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Chapter VIII

Peer-to-Peer Technology and the Copyright Crossroads

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Abstract

The introduction of peer-to-peer technology has posed enormous challenges for traditional copyright law. Whereas historically copyright holders could preserve their core economic markets by pursuing a fairly limited set of commercial actors, peer-to-peer technologies decentralize content distribution and make it possible for anyone with a computer to disseminate infringing content around the world. In the struggle to find a solution to the peer-to-peer crisis, courts and policymakers have considered a number of alternatives, from abandonment of copyright law to a wholesale restructuring of its entitlement structure. This chapter explains why peer-to-peer technology presents such a challenge for copyright, and explores some of the pending proposals to solve the current dilemma.

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Introduction

Before 1998, copyright law rarely made headline news, and few nonlawyers thought much about its existence. Today, copyright issues turn up on the front pages of newspapers and play a prominent role in public debate. As teenagers defend against infringement suits, courts shut down peer-to-peer networks, and social movements form in opposition to strong copyright law, it becomes increasingly clear that United States copyright policy is at a crossroads. Peer-to-peer technologies have forced an unprecedented reexamination of the purpose and meaning of copyright law in this country, with powerful voices engaged on all sides of the debate. Even traditional copyright allies—the software, music, and movie industries—find themselves in conflict over how the law should respond to the peer-to-peer crisis. And a number of serious legal scholars are advocating the outright abolition of digital copyright.

Why has peer-to-peer technology wreaked such havoc for copyright law? And what, if anything, should judges and policymakers do about it? This chapter considers these questions. It has three primary goals: (1) to explain copyright's economic objectives and why file sharing challenges them; (2) to explore the legal arguments for and against using copyright law to prohibit the distribution, operation, and/or use of peer-to-peer software; and (3) to introduce some of the alternatives that are currently being considered to address the peer-to-peer copyright crisis.

The Economic Foundations of United States Copyright Law

Copyright in the United States exists to induce people to make creative works. The law rests on an assumption that, without legal protection against copying, authors and publishers would under-invest in expressive works such as books, movies, music, and software. By granting an exclusive right to copy and distribute, the law insulates copyright holders from competition by low-cost copiers who did not incur the expense of creation and production, and thus offers an incentive to others to invest in these activities.

In economic terms, copyright law is justified by the “public goods” nature of creative expression. A public good is one that is both nonrivalrous (multiple parties can possess it simultaneously without interfering with one another's possession) and nonexcludable (once released to the public, its creator cannot physically exclude others from accessing and using the work). Economic theory

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