Copyright, Intellectual Property, and the Public Good

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Abstract

This paper traces the history of American copyright law and outlines the overreach of current copyright law and the conflation of “intellectual property” with property rights. These, in turn, limit access to information and stifle important information sharing and new creative endeavors. It is my assertion that a reassessment of copyright law is necessary to correct this imbalance and return copyright law to its “original” intent in order to promote the public good.

“…but then, we are all thieves.”

Mark Twain

**Copyright, Intellectual Property, and the Public Good**

Does property ownership issue from a place or from an idea? Is a literary work of art its ‘leaves of grass’ or its semantically arranged composition? Does copyright protection emanate from “natural law” (much like Locke’s notion of property as an inalienable right) to protect one’s intellectual property, or is it based on negotiations and evolving standards? These questions have long haunted the use and reuse of writing and scholarship and continue to impact knowledge creation and knowledge sharing today.

The original intent of copyright statutes was to balance the interests of authors, publishers, and the reading public (Vaidhyanathan, 2001; Lessig, 2006). It was felt that authors should be protected long enough so they profit and continue to create more works but not so long that the “public domain” suffers (Vaidhyanathan, 2001, p. 21). This “thin” copyright protection embodied in the US Constitution declared that works of art and science should be ultimately held as “common property” for the benefit of the American public:

*“To 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”* (U.S. Const. art. I, § 8, cl. 8).

Despite these original intentions for limited copyright, a long battle has been waged to strengthen copyright law to benefit authors at the expense of the public domain. The publishing industry and many artists have sought “to obscure copyright's true origins, and to promote the myth that it was invented by writers and artists” (Questioncopyright.org, n.d., para. 2). It is my assertion that this effort is a fundamental misreading of the purpose of Article 1, Section 8 and that a return to this earlier, “thin” copyright protection is necessary to promote the public good and support the growth of knowledge.

## Copyright

The history of copyright has long been traced to the movable-type printing press. It was during this period that the mass copying of books became a reality. This technological innovation created a burgeoning market of new readers who had not been able to afford expensive hand-copied works, resulting in a publishing and printing industry to profit from this new market. In many ways, copyright law has been reacting to such innovations (and who is the ultimate beneficiary) ever since (Paltry, 1994; Menand, 2014, October 14, para. 12).

As this new market and industry grew, copyright issues began to play a small yet important role. The first instances of copyright regulations were not designed to protect the reading public, authors, or publishing/printing industry, but as an effort to stop seditious works critical of the Crown from being printed and distributed (Paltry, 1994). “A royal charter as the exclusive printer of books was given in 1557 to the Worshipful Company of Stationers of London, a group of printers. To print a book, a printer had to register it with the Stationers Company, and registration was not allowed if another printer had previously registered the manuscript” (Paltry, 1994).

Lasting over 40 years, this use of copyright as fiat for censorship would gradually ease, creating a crisis in the printing and bookselling industry over ownership rights. To address these industry concerns, Parliament in 1710 passed the Statute of Anne Act. This act “established the principles of authors' ownership of copyright and a fixed term of protection of copyrighted works”: 14 years, renewable for 14 more if the author was alive upon original copyright expiration) (Association of Research Libraries, n.d.). This limited copyright statute prohibited the creation of a monopoly by the bookselling industry and, ultimately, established the concept of the “‘public domain’ for literature by limiting terms of copyright and by ensuring that once a work was purchased the copyright owner no longer had control over its use” (Association of Research Libraries, n.d.).

Since the Statute of Anne, both English Common law on copyright and U.S. copyright law have been frequently debated and revised. This has resulted in more robust, “thicker” copyright laws that lengthened the years of protection for authors and expanded its scope to include new technologies and forms of expression. But, despite this, the central question of copyright remains: For whom should copyright benefit?

**Copyright in the United States**

For the United States, the answer to this question can be found in the U.S. Constitution.

According to Article I, Section 8, Clause 8 of the [U.S. Constitution](http://www.law.cornell.edu/constitution/constitution.overview.html):

“the Congress shall have power . . . To 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.”

The framers clearly sought in Article I to prohibit the unauthorized copying and selling of an original work as a way of incentivizing authors to continue creating useful books (Menand, 2014, October 14, para. 13-14). Without such a monopoly, the Framers feared that authors would abandon their creative efforts and seek work that allowed them to make a living (Vaidhynathan, 2001, p. 21). For a limited time authors could profit from a monopoly of their work, thus encouraging them to produce more.

But the Framers are explicit in Article 1 that “the ultimate beneficiary of books and inventions is the public” (Menand, 2014, October 20, para. 14). Authors should enjoy the fruits of their labor but the “work should live afterword in the ‘public domain’” (Vaidhynathan, 2001, p. 21). As Louis Menand (2014, October 20) puts in a recent *New Yorker* article on the viability of copyright:

Copyrights are granted and patents are issued in order ‘to promote the Progress of Science and useful Arts.’ This is why the Constitution dictates a limit on the right to make copies. After the term of protection expires, a work cannot be copyrighted again. It becomes a ***public good*** [emphasis added].  It is thrown into the open market, which allows it to be cheaply reproduced, and this speeds the distribution of knowledge. (Menand, 2014, October 20, para. 13-14).

**Evolving U.S. copyright law.**

As the understanding of copyright began to change in the 19th century and as the move toward extended copyright protection for authors took hold, British Lord Thomas Macaulay delivered a speech in the 1841 House of Commons where he defined the principle of copyright as a “tax on readers for the purpose of giving a bounty to writers” (Macauley, n.d., para. 9). While Macauley saw the benefits of such a “tax on readers,” he warned that if legislation continued to leverage the “bounty” in favor of authors at the expense of the reading public, many past and future books could face extinction due to the imbalance between monopoly control by publishers and a reading public with limited resources.

One hundred and seventy-five years later, the “bounty” that Macauley warned about is a growing burden paid by the public for the benefit of the producers. For most of the 19th century, U.S. copyright law had very little impact on the daily lives of Americans. It is true that Mark Twain and other writers had a great deal to say about copyright law and that the economics of publishing was changing rapidly, but the majority of the public was uninterested and unaffected (Litman, 2004). This all changed by the 20th century and continues to exert an even greater influence today.

Current U.S. copyright law “touches everyone and everything…most of us can no longer spend even an hour without colliding with the copyright law” (Litman, 2004). This heightened influence of copyright law accelerated in 1976 and then again in 1988.

The 1976 Revision of the U.S. Copyright Act was primarily the result of the following factors:

1. Recent technological developments and digital products required a reassessment of what could and could not be copyrighted.
2. Increased technology made it easier to make unauthorized copies and it was felt that the parameters of “infringement” needed to be retooled.
3. With the pace of globalization increasing, it was felt that copyright should be adjusted to meet the standards of international copyright law. (Association of Research Libraries, n.d.).

The 1976 act took precedent over prior copyright law, extending the term of protection to life of the author plus 50 years. This increased protection moved US law closer to the European model which had long favored the rights of authors and publishers (Association of Research Libraries, n.d., para. 13; Vaidhynathan, 2001, p. 36).

In 1988, two acts continued to amend copyright along the same lines as the 1976 act. First, the Sonny Bono Copyright Term Extension Act extended protection from life of the author plus fifty years to life of the author plus seventy years. Second, the Digital Millenium Copyright Act “established safe harbors for online service providers; permitted temporary copies of programs during computer maintenance; made miscellaneous amendments to the Copyright Act, including amendments which facilitated Internet broadcasting;…[and] prohibit[ed] gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a copyrighted work” (Association of Research Libraries, n.d., para. 37). The result has altered the the original intent of copyright law. Again, Vaidhyanathan (2004), “The United States has radically increased the reach of copyright regulation…any balance between public and private will be lost.” The private property domain has supplanted the public domain, hindering both original expressions as well as knowledge sharing and creation.

**Conclusion**

Who benefits? The question itself now seems hollow. The 1976 and 1988 Acts, along with other legislative activity and judicial rulings, have substantially altered the answer to the question, For whom does copyright benefit? According to Siva Vaidhyanathan (2004, April), “copyright used to balance the public’s interests and private needs…now it only serves large, established copyright holders” (p. 2). The shift has indeed been substantial but not surprising. As intellectual property has become almost indistinguishable from our understanding of and protection for property rights—a “perpetual, exclusive, and inviolate” natural right—the rule of law and public perception has shifted according (Menell, 2007, p. 38). When the debate is framed as an issue of property rights, the conversation ends; after all, “how can one argue for theft?” (Vaidhyanathan, 2001, p. 12).

All may not be lost. As former Assistant Register of Copyrights Richard DeWolf reminds us, “The progress of copyright law does not take place by revolutions, but by successive stages” (qtd. in Patry, 1994, para. 4). Wolf equates copyright law to the “growth of a city, in which, as time goes on, some parts are torn down and others are devoted to new uses” (qtd. in Patry, 1994, para. 4). In such a scheme, we can review the original cityscape to locate how they have been altered and where the original architecture is still sound enough to be restored. It is my contention that the original architecture built by the framers of Constitution should be first place to begin to rebuild a copyright law that benefits both creators and the public in equal measure.

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