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Internet



Updated: Lawyer Discusses Xbox Live Bans, Piracy, Three Strikes Laws, and More

Jason Mick (Blog) - November 16, 2009 10:49 AM

We chat about the latest legal copyright related controversies with a seasoned legal professional

At *DailyTech* we are always looking for diverse opinions from those with experience and knowledge in fields relating to the tech industry. Thus *DailyTech* was quite enthused when Jeffrey Johnson, a partner with Pryor Cashman LLP agreed to do a piece with us discussing copyright and the tech industry. Pryor Cashman is one of the nation's leading law firms with 120 attorneys, with offices in New York and Los Angeles. The firm has worked on numerous cases concerning the software/hardware/internet industries and the entertainment industry.

The following is our unabridged interview with Mr. Johnson.

UPDATE: Monday, Nov. 16, 2009, 1:00 p.m.:

Many readers asked for Mr. Johnson to reply to the question about the legality of backup copies of DVDs/CDs. Rather than let these requests fall on deaf ears, we recontacted Mr. Johnson, and his response is now included below.

DailyTech:

What do you make of the current state of copyright law, and what parallels do you see to the stir that happened when Xerox hit the scene, offering easy copying of print media and potential infringement?

JCJ:

Generally speaking, and for many understandable policy reasons, law can be slow to change: usually, its a trailing indicator of changes in society at large, and when it does change, those changes ordinarily come about as new legislation or new ways of doing business, rather than judges imposing social change through case law. By way of example, when copyright law was first developed, there was no such thing as a copier.

Copying a book was a laborious process, and few people would undertake that process for a non-commercial purpose like sharing the contents with a friend; instead, they would actually share the book itself. When Xerox and other manufacturers made it so easy to copy books, it suddenly became very easy to copy a few pages from a book (or the entire thing for that matter, so long as you had enough nickels) and share them with a friend, or take them home from the library to work on your paper. It took the law several years to figure out how best to deal with the new technology, and even then most of the issues were worked out privately between rights holders (e.g., book publishers) and the owners of widely-accessible copy machines, such as libraries.

While 21st century technology is much different, the underlying process of grappling with technological change, and deciding how the law will change to cope with that new technology, is very similar. When judges try to apply old case law, and old legislation, to new technology, they frequently find that the law simply doesn't address the new circumstances in a manner that allows for sensible results, so they look to the legislators to make changes in the law that will allow for realistic solutions. The legislators, however, are beholden to competing interests that ensure that such change will be slow in coming.

DailyTech:

Do you see the music/movies/television industries' legal crusade against citizens who pirate as productive? With rulings like the recent \$1.92M USD verdict against Jammie Thomas-Rassert drawing public ire, how can the industry fight piracy, while not coming across as a bunch of thugs?

JCJ:

It's not easy. Until the law catches up with technological change, rights holders can, and I think should, seek to protect and enforce their rights under the law. Those suits, and the public response to those suits, may prove to be one of the best ways to spur legislators to make the hard legislative choices necessary to allow for more practical outcomes than forcing large industries to sue their customers.

DailyTech:

Microsoft recently kicked 1 million users off of Xbox Live for modifying their consoles. Likewise, Apple tried to brick iPhones that were unlocked or jailbroken, back in 2007. In your opinion should the law allow users who legally purchased products to modify them freely, or should the opposite -- a ban on modifications -- be enforced?

JCJ:

As a practical matter, I can't imagine a public consensus developing around a change in the law that would allow end-users to freely modify products that are used to access third party content. Vigorously enforcing a ban on modifications, however, may prove to be impractical. I can imagine a compromise where modifications are allowed subject to some process of review and approval (similar to how Apple handles iPhone apps), or perhaps where machines that can be modified are sold along-side versions that can't, with the machines that can be modified having reduced or altered functionality, or

perhaps a much higher price. The key complication is the fact that there are two parties to the transaction -- the manufacturer of the machine and the end-user -- but hundreds of other affected parties (i.e., the owners of all the content that is run on the machine). Getting a consensus from all those parties won't be easy.

DailyTech:

One of the key drivers for modification of Xbox consoles is to make backup copies of discs. The RIAA/MPAA have long stated that backups of legally-owned materials are illegal and that "making one copy is another way of saying stole one copy". Should such backups, in your view, be legal? Why or why not?

JCJ:

I think this is a good example of where the law and technology are no longer synchronized. It is generally correct that, as a legal matter, unless a written contract (e.g., license agreement) otherwise allows, it is a violation of copyright law to copy a copyrighted work for purposes of making a "back-up" copy. This is no different than making copies of a hard cover novel or a vinyl album just in case you lose or damage it. Nobody ever seriously grappled with the issue of whether you should have a right to make a copy of a book or an album and keep it on your shelf for that eventuality, arguably because the risk of loss/damage was relatively low, and the cost of copying was relatively high. It seems to me there is little difference with a machine-readable disc, except that the likelihood of damage or loss of the disc is probably higher, while the cost of making a copy is much lower. Accordingly, the real challenge is not construing existing law; rather, it is deciding how, if at all, to change the law in light of a new technological reality.

DailyTech:

A UK independent musician from the band Orange Juice says that a variety of major labels have infringed on his songs. He claims such examples of major labels claiming to own copyrights of small musicians (which they don't hold) to be common. What do you make of this, and how do you react to the light that this casts on the major labels campaign against civilian infringers?

JCJ:

These types of disputes are not new, but the vast majority of newly composed music does not get held hostage to a dispute over copyright ownership. When it does, it's a pretty straight-forward legal question, and the courts, however imperfect, are probably still the best place to resolve the issue. While I'm sure there are some unscrupulous label execs. who try to steal music their label's don't rightfully own, there are also musicians who, in all sincerity, hear their own music in tunes actually composed by others.

DailyTech:

What's your view on the "three strikes" laws proposed in France, UK, Australia, and elsewhere, that propose cutting off internet filesharers after two warnings, forcing ISPs to cut their service?

JCJ:

We all have to start experimenting with new options to deal with new technology. Whether this approach will work I can't say, but I'm skeptical.

DailyTech thanks Jeffrey Johnson for his time and for providing us with some insightful responses into how some in the law community view various copyright-related issues.