

Innovation and Copyright: The Neglected Relationship
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I. A vital, forgotten topic

- A. I recently examined patent, copyright, and antitrust laws to determine changes needed to promote innovation [*Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford 2009, paperback forthcoming 2010)]
 - 1. Patent and antitrust law: moving in right direction, need modest adjustment
 - 2. Copyright law: racing in wrong direction, needs radical adjustment

II. Rhetoric

- A. One reason: constant drumbeat of theft, piracy, and property
 - 1. Rhetoric shapes debate
 - 2. Property not absolute
- B. Copyright law fosters creativity, not copyright owners' business models
 - 1. Copyright owners panic when new technologies introduced

III. Innovation asymmetry

- A. Courts systematically overemphasize technology's infringing uses and underappreciate noninfringing uses
 - 1. Infringing uses can be quantified, threaten copyright industries' business models, and can be demonstrated by well-financed recording/movie industries
 - 2. Noninfringing uses are less tangible, not advanced by army of motivated advocates, and less obvious at onset of technology

IV. Error-costs asymmetry

- A. Antitrust courts examine error costs in determining appropriate rule
- B. False positives in copyright/innovation setting are devastating: technology is shut down; society never realizes what it is missing
- C. False negatives less harmful: can witness effects of technology and later adjust penalties

V. Litigation asymmetry

- A. Complicated litigation favors deep-pocketed copyright owners
 - 1. Industries often join forces in litigation
 - 2. Small companies' carcasses strewn on side of technology highway

VI. Legal application

- A. Return to Sony for secondary liability test
 - 1. Nuanced determinations like inducement not susceptible to summary judgment
 - 2. Filtering requirement becomes litigation landmine
- B. Eliminate statutory damages for technology makers
 - 1. Error-costs asymmetry: \$150,000 for each work performed on a technology becomes a billions-of-dollars Sword of Damocles forcing settlement/bankruptcy

VII. Committee actions

- A. Policy: Make clear that innovation can no longer be neglected in copyright reform
- B. Evidence: Gather evidence of harm to innovation from application of copyright law
 - 1. E.g., bankrupt companies, stifled venture capital, unpursued innovation

Supplemental Remarks on Innovation/Copyright Hearings
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I. Important Committee goal to gather information

- A. As I explained with my “innovation asymmetry,” information on copyright’s innovation effects lacking
- B. But no matter how much information Committee gathers, still will not be equal counterbalancing against infringement effects
 1. Infringing uses can be quantified (e.g., studies of downloading’s effects)
 2. Unpursued innovation paths can only be speculated

II. Committee can put specific company/innovation dots on the map

- A. Even though dollar amount for lost innovation not forthcoming, Committee can add vital pieces of information to debate:
 1. Examples of companies in bankruptcy as result of litigation– *see pages 132-33 of my book, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW, submitted under separate cover*
 2. Stifled venture capital – *look for reports, interview venture capitalists*
 3. Unpursued innovations because of copyright infringement fears– *interview innovators*
 4. Comparison of innovation in secondary liability context with more robust innovation in setting of DMCA safe harbors

III. Committee can put macroeconomic/innovation dots on the map

- A. Inventions have unanticipated consequences (INNOVATION page 129)
- B. Innovation is most important component of economic growth (INNOVATION pages 31-33)
- C. Unique role played by disruptive innovation (INNOVATION pages 27-28)
 1. Disruptive innovations not welcomed by market leaders, who lament displacement of their business models
 2. But such innovations introduce revolutionary possibilities (iPod, eBay, Skype) for consumers

IV. Conclusion

- A. Phenomena of unpursued innovations not directly calculable, but Committee can begin to connect dots of circumstantial evidence
- B. This task vital because of unparalleled role of innovation, and failure, to date, of any effective innovation counterweight to infringement costs