Copyright law and the Media and Filesharing

An Analysis of the First Amendment and Copyright and its impact on Entertainment and Music

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Copyright Law and the Internet

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Since the advent of the internet, motion picture studios and music labels have struggled to achieve a stranglehold when it comes to copyright. Now, we know what happens if you were to go to a local Walmart and steal a DVD or a CD off of the shelf; You end up getting in trouble and you may have to pay a fine. What, then happens when you do it through the confines of the internet? The Supreme Court itself has stated in Harper & Row Publishers v. Nation Enterprises (1985), that copyright is the engine of free expression, although some describe it instead as an engine of corporate censorship. “For something to qualify for copyright it must be original, and it must be fixed in a tangible medium” (Lipschultz, 2019, p. 233). According to Lisby the First Amendment and intellectual property are two sides of the same coin, their legal functions work to move forward and balance the purposes of each other (Lisby, 2019, p.233). The First Amendment protects our freedoms of speech, but it is the intellectual property rights granted to us in the constitution that allows us to profit from the benefits that the First Amendment may entail such as the ability to express any creative abilities one may have (Lisby, 2019, p.233). So, for someone like Joe Rogan, the First Amendment allows him to hold a podcast online and say whatever he wants pretty much but the constitution is what affords him the ability to profit from it. This paper will serve to show the difficulties of enforcing copyright laws in a time in history where more people than ever before have access to copyrighted materials.

A Brief Legal History
Copyright law initially began in Great Britain in 1710 so that the government could track and censor material that was printed, they did this through granting a royal license and privilege to printers (Lisby, 2019, p. 234). The first federal copyright law came into effect in 1790 and it was adopted from a British statute. The 1790 law offered protection for fourteen years for maps, charts and books. Prints were added to the list in 1802, musical compositions and their performances in 1831, photographs in 1865, drawings, paintings, sculpture and designs and models for fine art in 1870 (Lisby, 2019, p. 234). The Copyright Act of 1909 protected unpublished works that were made to be exhibited or performed. The Copyright Act of 1976 added even more protection such as protection for all “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” (Lisby, 2019, p. 234).

Congress, continually expanding the things they consider copyright, continues to try and encourage innovation and creativity. When the copyrights to a certain thing expire, it automatically becomes what is known as “public domain.” Works that are also not eligible for copyright are public domain automatically. Copyright law protects literary works, musical works, dramatic works, pantomimes, pictorial, dramatic and sculptural works, motion pictures, sound recordings and architectural works. It is important to note that copyright protects the expression of the idea not the idea in and of itself. It is also important to note that one of the most important defenses against any claim of copyright infringement would be the Fair Use Doctrine. The Fair Use Doctrine essentially states that the use of copyrighted works for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship
and research” are all permitted under Fair Use (Lisby, 2019, p. 245). There are four factors that must be met before something can be considered Fair Use.

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

2. The nature of the copyrighted work.

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

4. The effect of the use upon the potential market for or value of the copyrighted work.

(Lisby, 2019, p. 245)

Things that Fair Use does not protect are news, facts, ideas, theories, procedures, concepts, processes, systems, methods of operation, principles, history, works produced by the federal government, and standard calendars to just name a few (Lisby, 2019, p. 235). Fair Use is the most important and far reaching statutory limitation to the exclusive rights of copyright owners (Lisby, 2019, p. 245). When it comes to fair use, how much is too much? What is transformative use? In 1991 Paramount Pictures took a well-known picture of Demi Moore that was taken in 1991 while she was 8 months pregnant and doctored it to put the face of actor Leslie Nielsen on the body to promote the 1993 movie, The Naked Gun 33 1/3: The Final Insult. The photographers sued and lost because the poster for the movie was a parody of their earlier photograph (Lisby, 2019, p. 246). In order to be transformative, it is important to take something original and transform it into something completely different otherwise you would just be blatantly copying.

Technological innovation has always been the enemy of copyright if the primary purpose of copyright law is to protect the copyright owner’s right to make copies (Lisby, 2019, p. 248).
Since time immemorial copying things has always been hard and expensive, until Gutenberg’s printing press came about in 1436 and opened the pandora’s box. With the advent of the internet the levels of copyright infringement we are seeing are “unfathomable.” According to Lisby, “Ownership of a created work belongs to the work’s creator (or joint creators). This is a general rule. An author or artist may not own a work, however, if it was created

1. Within the scope of one’s employment
2. If a specific contract provision exists between two parties to the contract stating the conditions and extent of ownership
3. Or, if the work was created as a commissioned work for hire”

(Lisby, 2019, p. 235)

This will be especially important in the future as more and more companies seek to want to control our creative outlets, such as YouTube demonetarizing videos that it deems inappropriate for a general audience.

**Recent Case Law**

Before we get into recent case law it is important to understand the history of where this all begins. In the landmark case *Sony Corp. of America v. Universal City Studios, Inc* (1984) The Supreme Court ruled that videotaping a television show or movie for later use is not infringing on copyright. This translated later to DVR recordings in the case of *The Cartoon Network v CSC Holdings & Cablevision Sys* (2008) where the States Court of Appeals for the Second Circuit determined that copying content at users request did not violate copyright because the cable providers (Cablevision) servers were located at their headquarters not privately at the persons home. However, when it comes to copyright and digital files being taken from the internet,
things can get tricky. For example, in *Columbia Pictures Indus. v. Gary Fung* (2013), a movie studio sued a website operator and his company alleging that the defendants were liable for contributory copyright infringement and that they were in violation of statute 17 U.S.C.S § 106 of United States Copyright Law, also known as exclusive rights to copyrighted works. Ultimately the appellate court had confirmed that Fung was liable for copyright and that he was not eligible for protection under DMCA safe harbor provisions. DMCA safe harbor provisions are a way to keep internet service providers safe from liability should their users decide to use their services for illegal copyright infringement (17 U.S.C. § 502 (1998)). The defendants three websites took and collected torrent files and organized them so that they could be found more easily. For example, it is in the same fashion as Google, the site compiles searches to help you find what you are looking for faster. The court had ruled the owner of the website (Gary Fung), had explicitly known the website was going to be used for illegal downloading purposes and did nothing to try and alleviate or stop the act of copyright infringement from going down.

By both uploading and downloading copyrighted material, a person commits an act of copyright infringement. Based on statistical sampling, Columbia's expert averred that between 90 and 96% of the content associated with the torrent files available on Fung's websites are for "confirmed or highly likely copyright infringing" material (17 U.S.C.S § 106).

Congress had passed the DMCA (Digital Millennium Copyright Act) in 1998 to try and get ahead of the curve in terms of evolving technology. By adding a new section to the Copyright Act, section 512, Congress was trying to limit the liability of ISPs from litigation (17 U.S.C. § 502 (1998)). However, as we know, one must qualify first in order to enjoy these “safe harbor” provisions. It is basically a quid pro quo. In exchange for immunity from prosecution ISPs MUST cooperate with owners of copyrighted works to address any potential illegal activity. The
defendants tried to argue safe harbor through the DMCA, however they could not because the website owner, Gary Fung, had explicit knowledge of infringing activity and actively encouraged such infringement. Safe harbor through the DMCA offers protection from copyright claims if online service providers can remove or block access to the infringing materials after the copyright holder gives appropriate notice (17 U.S.C. § 502 (1998). Safe harbor was not available to the defendants because the trackers they used for their torrents are not considered service providers but rather “conduits” who communicate with each other. However, as we know, copyright infringement is not just exclusive to the motion picture industry.

In 1999, Napster was formed and the way we gathered and listened to our music was forever changed. Napster was a P2P (peer to peer) music file sharing site that made huge waves when it broke out on the internet, especially when in 2000 the site was sued by the heavy metal band, Metallica. However, before we dive into Metallica’s case it is important to look at the case that made it possible to sue Napster in the first place. In the case of A&M Records, Inc v. Napster, Inc (2001) you had a landmark case that was decided by the United States Court of Appeals for the Ninth Circuit. This was the case that decided that Napster could be held liable for copyright infringement. Napster however tried to claim that its users did not infringe on copyrighted material because they are engaging in Fair Use even though none of their criteria fit the Fair Use rules. In fact, the court found that Napster had known the entire time that its service was contributing to copyright infringement yet did nothing to try and quell the damages.

The Napster case, Metallica v. Napster, Inc. (2000), was the catalyst when it comes to enforcing copyright law upon a digital format being that it was the first time an artist sued a P2P file share company, but it would certainly not be the last.
“The band claimed large numbers of students were using campus computer systems to access the Napster site and trade pirated music. Metallica also identified 335,000 Napster screen names in 60,000 pages of documents. Napster ultimately yielded to legal pressures by removing 317,377 users, a move that did not prevent the traders of bootleg music from returning” (Lipschultz, 2019, p. 224).

With the case of *Recording Indus. Ass’n of Am., Inc v. Verizon Internet Servs* (2003) you had an instance of the RIAA using the subpoena provision in the DMCA in order to identify two users of Verizon Internet Services who were trading massive amounts of .mp3 files over sharing sites such as Kazaa. Interestingly enough while the RIAA stopped filing lawsuits in 2008, they still pursue cases from the past (Lipschultz, 2019, p. 225).

**Law Review Analysis**

In the case of *Columbia Pictures Indus v. Gary Fung* (2013), “red flag knowledge” came heavily into play. “The DMCA was enacted to ensure that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand” (Hansen, 2018, p. 321). Internet Service providers are forced to maintain a notice-and-takedown system so that way they can keep track of people and websites who commit copyright infringement. This system grants copyright owners the right to notify their ISP and tell them that someone is infringing on their copyright. Hansen says, however, that secondary liability is different from direct liability and can occur in several different ways. “The Copyright Act does not specifically mention secondary liability, principles of secondary liability are rooted in common law doctrines and are well established in case law (Hansen, 2018, p. 321). Even though the courts determined Fung was at fault for being in the know about intentional copyright
infringement, Fung tried arguing Fair Use, but the courts conducted the modern two-part test for contributory infringement. The test consists of two questions.

1. Is the technology capable of substantial non-infringing uses? and
2. Is the manufacturers/seller’s intent to encourage or induce others to violate copyright?

(Lisby, 2019, p. 249)

In Fung’s case the answer to both questions, the court found, were yes.

In the case of *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs* (2003), the RIAA obtained a ruling in their favor from the United States District Court from the District of Columbia. Verizon, however, fought back by trying to argue that the subpoena was related to materials transferred over, not stored on their network and that the DMCAs safe harbor provisions would protect the ISP. The district court however, ordered that the subpoena be enforced with Verizon subsequently appealing the ruling and ultimately the court ruled in favor of one subpoena while deciding to not enforce the other. This case was really the first instance in which the RIAA decided to go after the average everyday user, and the first time they tried going down the route of issuing subpoenas (Yu, 2019, p. 658). The court said that even though Verizon was correct in saying their service is only used to transmit the files instead of hosting them the court was not unsympathetic to the RIAA either, understanding the implications this may have on the music industry (Yu, 2019, p. 659). However, ultimately the district court decided it was not up to them to rewrite the DMCA every time a new technology comes along, the plight of copyright owners must be addressed by congress.

**First Amendment Conclusion**

First Amendment law and copyright have a very strong central relationship to each other and are essential to how we communicate, in the United States particularly. Fair use is the first
thing that comes to mind. “The use of copyrighted works for criticism, comment, news reporting, teaching, scholarship and research and anything else determined to be fair use” (Lisby, 2019, p. 245). According to Lisby, the First Amendment and “intellectual property” are two sides of the same coin in that their legal functions advance and balance each other out. The First Amendment gives Congress the power to promote the progress of Science and the Arts by letting people secure the rights to such properties. In doing so, the creator of said property can ensure that the property remains untouched. This can also be detrimental because it may inhibit creativity as well. With more and more avenues of access to entertainment popping copyright law will be more important to interpret correctly now and, in the future, more than ever before. Title 17 of the United States code deals with and outlines copyright law. The outlines are:

1. 17 U.S.C. Subject Matter and Scope of Copyright
2. 17 U.S.C. Copyright ownership and transfer
3. 17 U.S.C. Duration of Copyright
4. 17 U.S.C. Copyright Notice, Deposit, and Registration
5. 17 U.S.C. Infringement and Remedies
6. 17 U.S.C. Manufacturing Requirements and Importation
7. 17 U.S.C. Copyright office
8. 17 U.S.C. Proceedings by Copyright Royalty Judges
10. 17 U.S.C. Digital Audio Recording Devices and Media
11. 17 U.S.C. Sound Recording and Music Videos
12. 17 U.S.C. Copyright Protection and Management Systems
These thirteen provisions outline the basis of all of the copyright law for the United States of America. These provisions also provide the basis to any amendments that may be added in the future, and with how fast the technological landscape can morph you can be sure that we will see more and more being added.

This paper sought to explore and show the difficulties in enforcing copyright law when it comes to movies and music. All the way from the first federal United States copyright law in the world in 1790 to the *Copyright Act of 1909* to the *Copyright Act of 1976* to the DMCA, we have come a very long way when it comes to trying to protect intellectual property. But more work must be done. The limitations to this are vast. It seems as though laws change daily and with how fast technology keeps evolving it can be difficult to keep up with all the different cases and outcomes.
References


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