

PANGLOSS'S COPYRIGHT[♦]

DEREK E. BAMBAUER*

INTRODUCTION	265
I. TECHNOLOGICAL DETERMINISM.....	266
II. UTILITARIANISM'S UNCERTAINTY	268
III. INTELLECTUAL PROPERTY VERSUS USER RIGHTS.....	270
CONCLUSION.....	272

INTRODUCTION

In *Region Codes and the Territorial Mess* (“*Region Codes*”), Peter Yu presents a case study of the rising trend of private ordering of intellectual property rights through technological means.¹ The article marries a compelling description of the power of crude yet effective technological self-help with a searching normative assessment of the legitimacy and desirability of such measures. The distribution of works in digital formats, particularly via the Internet, has given rise to ever more sophisticated mechanisms of fine-grained control over copyrighted expression. Rights owners have deployed an admixture of utilitarian and rights-based claims to justify implementation of these technologies and to argue for the need to reinforce them via legal strictures. This Essay points to three puzzles implicit in Yu’s article: technological determinism; the uncertainty underlying utilitarian accounts of copyright; and the current tension between firm notions of intellectual property rights and inchoate visions of user rights. It argues that *Region Codes* questions the Panglossian assumptions of copyright enforcement, showing that for DVDs, at least, everything is not

[♦] Permission is hereby granted for noncommercial reproduction of this Article, in whole or in part, for educational or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included on all copies.

* Associate Professor of Law, Brooklyn Law School (through spring 2012); Associate Professor of Law, University of Arizona James E. Rogers College of Law (beginning fall 2012). Thanks for helpful suggestions and discussion are owed to Jane Yakowitz Bambauer, Annemarie Bridy, Dan Hunter, Mary LaFrance, Molly Land, Dave Levine, Irina Manta, Thinh Nguyen, and Peter Yu. The author welcomes comments at <derek.bambauer@brooklaw.edu>. © 2012 Derek Bambauer.

¹ Peter K. Yu, *Region Codes and the Territorial Mess*, 30 CARDOZO ARTS & ENT. L.J. 187 (2012).

necessarily for the best.² The Essay concludes by suggesting that Yu's piece charts an initial vision of how these issues might be addressed.

I. TECHNOLOGICAL DETERMINISM

DVD region codes are an example of technological determinism: the structure of the technology and the limitations it imposes dictate its social function.³ This helps explain the paradox of the codes. The DVD's design packs region coding into a single byte; each region is represented by a single bit. Since the scheme reserves two bits (one for special use, such as screener copies, and one for special locations, such as cruise ships), this architecture limits the motion picture industry to six regions.⁴ Yu notes that the resulting scheme defines a crude, nonsensical grouping of countries.⁵ Lumping Egypt in with Japan and Greenland is puzzling from either a revenue-based or geography-based perspective.⁶

Technological change means that in one sense, DVD region codes are outdated. The advent of higher-capacity media and new formats, such as Blu-Ray, diminishes the need to conserve information for regional divisions.⁷ Consumption of cultural products, such as motion pictures, via physical media is on the wane.⁸ And, general-purpose computers are increasingly the mechanism of access, rather than specialized appliances such as the dedicated DVD player. Region codes themselves are thus rapidly becoming outmoded.

However, DVD codes as an exemplar of technological determinism have powerful relevance for the shift to Internet-based distribution of copyrighted works. Region coding equips movie studios with relatively coarse mechanisms for the business practices described in Yu's article—primarily, different forms of price discrimination.⁹ Despite their simplicity, the codes enable distributors to engage in crude price discrimination using either geography or temporal delay as a

² See generally FRANCOIS-MARIE AROUET DE VOLTAIRE, *CANDIDE* 40 (2d ed., Bordas 1984) (1759) (stating that "things cannot be otherwise: because everything is made for an end, everything is necessarily for the best end . . . everything is for the best") (translation by author).

³ See generally NEIL POSTMAN, *TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY* (1993); MERRITT ROE SMITH ET AL., *DOES TECHNOLOGY DRIVE HISTORY?: THE DILEMMA OF TECHNOLOGICAL DETERMINISM* (Merritt Roe Smith & Leo Marx eds., 1994).

⁴ Yu, *supra* note 1, at 193–194.

⁵ *Id.* at 208.

⁶ *Id.* at 194.

⁷ See, e.g., *Blu-ray vs. DVD*, CNET REVIEWS, http://reviews.cnet.com/4520-6463_7-6462511-2.html (last visited Apr. 22, 2012).

⁸ See, e.g., Brooks Barnes, *Web Deals Cheer Hollywood, Despite Drop in Moviegoers*, N.Y. TIMES (Feb. 24, 2012), <http://www.nytimes.com/2012/02/25/business/media/web-deals-cheer-hollywood-despite-a-drop-in-moviegoers.html?pagewanted=all>; Richard Verrier & Ben Fritz, *Movie Industry Hits Ticket Sales Decline on the Nose: It's Put Out Some Stinkers*, L.A. TIMES (Mar. 30, 2011), <http://articles.latimes.com/2011/mar/30/business/la-fi-ct-cinemacon-20110330>.

⁹ Yu, *supra* note 1, at 200–13; see generally Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 361–68 (2008).

proxy for willingness to pay, and in somewhat more precise discrimination, by employing more direct proxies, such as a consumer's ability to undertake the expense of a cruise ship vacation or airline flight.¹⁰

Network-based access to digital works, such as movies, gives content owners potentially profound capabilities to fine-tune pricing. Services such as Hulu and Spotify use a consumer's Internet Protocol ("IP") address as a proxy for geographic location.¹¹ They will refuse to stream content to a location where the content owner has not authorized distribution. Content owners can utilize even more sophisticated pricing models—for example, varying price based on a user's Internet service provider ("ISP") or bandwidth speed. For example, News Corporation was engaged in a contract dispute with Cablevision, which retransmits News Corporation content such as Fox Broadcasting Company shows over its network.¹² To increase its leverage, News Corporation detected when a visitor to Hulu or Fox's Web site came from a Cablevision IP address.¹³ The sites blocked Cablevision customers from accessing popular Fox shows, such as "The Simpsons" and the Major League Baseball playoffs.¹⁴ Similarly, motion picture distributors could bargain with ISPs to allow their users to access movies—even ones hosted on otherwise publicly available sites.

The DVD conferred more technological capabilities, and hence control, upon content owners than analog videotapes did—and digital movie files distributed via the Internet offer yet more power. Even when movie studios do not control the underlying platform, as they did with the DVD format and players, they can still effectively implement access restrictions and price discrimination. Technology determines how finely content owners can slice their paying audience. The advent of more sophisticated mechanisms may mitigate some of Yu's concerns about region codes, such as the obvious irrationality of their geographic groupings. This possibility requires consideration of whether these expanded capabilities are normatively desirable, which is this Essay's next topic.

¹⁰ See Yu, *supra* note 1, at 207–09; see generally William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1788 (1988) (describing price discrimination practices by motion picture studios).

¹¹ See, e.g., *How Can I Change My Country Setting?*, SPOTIFY, <http://www.spotify.com/us/help/faq/account/how-can-i-change-my-country-setting/> (last visited Apr. 22, 2012); *International (Outside USA)*, HULU, <http://www.hulu.com/support/article/171122> (last visited Apr. 18, 2012).

¹² Brian Stelter, *Internet Is a Weapon in Cable Fight*, N.Y. TIMES, Oct. 19, 2010, at B3.

¹³ Peter Kafka, *News Corp. Shuts Off Hulu Access to Cablevision Customers – And Turns It Back On*, ALLTHINGSID (Oct. 16, 2010, 2:18 PM), <http://allthingsid.com/20101016/news-corp-shuts-off-hulu-access-to-cablevision-subs>.

¹⁴ *Id.*

II. UTILITARIANISM'S UNCERTAINTY

No one knows how much copyright is enough. The empirical basis of copyright law has been in doubt at least since then-professor Stephen Breyer analyzed the topic and concluded that copyright law was, barely, justified—at least for books—in 1970.¹⁵ And yet, utilitarian rationales for copyright predominate in American law.¹⁶ Peter Yu's article explores the degree to which DVD region codes, and the practices they enable, achieve their goal of maximizing revenues for movie studios. Yet, as he identifies, this revenue capture comes at a cost—arguably, at considerable cost, as when technological restrictions impede cultural learning or augment censorship by repressive regimes.¹⁷ One needs an explicit normative methodology when assessing the possibilities of control offered by new technologies, from deep packet inspection to Internet Protocol version 6.¹⁸ The key question is whether, as a society, we should be prepared to tolerate the tradeoffs, such as reductions in potential fair use or loss of privacy, that accrue from these new revenue-maximizing mechanisms.¹⁹

The methodology employed for most copyright analysis is rudimentary, yet straightforward. Utilitarian assessments of copyright protection, whether by public or private law, tend towards maximalism.²⁰ Put crudely, more copyright results in more culture. This leads to a one-way ratchet in copyright protection, as the pursuit of more cultural production leads to the establishment of greater protections for works.²¹ The maximalist framework also undergirds normative claims by copyright owners. In the contest between equipment manufacturers who seek to provide devices without restrictions, and movie studios who want region codes or their equivalents, the content industries have an advantage. They can effectively argue that electronics must respect copyright, else society will be deprived of new films (or, at least, of high-budget ones).²²

¹⁵ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

¹⁶ Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 450 (1984); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 13 n.45 (2004); see generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

¹⁷ Yu, *supra* note 1, at 226–33. On censorship, see ACCESS CONTESTED: SECURITY, IDENTITY, AND RESISTANCE IN ASIAN CYBERSPACE (Ronald J. Deibert et al. eds., 2011).

¹⁸ See, e.g., Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417 (2009).

¹⁹ See Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. (forthcoming 2012).

²⁰ See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 256 (2003) (Breyer, J., dissenting) (cataloguing arguments in favor of perpetual copyright).

²¹ See generally Derek E. Bambauer, *The Myth of Perfection*, 2 WAKE FOREST L. REV. 22 (2012).

²² See, e.g., Brief for Petitioners at 38–42, MGM Studios v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480).

However, it is not clear that the maximalist methodology is correct, even in analysis of marginal adjustments or incentives. Research suggests, for example, that additional movie revenues go to making more expensive movies rather than more of them.²³ Instead of using profits to fund additional films, studios invest it in expanded computer-generated imagery, higher salaries for star actors and actresses, and wider marketing campaigns. It is not self-evident that the resulting cultural output is better. There are sound aesthetic reasons to conclude that trading one “John Carter” for several of “Being John Malkovich” is a worthwhile endeavor.²⁴ The increased revenue potential that accrues from price discrimination mechanisms such as region codes may, or may not, lead to enhanced societal welfare.

Utilitarian analysis of copyright founders even more when it must contend with cross-industry considerations of welfare. Devices that implement technological locks are less flexible, and hence less valuable to consumers, than those without. In Jonathan Zittrain’s terms, locked-down devices are less generative.²⁵ Region codes impose direct costs, and disutility, on equipment designers and manufacturers who must construct devices that obey content producers’ signals. Implementation of the High-Bandwidth Digital Content Protection (“HDCP”) standard, for example, caused incompatibility problems for many television models.²⁶ In addition, technological locks impose indirect costs on consumers, whose freedom to operate is constrained to benefit the motion picture industry. As Yu’s article demonstrates, someone who has made a lawful purchase of a DVD may be unable to view it because her player has an incompatible region code.²⁷ She must alter the player, purchase a new copy, purchase a new player, or forgo consumption. Each choice forces her to bear disutility to benefit movie distributors—in effect, a forced transfer of welfare.

²³ Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 128 (2001).

²⁴ Compare David Denby, *Crash Landings: “John Carter” and “The Deep Blue Sea,”* THE NEW YORKER, Mar. 26, 2012, at 108 (“[b]y the end of the picture’s opening weekend, the press was already hailing a bomb in the legendary class of ‘Howard the Duck’ If the international audience rescues ‘John Carter,’ too, then more such follies will be launched by the studios”), with Janet Maslin, *Being John Malkovich*, N.Y. TIMES (Oct. 1, 1999), <http://movies.nytimes.com/movie/review?res=9F03E6DD123EF932A35753C1A96F958260> (describing the film as “intriguingly prophetic” and “irresistible”). The budget for “Being John Malkovich” is estimated at \$13 million in 1999 dollars (roughly \$18 million in 2012 dollars); the budget for “John Carter” was reportedly \$250 million in 2012 dollars. Michael White, *Disney’s Film Chief Ross Resigns After “John Carter” Loss*, BLOOMBERG NEWS, <http://www.bloomberg.com/news/2012-04-20/walt-disney-film-chief-ross-steps-down-after-john-carter-loss.html> (Apr. 20, 2012).

²⁵ Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006).

²⁶ See, e.g., Emily Masamitsu, *PS3 Blinking Mystery Deepens – Westinghouse*, POPULAR MECHANICS (Oct. 1, 2009, 12:00 AM), <http://www.popularmechanics.com/technology/gadgets/4212233>.

²⁷ Yu, *supra* note 1, at 217–20.

These tensions—between protecting copyright and generating innovation, between consumer and producer interests, and between Hollywood and Silicon Valley—are perhaps inescapable. They have played out with region codes, with broadcast flag regulation,²⁸ with the anti-circumvention provisions of the Digital Millennium Copyright Act,²⁹ and with the debates over the Stop Online Piracy (SOPA) and PROTECT IP Acts.³⁰ These controversies demonstrate the complexity of utilitarian analysis: is society better served by creating flexible devices or by protecting intellectual property? Maximalist analysis of copyright ignores this tradeoff, often deliberately.³¹

Yu's article contains a strong note of skepticism about the price discrimination practices that region codes make possible. It leaves open the possibility, however, that more refined techniques might justify the costs he identifies, such as to cultural learning, to consumption, and to competition. Thus, his paper contributes to the accretive scholarly understanding of when price discrimination appears desirable, while making clear that content producers should employ a scalpel, rather than the blunderbuss of region coding.

III. INTELLECTUAL PROPERTY VERSUS USER RIGHTS

Peter Yu wades carefully into the debates described above with three modest proposals: voluntary removal of region restrictions by producers, efforts to make multi-region players available to users in parlous financial condition, and a narrow right to circumvent restrictions on human rights grounds.³² These potential reforms are modest for a reason: minor alterations are the only changes likely to find acceptance with content producers, and hence to succeed. The proposed right to hack, under circumstances where the consumer has lawfully purchased the underlying content, is particularly illuminating. It points up the ways in which user rights are, if not under-theorized, at least under-implemented in American copyright law.³³ *Region Codes*

²⁸ See *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

²⁹ See, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT* 122–45 (2001); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 161–68 (2009).

³⁰ See, e.g., Mark Lemley, David S. Levine, & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (2011) available at www.stanfordlawreview.org/online/dont-break-internt.

³¹ See, e.g., Mike Masnick, *Chris Dodd: The Internet Developed Because Of Strict Copyright Enforcement*, TECHDIRT (Mar. 7, 2012, 9:33 AM), <http://www.techdirt.com/articles/20120306/04072817998/chris-dodd-internet-developed-because-strict-copyright-enforcement.shtml>.

³² Yu, *supra* note 1, at 234–64.

³³ Scholars have offered accounts of both a right to circumvent and user rights more generally. See, e.g., Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1 (2008); Jessica Litman, *Frontiers of Intellectual Property: Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996). The most straightforward implementation of a user right is § 1008 of the Audio Home Recording Act, 17 U.S.C. § 1008 (1992), which is largely unknown even to copyright lawyers.

describes this shortcoming and, to its credit, offers a starting point for a rebalanced approach to copyright enforcement.

Copyright scholarship tends to take Pangloss's approach to IP-related business models: content owners are free to adopt whatever private arrangements they see as maximizing revenues, and consumers have no moral claim to any alternative ordering.³⁴ This neutrality, or indifference, derives from the standard view of copyright's social bargain between authors and consumers. On this account, consumer interests are protected by public law provisions such as fair use,³⁵ the idea-expression dichotomy,³⁶ and limits on copyrightable subject matter.³⁷ As regards private ordering, consumer interests are identical to and subsumed by authorial ones. Since both parties benefit from enhanced incentives to produce expressive works, consumers have no standing to object to lawful practices that maximize revenues to copyright owners. (There are similar justifications stemming from moral desert rather than, or in addition to, utilitarian considerations.)³⁸

This perspective relegates user rights to trivial status, if it does not vitiate them entirely. And, this cramped view of consumers' entitlements dominates in both public and private law regulation of copyright. With public law, consumer and user interests have been almost entirely absent from deliberations over legislation, from the Digital Millennium Copyright Act to SOPA and PROTECT IP.³⁹ With private ordering, negotiations over enforcement mechanisms such as the new "6 strikes" system that will be deployed by ISPs and content owners in the summer of 2012 took place without consumer input.⁴⁰ These examples are representative, as Jessica Litman's history of the development of digital copyright law reveals.⁴¹

The challenge for reformers is two-fold: first, to envision an alternative system, and second, to implement it. The second is beyond

³⁴ For a recent example of this debate, see Derek Bambauer, *Stealing the Throne*, CONCURRING OPINIONS BLOG (Feb. 22, 2012, 12:21 PM), <http://www.concurringopinions.com/archives/2012/02/stealing-the-throne.html>.

³⁵ See 17 U.S.C. § 107 (1976); *Golan v. Holder*, 132 S.Ct. 873, 882–83 (2012).

³⁶ See 17 U.S.C. § 102(b) (1976); *Golan*, 132 S.Ct. at 882–83.

³⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³⁸ See generally Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

³⁹ See *The "Stop Online Piracy Act": Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. (2011), available at http://judiciary.house.gov/hearings/hear_11162011.html (listing witnesses at hearing); Litman, *supra* note 29, at 144–45, 174; Wayne Rash, *House SOPA Hearings Reveal Anti-Internet Bias on Committee, Witness List*, EWEEK (Nov. 16, 2011), <http://www.eweek.com/c/a/Cloud-Computing/House-SOPA-Hearings-Reveal-AntiInternet-Bias-on-Committee-Witness-List-222080/>.

⁴⁰ Mike Masnick, *Shouldn't Users Have Been At The Table For The Six Strikes Negotiation?*, TECHDIRT (July 20, 2011, 8:22 AM), <http://www.techdirt.com/articles/20110719/04260815164/shouldnt-users-have-been-table-six-strikes-negotiations.shtml>.

⁴¹ Litman, *supra* note 29, at 22–35.

Yu's power, but his proposals usefully advance our understanding of how copyright enforcement might function better. Voluntary removal, expanded access to multi-region players, and a limited right to hack would help ameliorate some of the flaws inherent in DVD region coding. Moreover, the careful elaboration of tradeoffs and countervailing interests in *Region Codes* serves as a model for thoughtful copyright policymaking. The article is simultaneously an implicit rejection of copyright maximalism and a well-working alternative methodology.

Perhaps most important, Yu's article begins to fashion a model of the good—of the ends that copyright should serve, and of how to fashion an ecosystem that incorporates the interests of multiple stakeholders, rather than merely producers and distributors.⁴² *Region Codes* maps a set of interests that deserve incorporation in shaping copyright, such as distributional equity, access to cultural material, robust market competition, freedom of expression, and safeguards for enjoyment of lawfully purchased copies.⁴³ The article charts the technological ecosystem created by region codes and shows how it shapes consumers' interactions with DVDs in a manner that serves Hollywood's interests at the cost of their own.

In theory, the consumer holds pride of place in copyright's pantheon.⁴⁴ In practice, though, user interests are systematically discounted or ignored. *Region Codes* catalogues the ways in which DVDs' artificial geography harms user rights, and offers an alternative framework that elevates consumer concerns as a significant factor in copyright's calculus.

CONCLUSION

Region Codes offers what the anthropologist Clifford Geertz termed a "thick description" of the world of DVDs' geographic restrictions: it is a fulsome account of the particulars of the technology and business model of distributing movies on discs, and it lends itself to useful generalization for copyright issues more broadly.⁴⁵ The article cogently analyzes not only the key role that region codes play in the movie industry's current business model, but also the often-invisible harms that they create, particularly for consumers who are either not American or not mainstream. It encourages reflection on the interplay

⁴² See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008) (offering such a vision).

⁴³ Yu, *supra* note 1, at 216–34.

⁴⁴ See, e.g., Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring [copyright's] monopoly lie in the general benefits derived by the public from the labors of authors.").

⁴⁵ Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 3 (1973).

2012]

PANGLOSS'S COPYRIGHT

273

between public copyright law and private enforcement; the ways in which technology determines cultural production; and the difficult struggle to take account of user interests in a political landscape dominated by content owners.