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Revise Copyright Law to Offer More Protection for Copyright Owners

Copyright law involves protection of original works from being unlawfully reproduced. The U.S. Constitution says, "Congress shall have Power… To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Const. art. I, § 8). This section of the U.S. Constitution authorizes the government to create acts that protect copyrights. Since the Copyright Act of 1976, the government's view on what it means to properly enforce copyright law has been blurred when it comes to protecting works from new means of distribution created by new technology. Copyright law is currently inadequate and should be revised to give copyright owners more protection in light of the development of new technologies.

The most recent copyright act is the Copyright Act of 1976, which has been amended five times and is still used to govern copyright law to this day. To summarize from the Copyright Act of 1976, copyright infringement includes any unauthorized reproduction of a work through making or distributing copies of the work, publically performing the work, or selling copies of the work (Copyright Act, 1976). Literary works, musical works, and motion pictures are all examples of things that are eligible for copyright protection, while formats, layouts, principles, and facts are not eligible for copyright protection (Copyright Act, 1976).

The court uses guidelines, commonly referred to as the Fair Use Test, to determine if copyright has been infringed. There are four parts of the Fair Use Test and they are written in section 107 of the Copyright Act of 1976. The first part is "the purpose and character of the use;" does the reproduction of the work provide an educational use or is it purely for profit? The second part is "the nature of the copyrighted work;" is the original work still available,

consumable, and published? The third part is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole;" is only part of the original work or the entirety of the original work used? The fourth part is "the effect of the use upon the potential market for or value of the copyrighted work;" is the reproduction of the original work affecting the profitability of the original work? (Copyright Act, 1976). All of these things are considered when determining if a reproduction of a work is fair use or copyright infringement.

Copyrights are meant to protect intellectual property, which now includes much more than what existed in 1976. New technological innovations that have been involved with copyrighting include Betamax and VCR tapes and file sharing via the Internet. Congress needs to account for these technological innovations and revise the copyright laws to incorporate them and help to better protect copyright owners. It could be argued that the Digital Millennium Copyright Act of 1998 adequately addressed this issue, but it really has not, considering that there are cases that took place after 1998 where courts still had trouble addressing the issue of technology and its effect on protecting copyrighted works.

There are four main U.S. Supreme Court cases that deal with copyright when it comes to new technology. They are *Sony Corp. of America v. Universal City Studios, Inc.* (1984), *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (2005), *Dastar Corp. v. Twentieth Century Fox Film Corp.* (2003), and *Eldred v. Ashcroft* (2003). These cases all offer insight on how the U.S. government has dealt with enforcing copyrights when it comes to new innovations in technology.

In *Sony v. Universal* (1984), Universal argued that Sony was liable for any copyright infringement committed by users of Sony's products that enable video recording. In 1975, Sony invented Betamax tapes, which are analog videocassette magnetic tapes that can record

television programs broadcast on public airwaves through a video recorder. People could purchase these tapes and record television shows and, because of this, Universal believed that Sony was liable for enabling the unauthorized reproduction of its work. The district court for the Central District of California had found in favor of Sony, but the Ninth Circuit Court had found in favor of Universal. Ultimately, the U.S. Supreme Court found in favor of Sony in a 5-4 decision.

In the opinion of the court, delivered by Justice Stevens, the court ruled that Sony could not be found liable for copyright infringement committed by people who purchase its tapes, saying, "the judgment of the Court of Appeals must be reversed." The court also ruled that making individual copies of complete television shows for purposes of "time-shifting" does not constitute copyright infringement, but is fair use. The Betamax tapes were therefore "capable of substantial non-infringing uses," and Universal could not dispute that (*Sony v. Universal*, 1984). Since this case took place, manufacturers of home video recording devices have not been able to be held liable for copyright infringement.

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (2005), Grokster's person to person (P2P) file sharing provided access to digitally stored information, such as movies, and Metro-Goldwyn-Mayer (MGM) led a consortium of 28 of the largest entertainment companies in suing for copyright infringement. In a way, this case is similar to *Sony v. Universal* (1984). In *Sony v. Universal*, Universal wanted Sony (maker of video recording technology) to be held liable for its users' copyright infringement. In this case, MGM wanted a maker of file sharing technology held liable for its users' copyright infringement. Grokster had already won in the Central District of California, which cited *Sony v. Universal* as a precedent, and Grokster won in

the Ninth Circuit Court, which upheld the district court's decision and ruled that P2P software had legitimate legal uses. However, the U.S. Supreme Court ultimately found in favor of MGM in a 9-0 decision.

In the opinion of the court, delivered by Justice Souter, the court ruled, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties" (*MGM v. Grokster*, 2005). This is the opposite of the opinion delivered in *Sony v. Universal* (1984). Here, the court held there was insufficient evidence that the file sharing could have uses that did not infringe on copyright. It also ruled that it did not need to interpret the standard set by *Sony v. Universal* as strictly because there was a "greater quantity of material" being used through Grokster's file sharing (*MGM v. Grokster*, 2005). This resulted in a greater effect on the market because MGM and all the other entertainment companies were not receiving profits from consumers that accessed Grokster's file sharing distribution system to view their works.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.* (2003), Dastar claimed it was not liable for copyright infringement by producing a television series called "World War II Campaigns in Europe" with the use of footage from a Fox-produced television series called "Crusade in Europe." Fox had obtained exclusive rights to "Crusade in Europe" in 1948, but Fox did not renew the copyright on the television series in 1977, and so the show became public domain. Dastar purchased the videotapes of the series in 1995 and proceeded to use footage from them in its new series "World War II Campaigns in Europe." In 1998, Fox sued under the claim that Dastar had infringed copyright and that, under the Lanham Trademark Act of 1946, it had

passed off the work as its own even though Dastar did not create it. The Central District of California found in favor of Fox. Later, the Ninth Circuit Court reversed and remanded the decision, but the district court still found in favor of Fox. Ultimately, the U.S. Supreme Court found in favor of Dastar in an 8-0 decision (one abstention).

In the opinion of the court, delivered by Justice Scalia, the court ruled that Fox could not bring a Lanham Act claim against Dastar because the rules regarding the misuse of trademarks is superseded by the fact that once a copyrighted work enters the public domain, anyone in the public may do anything they want with the work, with or without attribution to the author (*Dastar v. Fox*, 2003). So, even if the work is copyright protected at one point, the protection can go away simply if the copyright is not renewed, allowing people to legally pass off the work of others as their own.

In *Eldred v. Ashcroft* (2003), Eric Eldred challenged the constitutionality of the Copyright Term Extension Act of 1998 (CTEA). Eldred is an internet publisher who relied on the public domain for his work, so the CTEA posed a setback for him. Eldred held that it is only constitutional for copyright to be in effect for a limited time and the CTEA violated that, he held that First Amendment scrutiny should apply to copyright cases, and he held that the public trust doctrine was applicable to copyright law, in that the government would have to show public benefit for any transfer of public property into private hands. These three main complaints were rejected at the district level in the District Court for the District of Columbia, and the decision was affirmed by the District of Columbia Circuit Court. Ultimately, the U.S. Supreme Court found that the CTEA was constitutional in a 7-2 decision, much to the dismay of Eldred.

In the opinion of the court, delivered by Justice Ginsburg, the court ruled that "life expectancy had significantly increased among the human population since the 18th century," and therefore copyright law needed to be extended as well (*Eldred v. Ashcroft*, 2003). The court also ruled that Congress could set time limits for copyright, the length of which was left to its discretion. Therefore, as long as the limit is not "forever," any limit set by Congress can be deemed constitutional (*Eldred v. Ashcroft*, 2003). So here, the government upheld an act that moves works from public domain back under copyright protection.

These cases have become stepping stones for the U.S. Supreme Court when it comes to protecting copyrights in a new technological age. There is insufficient information in the current copyright law to rule consistently on cases of copyright infringement. Justice Blackmun brought this issue to light in his dissenting opinion for *Sony v. Universal* when he said, "Our task in the meantime, however, is to resolve these issues as best we can in the light of ill-fitting existing copyright law" (*Sony v. Universal*, 1984). Because that was the case in 1984, Sony got away with being a manufacturer of a product that enables a means of copyright infringement.

In *Sony v. Universal* (1984), the court used the term "time-shifting" to indicate that viewers were using the tapes for personal use to watch the shows later, making it fair use. However, the use of Sony's tapes violates the fourth factor in the fair use test. There is an effect on the market for television programs that are recorded on Sony's tapes because it affects the amount of money television networks can command from advertisers. Television networks make their profit by selling advertising during television programs. If those programs are recorded, then the viewer can fast forward the commercials and never see them. Advertisers know this and will not pay the television networks as much for advertising as a result, which affects television

networks' profits. Werner and Kirk-Duggan address the issue of copyright holder's profits, saying, "The courts' consideration of the profit factor usually arises because the alleged infringing work competes in the same market as the copyrighted work, thus making the 'commerciality' more harmful to the copyright holder" (Werner & Kirk-Duggan, 1993, p. 132). The commerciality is more harmful to the copyright holder in *Sony v. Universal* because the television networks' profits are being directly affected by Sony's tapes, so the court should have ruled against Sony. The court got it wrong and failed to protect copyright holders due to inadequate copyright law.

In *MGM v. Grokster* (2005), *Sony v. Universal* was used as a standard in the lower courts, but upon reexamination in the U.S. Supreme Court, it was determined that Grokster was liable for essentially doing the same thing as Sony, in that he provided a means for people to commit copyright infringement. Here, the court got it right and was able to sufficiently protect copyright owners, but the court had to use a lot of reasoning to reach that conclusion because this kind of protection was not explicitly stated in the law.

Another court case that involved file sharing was *A&M Records v. Napster, Inc.* (2001). Napster created file sharing that allowed users to share music. A&M Records sued Napster for copyright infringement and won in the Northern District of California, which ordered Napster to shut down its operation. The decision was later affirmed in the Ninth Circuit Court and it was written in the decision, "The shut down order was a proper exercise of the district court's power to enforce compliance with the modified preliminary injunction" (*A&M v. Napster*, 2001). *A&M v. Napster* served as precedent in *MGM v. Grokster* (2005), but even though MGM won in the U.S. Supreme Court, it lost in the Ninth Circuit Court. The Ninth Circuit Court had precedent

from *A&M v. Napster* where it shut down Napster, but it failed to shut down Grokster in *MGM v. Grokster* because copyright law was inadequate.

Because new technologies, such as file sharing and other means to distribute copyrighted material online, are not addressed in the law, copyright owners do not have clearly defined protection. As a result of this, Moseley suggests, "Online copyright infringement still represents a significant challenge to modern copyright owners. Any type of creative work that can be stored in a digital format faces the threat of unchecked online infringement" (Moseley, 2010, p. 311). If all this activity is going unchecked, as Moseley suggests, then Congress needs to pass legislation that clearly states that technology used to distribute copyrighted material is prohibited. In addition to the Internet in general, Moseley points out, "The deployment of even faster Internet access and the growing popularity of mobile phones that play video may lead to increased piracy of movies and television programs" (Moseley, 2010, p. 338). Mobile phones that play video are another example of new technology that creates a new avenue for copyright infringement and it needs to be addressed by Congress. Copyright law is clearly insufficient when it comes to protecting copyright, even with the amendments to the Copyright Act of 1976.

The most recent amendment to the Copyright Act of 1976 is the Digital Millennium Copyright Act of 1998 (DMCA). The act defines three new violations: circumventing technological protection measures that control access to copyrighted works; offering, manufacturing, or disseminating devices or services that circumvent access controls; and offering, manufacturing, or disseminating devices or services that circumvent a technological measure that effectively protects the rights of a copyright owner (DMCA, 1998).

While these new violations were adequate at the time, they are no longer adequate and need to be revisited. Even with the DMCA in effect, Ginsburg points out, "It is important to appreciate that these violations are distinct from copyright infringement. The violation occurs with the prohibited acts; it is not necessary to prove that the dissemination of circumvention devices resulted in specific infringements" (Ginsburg, 2007, p. 192). According to copyright law, if distribution of copyrighted works qualifies as infringement, but the above violations do not qualify as infringement, as Ginsburg states, then the laws of copyright are not even consistent within themselves. Grokster was found liable for copyright infringement based on the court's interpretation of his activities, but not based on what the law says regarding copyright infringement (*MGM v. Grokster*, 2005). So, the copyright law is insufficient to suitably protect copyright owners as currently written.

Dastar v. Fox (2003) is really where copyright law was proven to be inadequate. The *Dastar v. Fox* decision shows "that the limitations in the Copyright Clause are becoming insignificant" (Shipley, 2007, p. 1295). If the limitations on reproduction of works set forth in copyright law are too insignificant for the courts to protect original works, as Shipley suggests, then the law needs to be re-written to offer significant protection. As the law was written in 2003, the court had to rule in favor of Dastar in *Dastar v. Fox* because the Fox-created video it used had passed into the public domain and, therefore, fallen out of copyright protection. Fox put a lot of hard work into filming that video and Dastar did far less work to take it and pass it off at its own. No matter how old a work is, it should still be protected. If a student copies information from an article and passes it off as his or her own without giving credit to the original author, then that is considered plagiarism no matter when the article was written. So why is it okay for

Dastar to use another's work to pass it off as its own without giving credit, getting consent, or paying royalties to the copyright owner? It is not. But, the court ruled in favor of Dastar because the law is written in a way that allows works to fall out of copyright protection.

The court was able to rule in a way that partially remedies this problem in *Eldred v. Ashcroft* (2003). This was one of the first and most important cases to uphold the Copyright Term Extension Act (CTEA) of 1998. The CTEA (1998) extended these terms to "life of the author plus 70 years" and for works of corporate authorship to "120 years after creation or 95 years after publication," whichever endpoint is earlier. Eldred makes his living as an internet publisher off of other people's work and relies on works falling out of copyright so he can earn money. Eldred challenged the constitutionality of the CTEA and lost because the court ruled that Congress is allowed to change the duration of copyright. In this case, "the justifications set forth for the CTEA are rational and the statute is accordingly constitutional" (Walterscheid, 2004, p. 356). Walterscheid is right and the original works deserves CTEA protection.

Even though Eldred lost, his "effort underscored the need to create a copyright regime more commensurate with the Internet age" (Jones, 2004, p. 101). Jones makes a very valid point that copyright law needs to be revised due to new technology. It was not easy for the court to come to a conclusion for its final ruling in *Eldred v. Ashcroft* (2003) precisely because the copyright law was not written well enough to incorporate new technologies.

One would think since the *Eldred v. Ashcroft* ruling came in January 2003, and the *Dastar v. Fox* decision came in June 2003, the court would have been able to rule in favor of Fox in *Dastar v. Fox*. That is not what happened. Despite the court's ruling in *Eldred v. Ashcroft*, the court was unable to protect Fox in *Dastar v. Fox* because the copyright law has been inadequate

when it comes to protecting copyright owners. This is largely due to the wording of "limited Times" in the U.S. Constitution (U.S. Const. art. I, § 8).

To pose a reason for why the wording in copyright law should be revised, Van Kirk asks, "What if the copyright term is again extended each time a large group of lucrative copyrights is in danger of expiring? In that way, the 'limited Times' requirement of the Copyright Clause could be circumvented through the use of an unlimited string of 'limited Times'" (Van Kirk, 2003, p. 34). Van Kirk makes a compelling point that brings to light a specific instance where the wording for copyright law needs to be revisited. Using the phrase "limited Times" has become unclear. A change to the wording that would allow for more protection to copyright owners would be to eliminate the phrase "for limited Times" so that it can be very clear that copyrights will be protected for all times. This is not to say works can never be used by others, but expressed consent from the creator must be obtained and adequate royalties must be paid in order to be fair to all the creators of the original works. Whether "limited Times" is changed as suggested or not, it still stands to reason that Congress must revise the law to make it clear.

Until Congress revises copyright law, it will remain inadequate when it comes to protecting copyright owners in this new technological age. With the creation of new technologies, such as video recording devices and file sharing, that are used as a means to distribute copyrighted works, copyright owners remain insufficiently protected from infringement. The copyright law needs to be reviewed and revised to incorporate these new technologies and to better enforce copyright law and protect copyright owners. The ability of Congress to protect copyright owners has been weakened due to the lack of revision in the copyright law, and Congress' view on what it means to properly enforce copyright law has been

blurred when it comes to protecting works from new means of distribution created by new technology. The copyright law also needs to be revised to clarify how long copyright can be protected, and hopefully in a way that gives greater protection to copyright holders so they can collect royalties on uses of their works long after the works' creation and publication. Copyright law must be revised in order to give copyright owners and their copyrighted works adequate protection from infringement.

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