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2009-01-01

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Eadaoin O'Sullivan
Dublin Institute of Technology

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Recommended Citation
O'Sullivan, Eadaoin:Infringement Nation: Morality, Technology and Intellectual Property. Irish Communications Review, Vol. 11, 2009.

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INFRINGEMENT NATION: Morality, Technology and Intellectual Property

Eadaoin O'Sullivan

> [A] COMBINATION OF EASE of access, and the demands of new businesses, [have] contributed toward a shift towards viewing copyright works as simply 'content' needed to make a particular project work. It has also led to increased pressure on copyright owners, both to release their works for exploitation by others, and to do so more and more cheaply. – Cliodhna O'Sullivan, *Public Affairs and Ireland*, Summer 2005.

2004 could be said to represent a watershed of sorts in the Irish public's consciousness of copyright law. June 16th of that year was the 100th anniversary of Bloomsday, and events, under the umbrella of the 'ReJoyce Festival' were organised all over Ireland to mark it. Some, famously, ran square up against the intransigence of the Joyce estate, notorious up to then in some (legal, academic) circles for its tight grip on the copyright of James Joyce's work; in the wake of 2004's Bloomsday celebrations, this notoriety soon became widespread.

> It's an act of rebellion to stand and read aloud from James Joyce – it's as if we're in the 1930s again. – Helen Monaghan, director of the James Joyce Centre, *Sunday Business Post*, 13 June 2004.

Media coverage of the estate's challenges to those who wished to exploit Joyce's work during the Bloomsday celebrations was extensive, and uniformly condemnatory of the estate. The media's condemnation revolved around an idea that the Joyce estate was exercising unreasonable control over (it was implied) works which were the cultural and spiritual property of the Irish nation. Spectacularly, the Irish government, acting in response to a letter received from the estate's solicitors, rushed an amendment to the 2000 *Copyright and Related Rights Act* through the Seanad to allow for the public display of Joyce manuscripts in the National Library. (The purchase of these manuscripts was itself the subject of some controversy, beyond the scope of this paper.) The original act had made no provision for such display. The estate did not specifically threaten legal action, but merely pointed out that the government's intended exhibition of the manuscripts would be in breach of copyright. The latter's response was the insertion of a new subsection (7A) into section 40 of the act:

> For the avoidance of doubt, no infringement of any right created by this Part in relation to an artistic or literary work occurs by reason of the placing on

> display the work, or a copy thereof, in a place or premises to which members of the public have access. (*Copyright and Related Rights (Amendment) Act*, 2004.)

The events described above raise a number of issues. In no particular order: a jaundiced media and public attitude toward copyright; the interests of copyright holders; the interests of those who wish to exploit copyrighted works; and, though it is an extreme example, the malleability of copyright legislation in the face of powerful lobby groups. (This example is extreme as the lobby group in question is also the group with the power to amend legislation; also, the amendment was couched in terms of its being 'for the avoidance of doubt').[1]

As a jumping off point for an examination of the increased demand for easy and cheap exploitation of copyrighted works the Bloomsday controversies are salient because they reflect a conflict between the rights holders of traditional content (i.e. literary works) and traditionally powerful elites – government, academics, and other arbiters of elite culture. Because the battle was fought between elites, I would argue that it helped to normalise the idea that the exploitation of copyright content was permissible and desirable in a way that contests over new media (such as A & M Records Inc vs Napster and MGM vs. Grokster) could not.

Intellectual Property laws confer an exclusive right to exploit an invention or creation commercially for a limited period. These rights are essentially negative in that they protect the copying of the protected innovations. They do not ensure profitability but if the Intellectual Property Right is combined with a successful product the legal exclusivity provides a stimulus to innovation by acting both as a reward to the inventor or creator, and as a stimulus to innovation more generally (Anderton, 2007). Copyright represents a balancing act by legislators between different interests. On the one hand, it offers protection, as noted, to innovators, and in so doing seeks to foster further innovation. On the other, it also reflects a perceived public interest in facilitating certain kinds of access to copyrighted works that do not require the copyright holder's permission. These are known as 'fair dealing exemptions' ('fair use' in the US). Fair dealing exemptions inscribed in Irish law include certain types of non-commercial use (such as for research or study) (*Copyright and Related Rights (Amendment) Act*, article 50) and uses for the purposes of criticism, review, or the reporting of current events (article 51).

The question of copyright law and copyright norms arises with each round of technological innovation. Copyright and digital rights are the issue of the moment, but we should bear in mind that copyright law, while pledged to uphold innovation, has inscribed within it the struggle to keep pace with this innovation. For example, Kaplan (1967) stated some time ago:

> As a veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the

1 However, the comments of some Dáil members on the introduction of the amendment should be noted. Brendan Howlin said 'It is amazing that at the last minute a specific new legislative measure should have to be introduced into this House to avoid doubt about the legal right of the Natoinal Library to present State owned original Joyce works', while Philip Hogan of Fine Gael observed 'I am strongly of the view that we should not legislate our way out of problems at every hand's turn' (Dáil Éireann, 2004).

> communications revolution of our time, [and] then to pronounce upon the inadequacies of the present copyright act (p. 1).

Were we so minded, we could go back as far as 1710 for examples of the balancing act between protection and innovation. The first legislation for copyright, the *Statute of Anne*, was brought into law in Britain on foot of the activities of 'printers, booksellers, and other persons [who] have of late frequently taken the liberty of printing, reprinting, and publishing … books, and other writings, without the consent of the authors or proprietors of such books and writings' – activities made possible by the declining cost and increasing availability of printing presses.

We shall go back only as far as the 1980s, to the original modern copyright case célèbre – Sony vs Universal City Studios (1984)[2] (the Betamax case) in the US. Sony were sued for their distribution of the VCR recorder. The entertainment industry perceived the VCR, which enabled the public to record and copy film and broadcast content, as a massive threat. The judgement in that case found that the fact that a VCR has infringing uses was not enough for the finding of contributory infringement by the manufacturers, Sony. In England, CBS Songs vs Amstrad Consumer Electronics PLC., (1988),[3] (the latter, a manufacturer of double cassette decks) was the test case for contributory infringement, and was decided in favour of the manufacturer. This case paved the way for newer reproduction technologies such as MP3 players. It is significant to note, as will become clear below, that in neither case did the entertainment industry pursue individual users of either VCRs or double cassette recorders for infringement.

Napster was the first company to allow individuals to download freely and quickly large quantities of copyrighted content. It was found liable for copyright infringement in the US on the basis that while the company did not itself download the songs, it did have the songs on its server. In the wake of this judgement, 'peer to peer' (P2P) software was developed. This software was created in part to circumvent the liability of a central server holding copyrighted content. As the term implies, P2P software allows users' computers to communicate and share files directly. It also leaves individual users, rather than the P2P software developers or distributors, open to liability for copyright infringement. And, indeed, many were found so liable, creating a wave of negative publicity for record industries all over the world.

In 2005 the US Supreme Court – in MGM Studios vs. Grokster Limited (2005)[4] – found against the latter, a firm which distributed free P2P software. MGM had sued Grokster for copyright infringement on the basis that the defendants had knowingly and intentionally distributed their software to enable users to infringe copyright works. The judgement hinged on the fact that Grokster was seen to have induced copyright infringement through its publicity material, and as such was quite particular to this case, however, it was seen at the time as significant, as it suggested that if P2P software distributors could be found liable for contributory infringement, the record industry would be less likely to sue individuals, and would make these companies targets for redress instead. The industry, how-

2 Sony Corporation of America vs Universal City Studios, Inc. (1984) 464 US 417
3 CBS Songs vs Amstrad Consumer Electronics PLC., (1988) 2 All ER 484
4 MGM Inc. vs Grokster Ltd. (2005) 545 U.S. 913.

ever, continued in its pursuit of individual infringers; the *Washington Post* (31/12/07) reported in 2007 that more than 20,000 lawsuits had been filed in the US against individual downloaders; in Ireland, June 2007 saw IRMA obtain a High Court Order to obtain the names and addresses of 23 individual downloaders, with a view to prosecution (www.irma.ie/index2.htm).

P2P filesharing is unlikely to fall into the rubric of fair use in any jurisdiction – the copyright holders, in this instance, very firmly do have the right of law on their side. The fashion in which they have sought to uphold these rights, however, has been unfortunate. It has painted the content providers as cruel behemoths stomping on the little guy, with the little guy consequently losing some of his moral ambivalence about receiving content for free.

The European Union Information Society Directive was passed in 2001 in an effort to harmonise copyright law across the Union. Its list of fair use exceptions, like the Irish list, is limited: 'teaching, scientific research, and certain other private study purposes', 'criticism, review, caricature, parody and pastice' and 'certain purposes relating to the dissemination of news, political speeches and public lectures' (article 5(3)). Such an exhaustive list of exceptions, argue some, was ill-conceived, and poorly fixed to deal with the rapid developments in information technology (see Hugenholtz, 2000). In 2006, the EU announced a fresh set of copyright directives, commonly known as IPRED2 (European Parliament, 2007).[5] However they did not take the opportunity to expand the scope of fair use:

> Member States shall ensure that the fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching, scholarship or research, does not constitute a criminal offence (article 3).

Developments in copyright law in the US and the EU have been argued to be 'a story of increasing monopoly … [and] progressive expansion of reward' for copyright holders, according to Daithi O'Dell (2007), writing on the Cearta blog. O'Dell argues that 'every extension of the reach of copyright protection should have been accompanied by a concommitant flexibility in the exceptions, such as fair dealing'. This, he argues, has not happened, and 'the relationship has become progressively unbalanced and is now increasingly tilted toward the copyright holder'.

This imbalance in copyright protection is well illustrated by digital rights management technologies (DRMs). DRMs are incorporated into much legally available online content, as well as DVDs, and, in the US, into some television broadcasts (to prevent their storage on new hard-drive recorders like TiVo). They tether digital works to particular platforms to prevent format shifting. The *US Digital Millennium Copyright Act* (1998:17 U.S.C. article1201 (a) (b)), specifically encourages their use as does the EU's IPRED2. In 2006, in response to submissions by, among others, the anti-DRM lobby group the Electronic Frontier Foundation, the US Copyright Office asserted its position thus:

> At most, (anti-DRM) commentators have asserted that technological measures have made it difficult to make copies of musical and audio-visual works for

5 IPRED2 was originally mooted in 2005 and the latest amendments date to April 2007.

> use on other devices – a use that is either infringing, or, even if it were non-infringing, would be merely a convenience which is insufficient to support a claim for an exemption' (US Copyright Office, 2006).

In a keynote address to OSCOM (the International Association for Open Source Content Management) in 2002 Stanford Law Professor and founder of the Stanford Centre for Internet and Society Lawrence Lessig noted that legal usage of copyright works is tri-partite.[6] It consists of regulated use (uses specifically covered in a copyright license); unregulated use (not regulated by copyright licenses, but not necessarily illegal – as an example of unregulated use he suggests sitting on a book), and fair use. He argues that the concept of fair use has suffered most with the advent of DRM technology. Where previously users could engage in fair and unregulated uses of works (lending a book to a friend; creating a collage of copyrighted photographs for a non-commercial purpose as examples of each) without fear of legal reprisal, the traceability of unregulated or non-regulated acts, along with the restrictions imposed on use by DRM technology, has had the result that 'the use of creative output [has never] been more controlled'. Regulation of the use of copyright works has been taken from the hands of legislators and vested instead in those with an interest in protecting such works: 'Technology is better at controlling how online media is used than the law is at controlling its use in the real world'. Not only is policing technology far easier and more effective than real world policing of copyright infringement, it leaves no room for examination of individual cases as they arise. While European fair usage exemptions are limited, as noted, post-hoc judgement on such cases offers at least the prospect of a degree of wriggle room for defendants. As the British Court of Appeals, in deciding on the case of Ashdown vs Telegraph Group (2002)[7] observed 'It [is] necessary for the Court to look closely at the facts of individual cases – as indeed it must whenever a 'fair dealing' defense is raised'.

The demands of users, despite the best efforts of the entertainment industry, are making themselves felt. The inconvenience of DRM technologies are, in fact – contrary to the US Copyright Office's assertion – sufficient to support a claim for exemption. One online music store (7digital.com) reports that non-DRM protected music outsells its protected counterpart four-to-one (reported in the *Guardian*, 10/12/07). In light of figures like this, almost certainly, EMI announced in late 2007 that it would remove DRM protection from content sold through iTunes, while Universal made a similar move, removing protection from classical and jazz music downloads.

Every time a user transfers a song from CD to MP3 in Ireland (s)he infringes copyright, under article 201 (1) of the *Copyright and Related Rights Act 2000*. The vast disparity between the law and public norms is well demonstrated in this. Millions of songs are format shifted annually in Ireland by hundreds of thousands of MP3 player users, many of whom are unaware that they are in breach of copyright in doing so; many of whom would think its illegality ludicrous if they did know.

Even for those enjoying, under law, a 'privileged exception' which allows them to legally format shift – lecturers and students needing extracts from DRM protected

6 For a full transcipt of the speech, see http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html?page=1

7 Ashdown vs Telegraph Group (2002) Ch.149 CA.

media; or the physically handicapped, who need to format shift media to make it accessible, amongst others – DRM is frustrating. In the first empirical study of its kind, Patrícia Akester (2009) looked at how DRM impacted on such groups – such as the British Library, film lecturers and students, and the blind or sight-impaired (who need to run e-books through a screen reader to create accessible audio or large text versions). She found that all of these groups reported frustrations with DRM, as it is too blunt a tool to allow for their privileged exceptions. There is a complaints and redress procedure available, but in general it was found to be too cumbersome to be useful. Consequently, at least in the case of film lecturers and students, as well as the sight-impaired, many individuals are resorting to what is coyly described in the paper as 'self-help' measures to circumvent DRM – in other words, they are downloading illegal copies of films or books unencrypted with the technology.

Europe is tending to be more progressive than the US in realigning law and norm. In Britain, *The Gowers Review of Intellectual Property* (2006) recommends a 'limited private copying exception, which will allow customers to format shift legitimately purchased content'. Commenting on the review, the British Intellectual Property Office (2008) notes in connection with format shifting:

> The current law is difficult to enforce in this area. Not only may it be difficult to justify the illegality of such an activity but, because the restrictions are seen as unreasonable, they can often be damaging to the public's perception of copyright. Many consumers simply do not understand why the act of transferring music from CDs they own to their MP3 players is illegal (para. 81).

It may be too late. The lack of initiative shown by legislators to remedy 'unreasonable' copyright restrictions, married to the ease with which these restrictions can be circumvented, has already given rise to a mass infringement culture, itself generative of consumer disdain for copyright.

The European Union, also too late, is making moves to address the issue. A press release of 3rd January 2008 notes that 'Europe's content sector is suffering under … serious disagreements between stakeholders … about fundamental issues such as private copying' (IP/08/05, http://ec.europa.eu). The same press release stated that 'the demand and preferences of 500 million customers are the strongest arguments for achieving new solutions at EU level'. It stops short of recommending a private copying exception, suggesting instead that '[t]echnologies that support the management of rights and the fair remuneration of creators in an online environment can be a key enabler for the development of innovative business models'.

The internet is perhaps unique, despite the caveats regarding copyright's relationship to technological innovation above. Lawrence Lessig characterises its uniqueness in terms of the development of a 'Read-Write' culture as distinct from the 'Read-Only' culture that prevailed prior to its ubiquity. Where once our interaction with copyrighted material was on the level of passive consumption, the internet and associated technologies have allowed users to engage with and modify copyrighted material in ways and on a scale never before seen. He uses the example of 'machinima' and mash-up culture (editing separate audio and visual elements to create something new; or simply editing one or the other). Mash-ups are the logical end-point of a view of copyrighted work as simply 'content', in one conception; or as prime

exemplars of the 'standing on the shoulders of giants' relation between copyrighted work and innovations derived therefrom (see www.ted.com/talks/view/id/187).

Neither Napster nor Grokster, the Irish National Library nor Sony, nor the manufacturers of MP3 players or hard-drive recorders were or are disinterested parties in the battle for access to copyrighted content. All, with the exception of the Irish National Library, sought to gain some financial advantage from the exploitation of content. Despite this, the war for access to content has somehow become a moral one. The abject failure of legislation to keep pace with the rapidity of technological advances in the past decade has meant that the public have gained access to technologies which enable them to freely and easily infringe copyright. Knowing that the technology for conveniently copying and sharing content exists, there is an inevitable public backlash when protective fences are thrown up post-hoc, either by content providers or legislators. With reference to Lessig's observation of the disparity between the policing of copyright in the real world and in the tech world, the dogged pursuit of individual infringers has startled and antagonised users. As John Tehranian (2007: 537) observes:

> While there may be a vast disparity between what activities the Copyright Act proscribes and what the average American might consider fair or just, a lack of aggressive enforcement has long prevented this fundamental tension from coming to a head in the past. As technology improves, however, enforcement is becoming increasingly practicable (2007: 537).

This law/norm disparity is becoming more and more marked thanks to a combination of legislative lethargy and energetic technological innovation. This makes a mockery of the law. Enforcement seems arbitrary and unfair, coming as it does after the establishment of normative infringing behaviours. Where copyright holders maintain the right of law, they are coming to be seen more and more as aggressors, thanks in no small part to the methods employed to assert those rights. Now that it is common to view copyright holders as aggressive, wealthy monopolists, I find it hard to envisage a future in which the pressure relents on content providers to release their work for exploitation, and to do so more and more cheaply.

AUTHOR

Eadaoin O'Sullivan is a journalist and a PhD candidate in the School of Media at Dublin Institute of Technology, where she is conducting practice-based research into online journalism.

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