeria concerned about vagueness of language
 - Brazil, Egypt says need further clarification
- No recommendations or conclusions

Legislative History - Diplomatic Conference (Dec 1996)

- “Basic proposal”:
 - Targets trafficking + effective remedies
- Delegation response:
 - Ghana demands provision be dropped
 - Canada not acceptable
 - Korea concerned about lawful uses
 - Singapore concerned about high standard of liability
 - Australia, Norway, Germany, Jamaica all call for narrowing the provision
 - South Africa proposes general language on acts of circumvention (no trafficking)
 - Only three delegations support - U.S., Hungary, Colombia

Legislative History - Plenary Conference (Dec 1996)

– Delegation response:

- Israel says Basic Proposal is “over broad”
 - Singapore says it interferes with bona fide uses of technology
 - Indonesia calls for more study
 - India warns on impact on fair use
 - South Korea warns on overbroad impact
- No unqualified endorsements of Basic Proposal

So what happens...

“adequate legal protection and effective legal remedies against the circumvention of effective technological measures”

Country Implementations - U.S.

- Several bills tried to implement
 - *Digital Copyright Clarification and Technology Education Act (1997)*
 - No ban on devices, accounted for fair use
 - *Digital Millennium Copyright Act (1998)*
 - Acknowledge that it goes beyond WIPO requirements
 - Triennial review of new exceptions
 - *Unlocking Technology Act (2013)*

Country Implementations - European Union

- *EU Copyright Directive (EUCD)*
 - Similar to US DMCA but..
 - Mandatory exceptions including teaching, research
 - Open to private copying exception
 - Requirement to ensure appropriate access
- Different countries, different implementations
 - Denmark - only applies to copy controls
 - Germany - excludes public domain
 - Italy - includes private copying
 - Greece - legal right to pursue access following mediation
 - Netherlands - Justice Department power to decree access

Country Implementations - Canada

- Four bills tried to implement
 - Bill C-60 (2005)
 - Linked circumvention to infringement
 - No ban on devices
 - Bill C-61 (2008) & Bill C-32 (2010)
 - Bill C-11 (2011) enacted in 2012
 - US Style approach – access and copy controls

Country Implementations - Israel

- August 2012 – draft published in Hebrew
- Rumoured promise in return for joining OECD
- No implementation yet

Country Implementations - Australia

– Two stage process:

- *Digital Agenda Act (2000)*
 - Targeted distribution of circumvention devices
 - Established exceptions to distribution provision
- *Australia - U.S. FTA (2004)*
 - Ban on distribution
 - New provision on circumvention
 - Extends to access and copy controls

Country Implementations - Switzerland

- Article 39(a)(4) (2008)
 - Full exception to circumvent for legal purposes
- Establish monitoring agency on use of TPMs and potential instances of misuse