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A Personal Injury Law Perspective on Copyright in an Internet Age

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Perspectives on Intellectual Property

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by
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A recurring theme in modern copyright law is the notion that Internet technology unacceptably threatens the security of copyrights. The difficulty of policing millions of Internet users who can share files at the click of a button[1] means that copyright holders have no easy way to control or ensure payment for unauthorized uses of their works.[2] Those with major commercial interests in content, particularly the entertainment and software industries, understandably fear a potential loss in profits or even the end of their

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1. For descriptions of the Internet and its operation, see Reno v. American Civil Liberties Union, 521 U.S. 844, 849-51 (1997), Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1365 (N.D. Cal. 1995), PRESTON GRALLA, HOW THE INTERNET WORKS 5-7 (Millenium ed. 1999), DANIEL J. KURLAND, THE 'NET, THE WEB, AND YOU 25-29 (1996), DAVE SPERLING, DAVE SPERLING'S INTERNET GUIDE 2-3 (2d ed. 1998).

2. Title 17 of the United States Code reserves to copyright holders a number of exclusive rights, including the right to reproduce and distribute the copyrighted work. 17 U.S.C. § 106(4)-(6) (Supp. IV 1998). These rights, however, are not absolute, as copyright deliberately circumscribes the rights of copyright holders. *See* 17 U.S.C. § 102(b) (1994) (denying copyright to ideas); 17 U.S.C. § 107 (1994) (codifying the fair use doctrine); Baker v. Selden, 101 U.S. 99, 102-03 (1879) (denying the author of a book an exclusive property in processes or methods described therein); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (extending fair use to permit limited recording of on-air televsion programming); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (applying fair use doctrine to parodies); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (holding that playwright acquires no property right in his ideas by virtue of copyright). This means that unauthorized uses of copyrighted works are not necessarily infringements of copyright. Nevertheless, the Internet permits its users to commit (sometimes unwittingly) a number of acts that would be considered copyright infringement.

financial viability. Accordingly, these so-called "content providers" have taken steps to secure their interests.

A significant component of the content providers' strategy is the claim that responsibility for copyright infringement on the Internet extends beyond the users who directly commit infringement to those who provide Internet technology. Copyright holders have already argued (with mixed success) that Internet service providers ("ISPs") are liable for copyright infringement committed by their users.[3] Copyright owners have also successfully asserted that other providers of Internet technology are liable for infringement committed by their users of that technology. The most famous of these cases is the recording industry's claim that Napster, Inc. is both vicariously and contributorily liable for its users' unauthorized sharing of music files.[4]

Copyright owners have also successfully pursued legislative solutions. The recently enacted Digital Millenium Copyright Act ("DMCA")[5] contains a number of provisions designed to assist copyright owners' use of technology to prevent unauthorized access to or reproduction of works. Among other things, the DMCA outlaws the distribution or use of technological devices that circumvent encryption or other technological measures that restrict access to works, even if the works in question are not protected by copyright or the use being made is noninfringing.[6] These provisions have allowed content providers to gain injunctive relief against those posting Internet links that facilitate access to circumvention technology.[7]

Not suprisingly, these developments are controversial. Providers of Internet technology argue that they should not be held responsible for the behavior of others. Likewise, consumers of copyrighted works complain that these developments deprive them of access to works

3. *See* 17 U.S.C. §§ 512(a)-(d), (f), (g), (i) (regulating but not eliminating the possibility of ISP liability for user infringement); Marobie-FL Inc. v. Nat'l Ass'n of Fire Equip. Distribs., 983 F. Supp. 1167 (N.D. Ill. 1997) (generally following the *Netcom* analysis); *Netcom*, 907 F. Supp. at 1365-66 (denying plaintiff's claim for vicarious liability at summary judgment but refusing to deny plaintiff's claim for contributory infringement). For a detailed analysis of the relevant statutory and case law, see Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000).

4. A&M Records v. Napster, Inc., No. 00-16401 (9th Cir. Apr. 3, 2001) (affirming preliminary injunction against operators of music file sharing directory upon finding of vicarious and contributory liability); *see also* ALS Scan, Inc. v. RemarQ Cmties., Inc., 239 F.3d 619 (4th Cir. 2001) (reversing summary judgment in favor of defendant, which offered Internet access to newsgroups containing infringing material, on the issue of whether plaintiff was barred from asserting a claim of contributory copyright infringement).

5. 17 U.S.C. §§ 1201 (Supp. IV 1998).

6. 17 U.S.C. § 1201 (a)(1)-(2) (Supp. IV 1998).

7. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

presently guaranteed by the copyright law. Copyright holders reply that these measures are necessary to protect copyrights. Anything less, they contend, represents a fundamental neglect of property rights.

This Essay offers perspective on this debate by comparing recent efforts to prevent copyright infringement with similar efforts to prevent personal injury in tort law. Although the length of this Essay precludes comprehensive treatment of the issues that will be raised, it is hoped that its ideas will stimulate thinking and debate about the lengths to which society should go to ensure the security of copyrights. As will be described below, many recent efforts to protect copyrights bear considerable resemblance to the use of enterprise liability in tort and gun control measures. This correspondence is worth studying because the social balances struck in tort law and gun control have required intense litigation and social debate. The resulting compromises therefore represent a rough social consensus about how far we are willing to go to protect individuals from serious harm. If the measures desired by copyright holders seem consistent with the limits of personal injury law or gun control measures, then perhaps they do reflect our society's general values. However, if those measures seem more drastic than those we are willing to accept when guarding against serious physical injury or death, then perhaps recent efforts to expand copyright protection have gone too far.

I. Copyright, Enterprise Liability, and Gun Control

The claim that Internet technology providers are liable for infringement committed by users resembles the application of enterprise liability in tort law. Just as manufacturers of defective products must internalize the losses caused by their products, enterprises like Napster or ISPs must internalize the costs of copyright infringement caused by Internet technology. Such internalization forces enterprises to take precautions against losses and spread losses among their customers. Copyright holders undoubtedly hope that the use of enterprise liability will force enterprises like ISPs or Napster to stop unauthorized use of copyrighted works or collect licensing fees from users to pay for damages.

Polygram International Publishing v. Nevada/TIG[8] offers clear evidence of the connection between copyright and tort law. That case, which has been cited to support liability against Internet

8. 855 F. Supp. 1314 (D. Mass. 1994).

technology providers,[9] involved the claim that the organizers of a trade show were liable for unauthorized use of copyrighted music by exhibitors at the show. In finding for the plaintiffs, the court wrote:

> When an individual seeks to profit from an enterprise in which identifiable types of losses are expected to occur, it is ordinarily fair and reasonable to place responsibility for those losses on the person who profits, even if that person makes arrangements for others to perform the acts that foreseeably cause the losses. The law of vicarious liability treats the expected losses as simply another cost of doing business. The enterprise and the person profiting from it are better able than either the innocent injured plaintiff or the person whose act caused the loss to distribute the costs and to shift them to others who have profited from the enterprise. In addition, placing responsibility for the loss on the enterprise has the added benefit of creating a greater incentive for the enterprise to police its operations carefully to avoid unnecessary losses.[10]

A correspondence between copyright and personal injury also arises when one compares restrictions on technology to gun control. Just as some argue that guns must be made unavailable because they pose an unacceptable risk to human safety, copyright holders are claiming that certain technology must be made unavailable because it creates an unacceptable risk of copyright infringement.

II. Some Observations About Enterprise Liability and Gun Control

The application of enterprise liability and gun control concepts in copyright is quite plausible. The objectives of copyright and personal injury law bear some degree of undeniable resemblance. However, before the results urged in copyright can be fully accepted, some observations need to be made.

First, the use of enterprise liability in tort law developed from a concern about physical injury to humans. Early writers about enterprise liability in tort specifically cited human injury, and not generalized economic harm, as the justification for expanding the scope of tort liability.[11] This concern for personal injury still affects tort doctrine to this day. For example, the so-called "economic loss

9. *See Napster*, No. 00-16401 (9th Cir. 2001) (citing *Polygram*, 855 F. Supp. at 1325-26); *see also* Brief for Plaintiffs/Appellees at 36, 43, A&M Records v. Napster, Inc., Nos. 00-16401 and 00-16403 (9th Cir. Oct. 2, 2000).

10. *Polygram*, 855 F. Supp. at 1325.

11. For example, Fleming James spoke of injury to persons (and not all injuries) when making his early and influential case in favor of strict products liability: "Strict liability is to be preferred over a system of liability based on fault wherever you have an enterprise or activity, beneficial to many, which takes a more or less inevitable accident toll of human life and limb." Fleming James Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923 (1957).

rule" permits recovery for economic loss only when the defendant has also caused physical injury to humans or property.[12] Similar limits on recovery exist in the law of vicarious liability, particularly the exceptions to the independent contractor defense.[13] These doctrines are consistent with our general social intuition that personal safety is generally more important than harm to property or economic interests.[14]

Second, the fact that liability against a defendant will spread loss and create incentives to avoid injury has never, in and of itself, been considered sufficient to create that liability. If such loss spreading and avoidance were enough, there would be no limit to the reach of enterprise liability. Everyone associated with a product would become liable because everyone could spread loss or take precaution.[15] Accordingly, tort law uses doctrines of defect, proximate cause, and assumption of risk to limit the reach of enterprise liability in various situations, including those that involve third party misuse of products.[16] These doctrines explain, at least in part, why it is almost impossible for plaintiffs to recover against gun manufacturers or liquor manufacturers for personal injury caused by the use of their products even though such liability would spread loss and create incentives for safety.[17] Moreover, these doctrines embody

12. *See* Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103 (Tex. App. 2000) (applying the doctrine to prevent recovery against defendant software maker when bugs in software caused economic loss); Rissler & McMurry v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228, 1234 (Wyo. 1996) ("The 'economic loss rule' bars recovery in tort when a plaintiff claims purely economic damages unaccompanied by physical injury to person or property."); Fishbein v. Corel Corp., 29 Pa. D. & C. 4th 289 (1996) (applying the economic loss rule to bar class action against defendant software manufacturer for costs of overcoming or correcting bug in software).

13. *See* RESTATEMENT (SECOND) OF TORTS, §§ 416-417, 423, 425, 427, 427A-B, 428 (using the term "physical harm" and not "harm" in applying the independent contractor defense).

14. *See* Katko v. Briney, 183 N.W.2d 657, 660 (Iowa 1971) (holding property owner liable for using deadly force to protect property absent a threat of death or serious bodily harm). The RESTATEMENT (SECOND) OF TORTS § 85 cmt. a (1965) states:

> The value of human life and limb, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit, that a possessor of land has, as is stated in § 79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises.

15. *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 527 (1985) ("The unavoidable implication of the three presuppositions of manufacturer power, manufacturer insurance, and internalization is absolute liability.").

16. *See* Yen, *supra* note 3, at 1857.

17. *Id.* at 1859-62.

the social judgment that sole responsibility for misuse rests with the individual committing the misuse and not the entity providing the guns or alcohol.

Finally, it must be noted that our society has not in fact enacted legislation that bans the possession of guns—even the so-called "Saturday Night Specials" frequently used in the commision of crime. This observation is important because handguns impose huge amounts of tragic loss on society. Nevertheless, the social judgment expressed through our political and judicial processes is that even the terrible loss of human life is not enough to justify depriving citizens of the legitimate uses of handguns. The argument that "guns don't kill people, people do" reflects society's prevailing sentiment about the possibility of making guns truly unavailable.

III. Comparing Copyright to Personal Injury

The foregoing observations about personal injury law create some interesting implications for the expansion of copyright protection. At the outset, one should notice that the application of enterprise liability to products developed as a form of consumer protection.[18] One could argue that the use of enterprise liability in copyright turns everything upside down by protecting commercial entities from consumers, and not vice versa. It is as if copyright holders have been transformed into victims analogous to people injured by defective automobiles. The use of enterprise liability to protect copyrights seems even stranger when one recognizes that copyright infringement inflicts intangible economic injuries, and not the physical personal injuries that justify the use of enterprise liability in tort law.[19]

As noted earlier, plaintiffs injured by misuse of guns or alcohol have practically no chance of recovering from gun or alcohol manufacturers.[20] This reflects the social judgment that the losses suffered by those plaintiffs are not sufficiently serious to extend tort liability beyond the person committing the misuse. If we apply the same values in copyright, it is not clear why the harm of copyright infringement justifies the sort of extended liability deemed inappropriate in the case of guns or alcohol. To be sure, one could consider bodily injury and copyright infringement equally grave,[21] but

18. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (influential early products liability case in which plaintiff recovers against defendant on breach of warranty theory).

19. *See supra* notes 11-14 and accompanying text.

20. *See supra* note 17 and accompanying text.

21. In reference to the threat of copyright infringement posed by video cassette recorders, Motion Picture Association of America President Jack Valenti has been quoted

it is doubtful that society generally agrees with such a calibration of values.

Finally, the same sort of question seems relevant when considering anti-circumvention legislation. If our society does not think that gunshot wounds justify a general prohibition against the possession of guns, why should it deem copyrights important enough to support a similar prohibition against certain kinds of computer technology?[22]

IV. Should Copyright or Personal Injury Law Change?

A possible response to the foregoing is that tort and gun control laws need to change. If copyright is "ahead of" these areas of law by offering more generous protection against the misbehavior of individuals, then perhaps tort or gun control law should itself offer more generous protection. There is undeniable attraction to this proposition, particularly if one is frustrated by our society's willingness to take on gun manufacturers and other alleged tortfeasors. However, it is not at all clear that such a change would be desirable, even from the perspective of the entertainment and software industries pushing for more copyright protection.

As noted earlier, if the principles of loss spreading and loss avoidance are in and of themselves sufficient to establish enterprise liability, it is not clear that liability for copyright infringement stops with ISPs or Napster-like services. Manufacturers of operating systems, CD-ROM burners, Internet browsers, and computer chips all know that their products are used to commit copyright infringement and are in a position to both spread loss and take precautions. To the extent that some of these manufacturers are copyright owners desirous of greater copyright protection,[23] would they be happy if they were also financially responsible for the behavior of those who use their technology?

Consider what might happen if society decided to equate intangible economic harm with bodily injury for purposes of imposing enterprise liability. If society guards against intangible economic injuries as fiercely as it does bodily injury, manufacturers of software may find themselves exposed to lawsuits for economic harm.

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saying that the video cassette recorder "is to the American film producer and the American public as the Boston Strangler is to the woman alone." Adam Liptak, *Is Litigation the Best Way to Tame New Technology?*, N.Y. TIMES, Sept. 2, 2000, at Art & Ideas/Cultural Desk.

22. Although the scope of this Essay prevents further exploration of the possible responses to this question, at least one possible line of inquiry is suggested *infra* at note 27.

23. For example, Microsoft is a leading content provider and maker of operating systems.

Presently, the economic loss rule protects software manufacturers from economic losses caused by defects in software precisely because economic losses are considered less important than physical personal injury.[24] If that distinction disappears, those who suffer financially because of software that they or others use may find that a significant barrier to their recovery no longer exists.

The entertainment industry may also have similar problems under an expanded liability regime. That industry knows that consumers who watch television stunts or listen to violent music lyrics sometimes imitate what they consume. For example, a teenager in Connecticut recently suffered second and third degree burns when he and his friends tried to duplicate a stunt from MTV in which a person sat on a barbeque grill while having lighter fluid sprayed on his body.[25] Existing law generally bars plaintiffs in such cases from recovery, even when the First Amendment concerns are ignored.[26] If society begins expanding liability for such injury beyond the immediate misusers (i.e., the children themselves), the entertainment industry might lose protection from liability that it surely values.

Conclusion

This Essay suggests that recent efforts to expand copyright protection are inconsistent with our society's willingness to place responsibility for misbehavior on people other than those immediately committing the misbehavior. When one considers the limits that exist in tort law and gun control legislation, it seems that copyright's recent expansion may put society in the odd position of doing more to prevent copyright infringement than personal injury. Perhaps, then, extended liability claims against ISPs and restrictions on certain computer technologies upset a well-accepted social balance and should be curtailed.

This does not mean, of course, that society should not protect copyrights. Those who acquire technology that makes copyright infringement possible must use it responsibly or face liability. Some vicarious or contributory copyright claims will make sense. Nevertheless, the undesirability of overzealous enforcement is part of copyright theory itself. Copyright's social bargain involves the

24. *See* Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103 (Tex. App. 2000) (applying the doctrine to prevent recovery against defendant software maker when bugs in software caused economic loss); Fishbein v. Corel Corp., 29 Pa. D. & C. 4th 289 (1996) (applying the economic loss rule to bar class action against defendant software manufacturer for costs of overcoming or correcting bug in software).

25. *See Teen Burned Imitating MTV Stunt*, N.Y. TIMES ON THE WEB, *at* http://www.nytimes.com (last visited Jan. 29, 2001).

26. *See* Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603 (2000).

judgment that property rights must be offset by free unpermitted access to works. That is why doctrines like the idea/expression dichotomy and the fair use doctrine exist. These doctrines make copyright an insecure property right, one subject to unconsented use by consumers. Eliminating that insecurity from the Internet upsets an important social judgment.

To be sure, the conclusions offered here cannot be considered final, as the space available does not permit a complete examination of all the relevant issues. A particularly interesting topic for further study would be the degree to which existing or potentially legitimate uses of Internet technology govern their appropriate treatment.[27] The resolution of possibilities such as these requires fairly detailed study about the various types of products whose distribution society restricts or whose manufacturers might be held liable for their products'. misuse. The point here is merely that we must be careful about blithely accepting the assertion that copyrights are property, and that we can never do enough to protect property. As of this writing, we do not even know if copyright based industries are truly threatened by enterprises like ISPs and Napster or circumvention technologies.[28] Society has always expressed limits on the reach of

27. This line of inquiry was first brought to the Author's attention in discussions with members of the CyberProf listserv, with particularly helpful contributions from Eugene Volokh, Justin Hughes, and Lydia Pallas Loren.

For example, one might argue that guns are not banned because they can be put to a number of legitimate uses, including self-defense, target shooting, and hunting. Perhaps then only those Internet technologies without substantial noninfringing uses should be subject to restriction. Recent anti-circumvention legislation and case law arguably embody this principle. *See* 17 U.S.C. § 1201(a)(2)(B) (Supp. IV 1998) (restricting distribution of devices with "only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (refusing to apply contributory liability against technology merely capable of substantial noninfringing use).

One might also assert, however, that society has not consistently banned nor exposed to tort liability even those gun-related products with few legitimate uses. For example, courts have refused to hold liable the makers of hollowpoint bullets that increase the severity of injury by expanding upon contact with the body. *See* McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997) (affirming dismissal of complaint against manufacturer of hollowpoint bullets designed to increase severity of injury, sold to the general public, and used during a mass shooting of commuters). Perhaps these bullets should be left unregulated against the contingency that a citizen would face attack by an assailant undeterred by an ordinary bullet. Yet, if this claim were accepted, it would also seem as if Internet technologies with fairly limited noninfringing uses should also remain relatively unregulated, especially if one believes that preventing unwarranted gunshot wounds is more important than preventing copyright infringement.

28. *See* Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, __ U. DAYTON L. REV. __ (forthcoming 2001) (arguing that in the long run, technology like Napster will not destroy incentives for the production of recorded music).

liability, and until society has more time to think about the Internet, a cautious approach to expanding copyright protection seems wise.