

Yours, Mine or Ours: Can We Fix Copyright Protection in the United States?

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This article examines the history of copyright law in the United States and its implications for intellectual property. Copyright law is traced from the Statute of Anne through the Digital Millennium Copyright Act. Copyright protection originally provided a balance between encouragement and reward to stimulate creation and the expansion of the shared pool of common knowledge. The rights and protections of authors and creators have continually increased, generally to the benefit of multinational intermediaries and the detriment of the common social good. Recommendations include return of control to authors, shortening the term of copyright protection, and provide more direct reward.

INTRODUCTION

To the disappointment of distributors the blockbuster movie “X-Men Origins: Wolverine” was released to theatres a month after an illegal copy was posted online (New York Times, 12 January 2010). Google attempted to capture libraries of “orphaned” books, regardless of authors’ desires (Kunstadt, 2010). The recording industry has seen global digital sales grow, but global revenue growth is declining and blames the illegal downloading of content for much of the decline (IFPI, 2010). Has copyright protection gone as far as it can go? Have we entered a new age of copyright protection or perhaps an “uncopyrightable” age? These are the issues facing the producers and developers of intellectual and creative media, as well as the various governments around the world. The rise of the Internet and digital media has once again allowed for the rapid and widespread distribution of information and ideas outside the controls of government, organisations, or publishers.

This paper has two specific focuses. First, this paper will attempt to place the copyright debate into a historical framework. An examination of the history of copyrights and the development of the laws within the United States of America will provide a perspective on copyrights that is bigger than the current battle over control. Second, this paper will attempt to provide some ideas about what can be done to manage the digital content future.

HISTORY OF COPYRIGHT

The protection and control of information and “media” are not new, even though the United States is still young it inherited a rich legal tradition. The monasteries of the medieval church served as regulators of information and media through their control of writing, even though most of the information was

considered a common property (Merwe 1999). However, it was the creation and rise of the printing press in the sixteenth century which created the opportunity for mass dissemination of information and government's subsequent attempt to recapture the proverbial genie (Merwe, 1999).

The battle to protect and manage the relationship between the creation and duplication of documents first became an issue with the rise of the Stationers Company in England in the mid-sixteenth century (Feather, 1994). The Stationers Company controlled the right to publish books, initially classic texts, but gradually more current texts. Printers were required to obtain a license before printing a book. This control became a matter of law in 1662 when the Licensing Act was passed in England. This royal decree served to protect the printers' trade by allowing the Stationers Company exclusive control over the licensing of books. The decree also allowed the Stationers Company to legally seize and burn those books printed without permission. The Act also served a secondary purpose by ensuring the King control over what could be printed.

In 1694 after many years of debate and even heavy lobbying from people such as John Locke, the Stationers Company monopoly over the book licensing was repealed (Hesse 2002). This was a time of great debate in many areas of ownership and property and one of the ideas to arise was the notion of "intellectual property." This was grounded in the natural rights ideas of Locke and suggested that creators and authors should have ownership of their intellectual efforts and creations (Rose, 1993). The old system of control by distribution was gone and something new was needed to replace it. In response the Stationers Company and others began to argue that without some form of intellectual property enforcement protection, authors and creators would no longer commit the time and effort required to produce new ideas and knowledge.

In 1710 the Statute of Anne became the first modern copyright law in the world (Holderness 1998). It fixed into law for the first time the two ideas that still underlie even modern copyright legislation. First, the Statute recognised the author as the owner of the right to copy his/her work. This was clarified in later court decisions to be a right to control the content, style, timing, and even if a creation were to be published. The second idea introduced was the concept of term. Under the Statute of Anne the copyright holder was awarded control for 14 years, with the option of extending that protection for another 14 years. Later an English court while supporting the Statute stated that when considering copyright protections the rights of the copyright holder to compensation and control must be balanced with the right of society not to be deprived of the creative contribution (Hesse, 2002). This was also when the works of Shakespeare were finally set free to be performed and enjoyed by all, to the benefit of all.

In the emerging United States of America copyright was also an issue of concern. In 1787 the United States Constitution Article 1 Section 8 specifically provided Congress with the power to "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." It is clear that the framers had been influenced by the Statute of Anne as well as the concerns raised in subsequent court considerations (Hesse, 2002). Three things emerge from this brief statement. First, that protection is needed to promote the advancement of science and art. Second, the term of protection was to be limited to ensure that the benefit would eventually fall to society as a whole. Third, and perhaps most importantly, the power was placed with the authors, not with intermediaries like the Stationers Company (Hamilton, 2000). The founding fathers distrusted the power of the state and sought to avoid the restrictive power of state sanctioned monopolies, thus they limited the purpose, scope, and focus of government's power to regulate copyright.

The first copyright statute passed in 1790, regulated the "printing" and "vending" of works, but not derivative works, for an initial 14 years after registering the work, with the option of an additional 14 extension, for a maximum of 28 years of protection. By not protecting the derivative works the creators left works open to translation, adaptation, or even abridgement without the permission or compensation of the original author. Yet the initial impact of this copyright law was small and of the roughly 13,000 titles published fewer than 5% were actually copyrighted, leaving the balance in the "public domain" (Lessig, 2001). Public domain refers to the status of the work as available to anyone for any purpose and outside the control or commercial gain of the creator or other owner of the created work. This statute however did

not protect foreign copyrights, which were not protected until 1891, leading Lawrence Lessig to declare “[w]e were born a pirate nation” (Lessig 2001, pg. 1601).

The rules for the ownership of copyright were modified in 1909 with the passage of the Copyright Act of 1909 (Hesse, 2002). This act defined the rules and laws that would apply to “published” works, by anyone, not just works handled by publishers. Publication involved the public presentation of the works in a tangible medium. The Act also required that the works be identified with a notice of copyright or the familiar copyright symbol “©”. Unpublished works were protected under individual states’ laws by “common law copyrights.” If the correct publication and notification standards were followed then the owner of the copyright would be entitled to sole control and ownership of the copyrighted work for 28 years, with an extension option available to extend the coverage another 28 years (Labriola 2002, Martin, 2002). At the end of the copyright period or if the owner failed to follow the publication and notification provisions correctly, the work would enter the public domain. Once a work entered the public domain under the Act of 1909 it would never again be able to be copyright protected (Moore, 1999).

This early Act supported the original Constitutional intentions by protecting the commercial interests of the creators of intellectual property as well as providing a benefit to society at large by ensuring that works would one day enter the general shared knowledge of the country. Creators were allowed to derive value for their creations, providing incentives for the continued expenditure of intellectual effort and the general advancement of knowledge. At the same time the Act provided a benefit to the common social good, by ensuring that after a maximum of 56 years the exclusive monopoly on the dissemination and access to the knowledge would expire and the knowledge would become available for anyone to share. Thus both the creation incentive and common good were protected. Unfortunately information and information products were becoming more valuable and commercial interests feared losing control of their exclusive rights.

Beginning in the 1960’s Congress began to examine ways in which the rights and protections of copyright holders could be expanded. The global community, recognising the ease with which information could be spread, had continued to pass international agreements which attempted to strengthen the rights of intellectual property holders, but the United States was slow to join. It cannot be a coincidence that the United States Congress began to seriously take up these discussions at roughly the same time that the maximum 56 year copyright protections of the Act of 1909 approached expiration. These discussions were also taking place during a time of rapid growth in technology and innovations such as televisions, radios, photocopiers, popular music, and computers. Thus both the creators at the end of their copyright terms and the creators at the beginning of their copyright terms were combining in a co-ordinated effort to protect their information products. Congress struggled with these concerns until 1976.

In 1976 the rules for ownership of intellectual property in the United States changed dramatically with the passage of the Copyright Act of 1976. The Act, which became effective in 1978, changed the way that the United States handled copyrights (Moore, 1999). First, the Act defined copyrights as existing automatically. There was no longer a need to register the copyright, publish the work, or even place the copyright notice on the work to gain full copyright protection. Copyright protection was granted to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” (17 USC 102(a)). This automatic copyright eliminated the common law copyright and covered all works that had been put into a “fixed” medium (Maury & Kleiner 2002). Fixed did not mean permanent or published. Thus all works were copyrighted unless specifically defined as public domain, a dramatic shift from the Act of 1909.

The second area in which the Act changed copyright law was in the term of the copyright. The Act of 1976 extended the life of a copyright to the life of the author plus 50 years, adding an extension to works already copyrighted under the previous legislation. In addition, each version of a work was now protected as a new work and thus gained the new time provisions for itself, regardless of the term on the original foundational work. So a work was now protected, without need for registration or renewal, for a period greater than the entire life of the author (Lessig, 2001). The term of a copyrighted work was later extended even further by the Sonny Bono Copyright Protection Act of 1998, a.k.a. “Mickey Mouse

Protection Act” (Lessig, 2001, pg.1065), to the life of the author plus 70 years or 95-125 years for works-for-hire or works published before 1978 and under active copyright protection (Maury & Kleiner, 2002).

The third fundamental changes contained in the Act of 1976 were the rights preserved for the copyright owner. Under the original Act of 1909 the purchaser of a copyrighted work gained control of all rights associated with the work, unless specifically noted otherwise. In the Act of 1976 the owners of the copyright had the exclusive rights to copy, distribute, perform, display, and/or broadcast the copyrighted work. Ownership of the copyrighted work did not convey any rights under the new Act other than the right to dispose of the copy through sale or other means, except for computer software and phonorecords which under a 1990 amendment could not be loaned, leased or rented for commercial gain. The new Act also required that all transfers of the owner’s exclusive rights must be in writing and signed, a further movement towards information products as quasi-real property.

An interesting twist in the Act was the inclusion of guidance on how to determine if a case was a “fair use.” Fair use was originally a court creation under previous copyright law, but was added specifically for the first time in the Act of 1976. Fair use is described in the Act of 1976 as a use, which while in conflict with the exclusive rights of the owners, was not considered a violation of the Act (Moore 1999). The Act however, failed to specifically define what a fair use was or was not, leaving it to future court action to refine and clearly define its exact meaning.

Following the introduction of the original Copyright Act of 1976 many amendments and court decisions changed the Act and its interpretation to fit various niches of the information production and transmission arena. Historical, factual, common information, literary devices, and government-developed works were added to public domain as items that could not be copyrighted (Moore 1999). Specific changes in response to developments in industries as diverse as satellite broadcasting and small bars and restaurants were also given special attention through amendments to the Act.

In 1998 Congress again changed the rules with the introduction of the Digital Millennium Copyright Act (DMCA) of 1998 (Heidmiller 2002). The Act was a response to the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty, and to the perceived threat to copyright holders of digital piracy. Specifically, the DMCA contains five titles. Of particular interest is Title 1, which specifically addressed several new violations of copyright protections.

Title 1 of the DMCA provides protection for the copyright holders from unauthorised circumvention of technological means used to protect copyrighted works (Heidmiller 2002). Title 1 further separates circumvention into two specific types of acts. The first is circumvention of *access* limiting technologies. These technologies limit the user’s access to the copyrighted content. The second is circumvention of *copy* limiting technologies. These technologies limit the user’s ability to copy the copyrighted material. Acts of the first type, circumvention of access control mechanisms, are strictly prohibited. While acts of the second type, circumvention of copy protection mechanisms, are not specifically prohibited due to the possibility of protected fair uses, which may arise from a need to copy the material.

The second part of Title 1 focuses on the means or tools used for circumvention. The creation or sale of devices or services, which are used to circumvent either type of copyright protection technology, were prohibited. Specifically, Title 1 prohibits devices or services, which fall into any of the following categories:

- They are primarily designed or produced to circumvent
- They have only limited commercially significant purpose or use other than to circumvent
- They are marketed for use in circumventing. (pub L No 105-304 112 Stat Oct 28, 1998)

These prohibitions apply even though some *uses* of circumvention technology could be considered fair use and allowed under the act of copy protection circumvention. The DMCA Title 1 does provide some limited exemptions from these provisions, but these are primarily educational, governmental, and research focused.

The final part of Title 1 deals with copyright management information (CMI). CMI is specific information about the work, copyright holder, author, or other aspects of the work. This section of Title 1 prohibits the falsification, removal or alteration of the CMI information.

In a 2001 challenge to the definition of free speech and fair use an independent magazine was permanently barred from publishing the code or even providing hypertext links to a program that could circumvent the copy protection on DVD movies (Heidmiller 2002). The magazine was not the creator of the code, nor had they been accused of copyright infringement. The ban was upheld on appeal by the US Second Circuit Court.

The evolution of copyright laws within the United States has taken a strong turn toward the rights of the owners over the common good and the rights of the users (Heidmiller 2002). The rise of large media corporations and information product producers has swung the balance out of equilibrium.

WHAT TO DO NOW

How can the rights of the media and intellectual property producers and the rights of the public be rebalanced? The first aspect to recognise is that the situation is shockingly similar to the world as it was in the early sixteenth century. Then the rapid spread of the printing press had led to the rapid and uncontrolled distribution of what would eventually become intellectual property. People had access to information and the fear resided with those producing the works and the governments trying to control the information. Today we see that government is pushed by the information production controllers to once again reign-in this “chaos.”

The second aspect is that then, as now, there are no quick and easy answers. The Stationers Company began by dark alley strong-armed action to reign in the mass production through threat and intimidation, until they were legitimated by royal decree. The control was not to protect the material, but rather to ensure the livelihood of those printing the material. Today the battle is carried out in the law offices of media production companies around the world through threat and intimidation of their own consumers (Kravets 2009). Courts become the means by which the power and livelihood of these media giants is ensured (e.g., Google’s digital library and the American Publishers Association). At the same time the creators of the intellectual property are often fighting on the side of the masses as they try to have their creations seen, heard, read, and their claims protected (e.g., Recording Artists Coalition).

The third aspect is that the rights of the individual creator, and his/her exclusive right to assign those rights, must be balanced against the good of society as a whole. In the original Statute of Anne the term was set for a maximum of 28 years, this was extended to 56 years by the Copyright Act of 1909, and now can reach 125 years under the Copyright Act of 1976 (Waelde 2001). When does a work ever come back into the public domain? Society and its advancement are at the core of the original ideas of copyright and yet even as the technological rate of change increases and the life span of an innovation declines, the term of protection is increased. Who is to say that in 95 to 125 years as the protections given under the Act of 1976 approach expiration, there will not be another extension as there was when the protections of 1909 approached expiration in the 1960’s and 1970’s. Following the passage of the 1998 extension one Congresswoman suggested the protection should last forever, or at least forever minus one day (Lessig, 2001).

So what should be done? After examining the history of copyright and its growing market value in the current digital world several suggestions about what to do next are presented below.

Rethinking Intellectual Property

The balance of social benefit and creation incentive has become unbalanced. Creators and authors create, then turn over the rights to a shrinking number of multinational publishers, managers, and developers for a mere pittance. Contracts are written transferring not only the rights to current work, but for the transfer of future works. These transfers are done before the true value of an author’s or creator’s work is even fully known. The proceeds and revenue generated by the works of intellectual property are gathered by middlemen and intermediaries. How does this encourage the future creative effort of the creators?

To rebalance this equation the ownership rights of the authors and creators must be more explicitly protected. The right to transfer must not only be required to be in writing, as under the current DMCA,

but rather specific to each work of creative endeavour, thereby more fully rewarding the exercise of creative effort and the advancement of art and science.

Authors must also be guaranteed the ultimate control of their creative works, even in situations where they produce work-for-hire. Only the rights to use or exploit their work for specific periods would be allowed. Any work created must be owned, not by middlemen, intermediaries, or other distributors, but by the author exclusively. The right to publish, distribute, or transmit would only be able to be granted for a specific term and a specific work, and would be ultimately controlled by the creator. No longer would writers or performers be faced with the situation of having their works, names, and reputations controlled by others or scanned, published or used without their permission.

Examine the Term of Copyright Protection

Currently the term of copyright has grown to be the life of the author plus 70 years; this is a far cry from the 28 year maximum envisioned in the Statute of Anne. Why such a long term? Copyright has become more than a protection of the author or creator's work and an incentive for future development, it has instead become the foundation upon which inherited dynasties and corporate empires are built. This term must be changed.

The original intent of protection of the author and society must be rediscovered. To protect the author some term of protection is warranted. This allows the creator to be compensated and rewarded for adding to the sum of human knowledge and art. By extending the term beyond the life of the author society is forced to pay tribute not to the creator, but rather to heirs and holders of the work, people and institutions which may have had little or nothing to do with the creative endeavour. Therefore at a maximum the protection given to a work must end with the life of the creator. Any extension beyond this point benefits neither the social good nor the development of future creative efforts. This might be difficult when faced with the prospect of beloved characters entering the public domain, but this has happened before and we have grown to appreciate the wonders and creative engines they can become (e.g., Bram Stoker's "Dracula").

The term could also be much shorter than the creator's lifetime. As society grows and the rate of change continues to increase the need for faster access by general society to the creative contributions of authors and creators must be examined. Copyright protection of software code for 95 years makes little sense. It makes even less sense when one thinks about the advancement of overall society and the common good. Would society not be better served to set a term that is perhaps as short as 10 years from the date of publication? Professor Lessig has suggested a 5 year term with one 5 year extension for software and a 5 year term, renewable in 5 year increments up to 75 years, for other works (2001b). A 10 year term would allow the creator to gather proceeds on the original creation for the majority of its useful life, but would also serve as an incentive for the modification and refinement of the creation during that term, especially since updated works are already afforded a new copyright clock. Additionally, the recreation of the registration and renewal process would release the Internet world from the constant battle of content ownership and obsolescence which the current copyright system encourages. Regardless of the author's actions however the original idea and method would become available to the public as public domain while it could still be used to increase the general knowledge of society.

Regardless of the exact term chosen, it is clear the term must be shortened. The life of the author could be the extreme for items of artistic creation, with the shorter term reserved for technological or intellectual contributions. The exact divisions are beyond the scope of this paper, but the re-examination of the term is critical.

Rebalance Social and Creator Rights and Benefits

The final suggestion as to the future of copyright protection requires that the economic conditions of copyright be rebalanced (DeGeorge 2001). While the need to reward creators and encourage advancement are both noble goals, they must be more accurately balanced in the future. As mentioned before, the shortening of the term of copyright protection begins this process, but it is by no means the end.

Authors and creators must have compensation tied to the created property. Just as the ownership rights of the author must be more strongly protected, so too must the economic incentive to the creators be more clearly tied to the work. Legal standards must define minimum percentages of gross value, which must be paid directly to the author. This direct payment ensures that the author is rewarded in direct proportion to the value of the work and that exploitive intermediaries cannot deprive the creator of direct proportional benefit from his/her work.

The rise of the Internet and digital media have made the cost of transmission and distribution very low, making the transfer of digital content both easy and inexpensive. The response from the media industry has been to increase legal efforts to protect the content, without consideration of the new economics of the digital world. The music industry, a protected intellectual property monopoly, has enjoyed decades of profitability, but consistently refused to adjust the price of products such as compact discs. The cost of production of digital media has benefited from the same cost savings, as those illegally trading the digital media on-line, but the cost of the product has not reflected the efficiency gains. The price of the product must be adjusted to reflect the free operation of the markets and not the tightly controlled cartel of media distributors. While the IFPI claims growth in digital “revenues” and declines in global “revenues”, they continually fail to discuss the cost structure changes that the same technology has allowed. Revenues might be down but the cost of production plummets through digital distribution, and the companies grow larger and remain profitable.

The legal juggernaut, unleashed by copyright conglomerates, must be targeted against commercial infringement and those who seek to profit from copyright violation and not those who do not seek commercial gain. Existing copyright law “provides that instrumentalities of infringement such as printing presses used to print infringing copies of books and labels, may be impounded and destroyed on court order” (Kunstadt 2010, pg. 29). So why are the servers and systems used for the profligate violation works not being destroyed?

Finally, the realm of public domain must be recreated and strengthened. The quality and quantity of intellectual property in the public domain is the true measure of its social good. The public domain serves as an open and available source of knowledge, which allows for people worldwide to gain and benefit from the work that has gone before. Exposure and access to a body of common knowledge, available with minimal cost or restriction, encourages the development of new and greater works. Digital media and the Internet have become the perfect vehicles for the easy and near-instantaneous sharing of information and knowledge, around the world. Why should other creative efforts be banned by the intellectual protectionism of Disney’s Mickey Mouse, when Disney itself has been among the leading exploiter of now public domain characters and stories (e.g., Quasimodo, Pocahontas, Snow White)? While the perverse argument that somehow prohibiting the use of existing works stimulates creativity through the elimination of the easy option of using previous works (Martin 2002) is specious at best.

Authors are recognised as the creators of this knowledge and are compensated for a reasonable term, but eventually it must move beyond them and be shared with all. The rise of western civilisation after the dark ages is firmly rooted in the rediscovery of the ideas and thoughts that those in an earlier age had created. Imagine the next enlightenment when the digital world provides access to the thoughts and ideas of all those who have expanded knowledge since the beginning of the 20th century.

CONCLUSION

The rise of the rights of an author or creator to benefit from ownership and protection of his/her ideas has marked the rise of the Information Age and the growth of the United States. However, the terms of that protection have been extended, expanded, and the barriers to access expanded, but at what cost to society. This article has suggested ways in which the system can be recreated, based upon the original ideas and intentions of copyright protection. Today we stand at a crossroads. Will society continue to expand and entrench the intermediaries and interests who seek to increase restriction and control or will it take a step back and re-examine the foundational ideas and concepts upon which the rules of copyright were built.

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