

Session 3: Limitations and exceptions in the digital economy.

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Copyright Limitations and Exceptions in the Digital Economy

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Copying and Digital Technology

- Copying is an inevitable feature of digital technology
- The digital economy is built on copyright exceptions and limitations
- Two sets of limitations needed:
 - Limitations that enable competition with dominant entities
 - Limitations that enable new digital products and services (that compete with existing business models)

Competition

- Idea/expression dichotomy
 - Allows competing applications (e.g., word processors, browsers)
 - Allows interoperability by not protecting interface specifications (*Computer Associates v. Altai*, EU Software Directive)
 - SAS case in ECJ?

Competition

- Fact/expression dichotomy
 - *Feist v. Rural Telephone*
 - Allows competition among downstream e-commerce businesses (financial services, real estate, “fantasy sports”)
 - Contrast with EU Database Directive (expression v. substantial investment)

Competition

- Temporary copies made when competitor runs a computer program
 - Software/hardware maintenance
 - “Blackbox” reverse engineering
- Exceptions: 17 U.S.C. § 117(a), EU Software Directive Art. 5

Competition

- Decompilation/disassembly for interoperability
- Fair use (*Sega v. Accolade*); EU Software Directive Art. 6
- Similar exceptions in Australia, Singapore, Hong Kong, Philippines, Israel, Malaysia, New Zealand

Competition

- Exception from prohibition on circumvention
- DMCA Section 1201(f); EU Software Directive Art. 7(c)
- Australia, Singapore
- Aftermarket competition: *Skylink v. Chamberlain*, *Lexmark v. SCC*
- DMCA exception: “jailbreaking”

Competition

- Exhaustion/First Sale Doctrine
- 17 U.S.C. § 109(a); EU Information Society Directive
- Necessary for e-commerce platforms (e.g., eBay)
- Parallel imports?

Products and Services

- Temporary copies (buffers/caches)
- Not “fixed” (*Cartoon Networks v. Cablevision*); fair use (*Perfect 10 v. Amazon.com*); DMCA “mere conduit” safe harbor
- No economic significance (EU Information Society Directive Art. 5(1))

Products and Services

- Secondary liability limitations
- *Sony v. Universal (Betamax)*: no liability if device is capable of substantial non-infringing use
- *Betamax* allows time and space shifting, email services
- But under *MGM v. Grokster*, can incur liability if intentionally inducing infringement

Products and Services

- DMCA safe harbors (limit damages)
- DMCA safe harbors for hosting (*Viacom v. YouTube*)
- DMCA safe harbor for linking
- EU E-Commerce Directive

Products and Services

- Fair Use
 - Search engines (*Perfect 10 v. Amazon.com*)
 - Plagiarism detection (*iParadigm*)
 - Hosting “remixes” – user generate content based on preexisting material