Copyright as a Chill on Innovation

Author : Pamela Samuelson

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Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 **Wisc. L. Rev.** 891 (2012).

Sony's Betamax was the first reprography technology to attract a copyright infringement lawsuit. Little did copyright experts back then realize how much of a harbinger of the future the Betamax would turn out to be. Countless technologies since then designed, like the Betamax, to enable personal use copying of in-copyright works have come to market. Had the Supreme Court outlawed the Betamax, few of these technologies would have seen the light of day.

The most significant pro-innovation decision was Supreme Court's Sony Betamax decision. It created a safe harbor for technologies with substantial non-infringing uses. Entrepreneurs and venture capitalists have heavily relied on this safe harbor as a shield against copyright owner lawsuits. Yet, notwithstanding this safe harbor, copyright owners have had some successes in shutting down some systems, most notably, the peer-to-peer file-sharing platform Napster.

It stands to reason that decisions such as *Napster* would have some chilling effect on the development of copy-facilitating technologies. But how much of a chilling effect has there been? Some would point to products and services such as SlingBox and Cablevision's remote DVR feature and say "not much."

Antitrust and innovation scholar Michael Carrier decided to do some empirical research to investigate whether technological innovation has, in fact, been chilled by decisions such as Napster. He conducted qualitative interviews with 31 CEOs, co-founders and vice presidents of technology firms, venture capitalists (VCs), and recording industry executives. The results of his research are reported in this Wisconsin article, which I like a lot.

One reason I liked the article was because it confirmed my longstanding suspicion that the prospect of extremely large awards of statutory damages does have a chilling effect on the development of some edgy technologies. Because statutory damages can be awarded in any amount between $750 and $150,000 per infringed work and because copy-facilitating technologies can generally be used to interact with millions of works, copyright lawsuits put technology firms at risk for billions and sometimes trillions of dollars in statutory damages. For instance, when Viacom charged YouTube with infringing 160,000 works, it exposed YouTube and its corporate parent Google to up to $24 billion in damages. While a company such as Google has the financial resources to fight this kind of claim, small startups are more likely to fold than to let themselves become distracted by litigation and spend precious VC resources on lawyers.

But a better reason to like the article is the fascinating story Carrier and his interviewees tell about the mindset of the record labels about Napster and the technology "wasteland" caused by the *Napster* decision.

The lesson that record labels should have learned from Napster's phenomenal (if short-lived) success was that consumers wanted choice—to be able to buy a single song instead of a whole album—and if it was easy and convenient to get what they wanted, they would become customers for a whole new way of doing business. Had the record labels settled with Napster, they would have benefited from the new

digital market and earned billions from the centralized peer-to-peer service that Napster wanted to offer.

The labels were used to treating record stores as their customers, not the people who actually buy and play music. Radio play, record clubs, and retail were the focus of the labels' attention. They thought that the Internet was a fad, or a problem to be eradicated. They were unwilling to allow anyone to create a business on the back of their content. They believed that if they didn't like a distribution technology, it would go away because they wouldn't license it. They coveted control above all. When the labels began to venture into the digital music space themselves, they wanted to charge $3.25 a track, which was completely unrealistic.

Some of Carrier's interviewees thought that the courts had reached the right decision in the *Napster* case, but questioned the breadth of the injunction, which required 100% effectiveness in filtering out infringing content and not just the use of best efforts, thereby making it impossible to do anything in the digital music space. One interviewee asserted that in the ten years after the *Napster* decision, iTunes was the only innovation in the digital music marketplace. Many more innovations would have occurred but for the rigidity of the *Napster* ruling and the risk of personal liability for infringement by tech company executives and VCs.

The role of copyright in promoting innovation was recently highlighted in the Department of Commerce's Green Paper on "Copyright Policy, Creativity and Innovation in the Digital Economy" (July 2013). It aspires to present a balanced agenda of copyright reform ideas that will promote innovation. It is an encouraging sign that the Green Paper identifies statutory damage risks in secondary liability cases as a policy issue that should be addressed. Reforming statutory damages would not entirely eliminate the risks that copyright would chill innovation, but it would go a long way toward that goal.

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