

FIFTH ANNUAL  
CATO INSTITUTE/FORBES ASAP  
TECHNOLOGY & SOCIETY CONFERENCE

THE FUTURE OF INTELLECTUAL PROPERTY  
IN THE INFORMATION AGE

Saturday, November 14, 2001

PANEL #3: COPYRIGHT-2

"Technology vs. Technology: Should Code  
Breakers Go to Jail? The Limits of Fair Use  
and Anti-circumvention"

Julie Cohen, Professor of Law,  
Georgetown University Law Center

The Cato Institute  
F.A. Hayek Auditorium  
Washington, D.C.

## P R O C E E D I N G S

JULIE COHEN, PROFESSOR OF LAW,  
GEORGETOWN UNIVERSITY LAW CENTER

MS. COHEN: By way of disclaiming responsibility for everything I am about to say I should note that I have terrible fall allergies, so my apologies in advance.

I didn't come here to talk to you about Hayek. And I am not enough of an expert to stay in a conversation about Hayek for a very long time, but I suspect that he is spinning in his grave right now. The question really that the DMCA's anti-circumvention provisions predispose or prejudice is: How should information markets work? And another thing that the DMCA prejudices or predisposes of is: Where will the "creative" in creative destruction come from?

I would like to suggest to you, and I hope to do more than suggest to you, that the DMCA prejudices these questions in a very poor way. I should disclose that I filed an amicus brief in the DECSS case in the Second Circuit on behalf of the hackers there and have been consulting in a limited capacity on the Felton case, who is the Princeton professor. So I will wear my beliefs on my sleeve. But, in brief, I believe that the answer

to "Should code breakers go to jail?" is clearly no, and for at least three reasons.

First, and here we are speaking about constitutional reasons, within the structure of our Constitution as written, Congress simply may not enact a law that would work at cross purposes with and in fact undermine the powers granted to it in the exclusive rights clause, which gives it the authority to create patents and copyrights. And the DMCA's anti-circumvention provisions, of course, allow conduct clearly at cross purposes with these powers. They allow owners of content to take knowledge out of the public domain, so they violate the limited time proviso. They allow owners of content to take uncopyrightable material and grant it perpetual protection, so they violate the originality proviso and also violate the division of Congress' authority between the certain powers to protect writings and other powers to protect inventions.

And finally, they violate the progress limitation, which has been fairly consistently interpreted at the Supreme Court level to say that you simply cannot negate core user rights that permit ideas to circulate within society; so things like the traditional first sale rights individuals have enjoyed to dispose of chattels and the traditional fair use concept.

Now, I don't really want to spend most of my time talking to you about the Constitution, because if you want to

talk about that you can, I suppose, go and read our brief; it's on my Web site, or bring it up in the question-and-answer period. What I want to do is talk to you instead about two other reasons why I think the DMCA makes very bad sense and why I think that Hayek is spinning in his grave to hear that he would think otherwise. And these reasons are both economic and non-economic.

First of all, from an economic perspective, we want to hear that copyright exists to solve a public good problem. It's too easy to copy stuff, and so we give people exclusive rights to give them incentives to produce the stuff and to ensure a continued flow of creative stuff within society. What is often lost in that account is that copyright addresses two public good problems. And the second public good problem concerns the consequence of keeping those exclusive rights leaky or incomplete. Leaky rights, in the context of information markets, promote welfare gain. Economic models of copyright law sometimes lose sight of this because they tend to focus on a micro-transactional level, on a static picture of particular licensing arrangements, and focus on the welfare gains and then losses that might attach to particular transactions.

But in fact -- and here we come to creativity -- some works, and perhaps indeed most works, produce diffuse public benefits that can't be wholly internalized by their creators. They serve as the substrate for various kinds of shared social

understanding and, I might say, see, e.g., the works of Hayek, if I were so inclined.

Now, using code to gain perfect control over uses of copyrighted material solves public good problem number one, in that the incentives are closer to perfect and thus one can have private ordering of a sort. However, using code to gain perfect control over uses does so at the cost of exacerbating public good problem number two. We lose the public good produced by leaky rights. We lose the public benefit that flows from the fact that there is a certain free flow of ideas and even of expression within society. We can all speak in this room about the works of Hayek, and we know more or less what we are talking about. And perhaps that would work differently in the presence of perfect control enabled by code.

One can make this argument as well, and I think one should make this argument as well from a non-economic perspective. Information -- I won't even say it's a commodity -- is a non-commodity that is poorly understood. And efforts to make it appear as though it were a commodity I think lose sight of that. Information can't simply be owned in the same way that one might own a car or a house. Once it has been made public, a book of Hayek's or perhaps -- since I can't resist -- a song sung by Britney Spears, the ideas contained in that song become in some sense the public's.

And once something becomes very popular, even to some extent the expression in it enters the public lexicon. So it makes sense to write a book called "The Wind Done Gone" because of the meaning that "Gone with the Wind" has as a cultural text. And thus a wide variety of referential and critical uses of other's expression are to be expected.

Now, of course, we can take care of that, and the DMCA tries to, by superimposing code-based private ordering. But I think that that loses sight of the fact that the circulation and sharing of ideas is not in any sense unfair. What copyright might classify as my expression in fact is not entirely mine. All expression builds on what has gone before it. And even to say, "Well, Professor Cohen, you can still build on what has gone before you, just identify the building blocks that you want and license for them," that approach is to miss the larger point.

We lack currently a good theory of how those who we call creators derive inspiration. The anecdotal evidence, however, and I think possibly the personal experiential evidence of most of you in this room, suggests that creativity in both the arts and the sciences depends fundamentally on the freedoms to follow nonlinear pathways of exploration and exploit chance associations that may arise when one stumbles across particular reading material without the meter running. And we at least need to consider whether having the meter running requires too great a

cost to this poorly understood social process of creativity, which, I might point out to you, has made the United States high-tech economy and the United States educational system really second to none.

I think it follows, therefore, that encrypting a digital work is not the same as locking a manuscript inside your car or your home. What I am saying to you is that information policy is public policy and depends fundamentally on incomplete ownership. And what I am also saying to you is I don't think Hayek is spinning in his grave at all about that actually, because, again, we are talking about where the "creative" in creative destruction comes from. And we are not talking about cars or shoes or rice. And we don't know enough about what we are talking about to claim that we are.

The publicness of information is determined not by its encrypted-ness but by a prior decision to market it to the public or some group among the public -- CPA's or law students or housewives or people who make \$25,000 to \$50,000 a year. And once one has made that decision, that information cannot, at the same time, be considered on a par with a sort of secret that one is entitled to lock inside one's car or inside one's house.

Now, the DMCA does not create this regime of private ordering; it reinforces it with some rather draconian penalties. But private ordering predates the DMCA, and that's another reason

why I think Hayek might be spinning in his grave, to say that all the DMCA does is enable private ordering. In an age of encryption, people will attempt to privately order their informational rights. It follows then that the solution to that is that code breakers should not go to jail. It is because of the code breakers, because of people like Ed Felton, and even because of the people who spread DECSS on the Web, that the public, the undifferentiated, disaggregated but rather important to this process of creativity public, can engage in these mysterious processes and we can all reap the rewards.

So I would say to you that, in addition to being unconstitutional, the DMCA is just simply bad public policy and it should go. And hopefully the courts will agree. But, if not, then I think Congress needs to consider it further. Code breakers may be liable some of the time, but I think that they should be liable only if traditional copyright standards for civil liability are met or only if the heightened standards for criminal copyright infringement are met, and not simply for interfering with an attempt to privately order rights in a non-commodity whose workings are vitally important and which no one yet understands.

Thank you.

(Applause.)

(End of Ms. Cohen's remarks.)