

IP JUSTICE

An international civil liberties organization promoting balanced intellectual property laws.

Phone: +1 415.553.6261 Fax: +1 415.553.6296 Web: www.ipjustice.org

Consumer Rights Under Fire: 321 Studios and the Demise of Fair Use

Consumer rights are under fire worldwide. Media conglomerates use new intellectual property laws and technological restrictions to eliminate the right of consumers to engage in Fair Use and other types of private copying. Laws, trade agreements, and treaties ranging from the Free Trade Area of the Americas (FTAA) Treaty to the European Union Intellectual Property Rights Enforcement Directive threaten to restrict the rights of consumers to use movies, music, and eBooks. The end result of these policies will be a media landscape controlled by giant media conglomerates. Creativity and innovation is stifled, jobs are destroyed, technological development is curtailed, and society suffers. This is the story of one company under the gun of Hollywood lawsuits in retaliation for providing tools that allow consumers to make lawful Fair Use of DVDs that own. On February 19, 2004 a US Federal District Court in San Francisco ordered the company to halt its sale of distribution of the Fair Use DVD software, stripping consumers of their Fair Use rights in a digital world.

In 2001 Robert Moore had an idea. He had spent thousands of dollars building an extensive library of DVDs and was worried about his discs being damaged by sunlight, warped by heat, broken by his children or pets, scratched by careless fingers, or otherwise damaged by normal household accidents. To protect his investment he decided to learn how to archive a backup copy of his DVD collection -- just in case something happened.

Many consumer uses of media have traditionally been protected by the principle of Fair Use (or Fair Dealing) that permits private copying without the need for authorization of the copyright holder. Fair Use or Fair Dealing generally allow a consumer to make use of copyrighted media for personal use, archiving, commentary, criticism, parody, and other socially beneficial uses. US courts have ruled that consumers can use technology to control the way in which they experience media. For example, consumers may change the time¹ and medium² through which they experience entertainment that has been legally acquired.

Robert Moore understood that making a personal backup copy of a DVD was protected, as he was not distributing the copy nor re-selling it for profit. He simply wanted some “insurance” against the inevitable accidents of life to protect his property. Mr. Moore realized that other people probably had the same concerns as he did, so he wrote an e-book and published it online. The book was an instant success; within an hour of its publication it was purchased by several interested DVD owners.

321 Studios was founded to answer the demand revealed by the rapid e-book sales. An entrepreneur, Robert Moore started the business out of his home, hiring four family members to fill

¹ Sony Corp v. Universal City Studios, the “Betamax” decision: <http://www.oyez.org/oyez/resource/case/768/>

² RIAA v Diamond Multimedia Systems: <http://www.gigalaw.com/library/riaa-diamond-1999-06-15.html>

orders for the fledgling company. The company soon replaced the original e-book with a software package that simplifies the process of creating a DVD backup to allow users that are not technologically savvy to create their own DVD movie archive. Today, 321 Studios has grown to a staff of 300 employees and it is still growing. The firm has offices in three states as well as overseas sales offices and distributors across Europe, Asia, South America, and Australia. Small businesses such as 321 Studios are the source of approximately 75% of new jobs added to the US economy every year³.

321 Studios has taken a strong stance against illegal copying of DVDs. It emphasizes that its product is to be used for lawful personal backup copies only. The company also took technological steps to insure that the product is used in appropriate ways. For example, each backup copy has an invisible “watermark” embedded in it that indicates what computer made the backup. The software’s serial copyright management system will not allow backups to be made of other backups; only original DVDs can be used as a source for a backup copy. The software also only allows two backup copies to be made per DVD.

However, Hollywood lawyers and the Digital Millennium Copyright Act (DMCA) in the US and similar “anti-circumvention” laws abroad have taken away the rights of consumers to use the media that they have purchased. In addition to the software being banned, 321 Studios is currently embroiled in several lawsuits seeking millions of dollars in damages. As a result of the lawsuits, consumers are prevented from making Fair Use of media they have purchased.

In April of 2002 321 Studios filed a “Declaratory Relief Action” (DRA) in US Federal Court to request a clarification from the courts without seeking damages. 321 Studios wanted confirmation from the court that it was not violating the copyright provisions of the DMCA by distributing software capable of accessing DVDs. Nine major movie studios were named as defendants in the DRA case. Hollywood immediately motioned for a dismissal of the case.

Then, in December of 2002 attorneys for seven major studios (including MGM, Time Warner, Columbia Pictures, Disney, and Universal) filed a counter-suit against 321 Studios. Their suit argues that DVD backup software violates the DMCA’s “anti-circumvention” laws. The studios sought an injunction to prevent 321 Studios from selling DVD backup software, to confiscate the source code of the DVD backup software, and take all of the profits that 321 Studios ever made for the software.

Hollywood’s lawyers contest that DVD backup software violates the “anti-circumvention” clause⁴ of the DMCA. The DMCA states that it is illegal to circumvent any “technological measure that effectively controls access to a work,”⁵ with a few limited and narrow exemptions⁶. The content on a DVD is stored in a scrambled format that is trivial⁷ to unscramble – in fact a Norwegian 15 year-old boy was the first to publish the software as part of an effort to build a DVD player for the Linux operating system⁸. Agreeing with Hollywood’s lawyers, the court ruled that this de-scrambling violates the DMCA.

Under the district court’s decision, it is illegal to access the contents of a DVD through any means but a licensed DVD player, *even if the consumer was intending to access the media they purchased for a legal use*. Consumers are prevented from being able to make Fair Use or engage in any unauthorized copying of any technologically restricted media. Consumers are limited to only viewing DVDs in the times, places, and ways that media conglomerates want them to. And it’s

³ <http://www.sba.gov/aboutsba/sbastats.html>

⁴ <http://www.ipjustice.org/102803.shtm>

⁵ <http://www.copyright.gov/title17/92chap12.html#1201>

⁶ <http://www.copyright.gov/1201/>

⁷ <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/>

⁸ http://www.ipjustice.org/media_releases/122203.html

illegal to access the content of a DVD to create a parody, commentary, or other educational reference, stifling creativity and expression.

In an effort to bury the company with costly litigation, additional suits have been filed in the UK by Warner Home Video to prevent 321 Studios from selling its software in England. Twentieth Century Fox and Paramount Pictures also filed a US lawsuit in November of 2003 against 321 Studios over the software. Macrovision, best-known for an analog copy-prevention system used on VHS cassettes, has even filed a lawsuit against 321 Studios in January of 2004.

The threat is not only in the United States, however. Consumers' rights are endangered worldwide. The Free Trade Area of the Americas⁹, an agreement currently under negotiation between all 34 Western Hemisphere democracies, threatens to export DMCA-like anti-circumvention restrictions to an entire hemisphere. The EU Intellectual Property Rights Enforcement Directive¹⁰ also threatens to strangle consumers' rights in the European Union with excessive provisions. Other international treaties and agreements, including a recent free trade agreement between the US and Australia¹¹ and the US and Chile also impose restrictive intellectual property rights regimes on other countries.

There are signs of hope for reasonable and balanced IP policies abroad, however. An Italian judge ruled in January of 2004 that according to Italian copyright law Sony cannot restrict what consumers do with their PlayStation consoles after purchase¹². Sony had sought to block the sale of a chip that allows PlayStation owners to read CD-ROMs that were not published through official channels. The judge ruled that the primary purpose of the chip was not piracy, but rather to allow a fuller use of a device than the manufacturer had initially intended. The judge stated that the owner of a product (here an individual PlayStation owner) can use the device in the widest manner possible and make all potential uses of it. This includes using it in ways that the original manufacturer may not have intended.

Another small glimmer of hope was the second acquittal in a Norwegian court of "DVD Jon" in December of 2003. As a teen, Jon Johansen wrote software in an effort to play his legally-purchased DVDs on his home computer, for which there was no licensed DVD software. Hollywood filed a complaint with the Norwegian Economic Crime Unit who prosecuted Johansen for reverse-engineering his DVDs. The Norwegian Appellate Court stated that making backup copies of fragile optical media such as DVDs is protected by Fair Use under current Norwegian law. Norway has yet to implement the EU Copyright Directive, which could impose DMCA-like anti-circumvention restrictions in Norway.

The spread of restrictive intellectual property limitations through a combination of technology and laws, treaties, and agreements harm society worldwide. If restrictive approaches to IP such as the EU Intellectual Property Rights Enforcement Directive are enacted, then small businesses, consumers, and independent artists will lose out to big media conglomerates and entrenched industry players. Small business owners, such as Robert Moore of 321 Studios are precluded from creating new and innovative products. As a result, competition is destroyed and technological development is stifled. A culture of fear replaces a culture of innovation and growth. Consumers are forced to experience music and movies when, where, and how media companies decide to permit. Independent artists and educators are not able to build on the works of others for parody, criticism, and other socially beneficial uses. It is time to stop the international tide of subjugating civil liberties in the blind ambition for greater intellectual property grants.

⁹ See more coverage at <http://www.ipjustice.org/FTAA>

¹⁰ See more coverage at <http://www.ipjustice.org/CODE/>

¹¹ <http://www.zdnet.com.au/news/business/0,39023166,39116054,00.htm>

¹² http://www.ipjustice.org/media/release20040112_en.shtml

Fortunately, 321 Studios is appealing the District Court's decision and has vowed to go all the way to the US Supreme Court to uphold the legal principle supporting the rights of consumers to make Fair Use of digital media.