Property Rights and the Internet

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The copyright has long been an important tool for protecting various forms of creative property. However, throughout the twentieth century, technological advancements have made it increasingly easy for people to infringe upon such property by making illegitimate reproductions. Photocopiers made it quite easy to reproduce books, while VCRs and tape recorders made it an easy matter to record movies, television shows, and music. And, most recently, advancements in computer technology allow such reproductions to be made via the internet. For the most part these advancements have greatly improved our material well-being without abusing or infringing upon copyrighted property. The magnitude of the benefits arising from these developments is immense. These new ways of doing things are effective and efficient, and, when used legitimately, enhance economic life.

However, such technologies are not always used for legitimate purposes. The recent court case against Napster is an excellent illustration of the fundamental problem associated with protecting creative property in the current digital information era. The questions that arise from the case are, what is the proper way to protect creative property? And, is our current understanding of the nature of intellectual property correct and is it correctly encapsulated in the legal code? To answer these questions we need to examine the history of copyright protection. We also need to examine the record of legislative action and the numerous judicial rulings that have been made. By looking into these matters, we should be able to assess the relative success of protecting such property. This is important because the existence of the marketplace depends on the general protection of and

respect for private property. Apart from such protection, free market trade cannot exist.

A brief history of the copyright

Copyrights in the United States evolved over time within the framework of the Anglo-American common law tradition. While there were some early calls for the need to protect the rights of writers and artists, from a practical point of view the need for copyright protection did not become widespread until 1476 when William Caxton opened his shop and became England=s first printer. The invention of the printing press greatly expanded one=s ability to reproduce books and other printed materials. As a result, the Crown sought to secure the printing rights of the publisher by establishing the copyright (Foster & Shook, 1993). Thus, the copyright began as a publisher=s right and was eventually extended to recognize the author=s property interest. It was regulated not only by the common law, but also by guild ordinances and acts of censorship (Patterson, 1968). The importance of copyrights was stated some 200 years ago in a legal case in Great Britain:

> We must take care to guard against two extremes equally prejudicial; the one, that men of ability who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded (Mansfield, 1967).

While this statement affirmed an interest in the progress of the arts, the thrust of the argument was that writers would have no incentive to create property if it were not protected by the law. On this basis the morality of the protection of property was recognized. It was assumed that this protection would lead to general societal benefits. Such protection did not guarantee a reward, nor prohibit the competitive efforts of others. Rather, it merely recognized the fact that scarce resources were employed to create a product and the owner of the resulting property had the right to have it protected.

Following the British, the American colonies based their copyright laws on the English system. By 1786, all of the original state, except for Delaware, had passed legislation protecting the copyright. The expressed purpose of these laws was to protect the author=s right of property. This conclusion is supported by the actual titles of the acts. The state=s actions were subsequently followed by federal legislation in 1790 that was passed to protect books, maps, and charts. As was the case under English law, the federal act protecting the copyright for an initial period of fourteen years which could be extended by another fourteen-year time span (Foster and Shook).

Throughout the nineteenth century, amendments were added to the original copyright laws, but its primary focus remained intact. However, legal views began to shift in the twentieth century as utilitarianism spread. The nineteenth century development of this new moral perspective focused on results rather moral tradition. The aim of utilitarianism is the direct pursuit of material well-being via the implementation of pragmatic laws that are thought to promote economic progress. The passage of the 1976 legislation controlling the copyright reflected this change in perspective. Many copyright experts viewed the 1976 act as an entirely new body of law (Foster and Shook). While it included most of the older legislation, and while property right protection was still the main underlying theme, the new act expressed interest for the first time in providing adequate compensation to the creators of new information products and services, in promoting an atmosphere in which the maximum dissemination and usage of the new information could be had, and in determining the most valuable information products and services for production. In that sense, the new act adopted a utilitarian tendency that obfuscated the main issue of protecting property. In short, it tended to undermine the notion that the protection of property was needed for essentially moral, rather than pragmatic, reasons.

The spread of utilitarianism has also tended to create confusion about the nature of intellectual property itself. This was done by lumping together patents and copyrights and defining them as intellectual property. On this basis, the legal policy is viewed as one that involves trade-offs among the costs and benefits of various factions. The inclusion of such thinking can ultimately lead to the

compromise of private property under certain conditions. In recent times this has happened. For example, a U.S. court reiterated the significance of balancing rights and access:

> We must remember that the purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development (U.S. Court of Appeals, 1986).

But, is it good to violate property in order to extend the benefits of some? And, can the marketplace continue if property is readily violated? In his treatment of the subject, Murray Rothbard, borrowing heavily from Henry George, differentiated between copyright protection and patent protection (Rothbard, 1962). In his view, the copyright is to be seen as the legitimate protection of private property while the patent is to be seen as a grant of monopoly privilege. This conclusion was reached by developing an understanding of the nature of property within the context of a free market.

This approach differs significantly from that of other theorists on the subject. Most tend to regard both the copyright and the patent as grants of monopoly privilege that are justified because of the material benefits that flow from innovative human action. In the context of this utilitarian view, the copyright is seen as a grant of monopoly privilege protecting artistic compositions while the patent is the grant of monopoly privilege protecting mechanical devices. For Rothbard, this understanding is misguided. Instead, he approaches the matter from a pure property rights perspective. In this view, the copyright is seen as the valid protection of property. The property created in this case is that which arises from the use of scarce resources aimed at producing some new design or composition. Once completed, the originator of the product would possess the right of reproduction for that specific product. In that sense, the copyright can be applied equally to both artistic and mechanical innovations and would protect personal designs, trademarks, and compositions of various sorts. For Rothbard, Athe acid test by which we judge whether

or not a certain practice or law is or is not consonant with the free market is this: Is the outlawed practice implicit or explicit theft?@ (Rothbard). Of course, the proof of whether or not a violation of such property had occurred would be the burden of the person who claimed his property right had been infringed.

It was for this reason that Rothbard rejected the notion of the patent as a valid right that government ought to support. As Rothbard put the matter, the Apatent...has nothing to do with implicit theft [because it is possible for people to develop similar inventions and compositions in isolation of one another. Therefore,] it confers an exclusive privilege on the first inventor, and if anyone else should, quite independently, invent the same or similar machine or product, the latter would be debarred by violence from using it in production.... The crucial distinction between patents and copyrights, then, ... is that copyright is a logical attribute of property right on the free market, while patent is a monopoly invasion of that right@ (Rothbard). The failure to make this distinction in practice has been largely due to the unfortunate spread of the moral philosophy of utilitarianism.

The shift towards utilitarian thinking marked a departure from the more traditional views of the essential purpose of a society=s legal structures. It is our assertion that this move was not only inappropriate, but also problematic, if not useless, in resolving property rights issues, especially those created most recently by current technological advancements.

Advances in technology have produced radical shifts in the ability to reproduce, distribute, control, and publish information. Reproduction costs are much lower for both those people holding the rights (content owners) and those people wishing to infringe upon them. Digital copies are also near perfect replicas, and computer networks have radically changed the economics of distribution (National Research Council). With its commercialization and integration into everyday life, the information infrastructure has run headlong into intellectual property law. With so many people making innovative contributions, they naturally turned to the law to protect their creations. Throughout the 1970s and 1980s, the courts determined what could be copyrighted on a case-by-case basis. They continue to do so.

From the copyright law=s beginnings close to three centuries ago, the term Acopyright@ meant the right to make copies of a given workCat first it meant simply written workCand to stop others from making copies without one=s permission. The first copyright laws aimed only at exact replications of printed work. Starting in the mid-nineteenth century, the reach of the copyright was extended as the utilitarian view gained momentum. As the law evolved, copyright owners could stop the publication not only of the exact exemplar, but also of imitations and adaptations. Such expansions of legal control were misguided. They tended to view the copyright as a protection of intellectual property as if someone could stake his ownership to certain ideas and natural principles embodied in his work. This notion is ultimately foolish. No one can possibly own the natural principles of the universe. The protection of natural human rights allows anyone to discover such principles apart from any particular copyrighted work. Therefore, the copyright is not of the same sort as patent right protection and ought not be confused as such. In truth, the patent is a government grant of special monopoly privilege that is promoted only on utilitarian grounds without reference to adhering to the principles of natural law.

Legal protection of the copyright ought to be based solely upon the protection of private property. It can cost a lot to conceive, execute, produce, and market creative works. The right to stop the copying of creative property implies the power to allow it for an agreeable price. The prospective copyright owner may rely on the possibility of eventual copyright revenues to repay the costs of the initial investment. For instance, a songwriter assigns the copyright in a song to a music publisher in return for the promise of royalties paid on each copy sold or performed. Or, in another case, the publisher sells a film company the right to use the song in a movie sound track, again in return for a share of the anticipated profits. Only in the marketplace can it be determined whether such property has commercial value, so the aim of the copyright is to protect the private property of the rightful owner.

With new inventions in technology that influence existing copyrights, the issue arose as what the legal authorities should do to protect new forms of property. Sometimes the courts were unwilling

to stretch existing copyright doctrines to protect new sources of commercial property. In these cases, product creators typically sought help from legislators. However, from the utilitarian viewpoint, copyright protection involves an intricate web of private interests. As such, the more utilitarian the thinking of the legislators became, the more the legal code was twisted against the protection of private property. As a result, it was not always easy to determine whose interests would be secured by the law. From a property rights standpoint, anyone who publicly distributes unauthorized videocassette copies of a motion picture is surely guilty of infringing on the copyright. But what of a VCR owner who copies the movie off his television set in the privacy of his home for the purpose of later viewing? In this case, the movie was publically displayed and the viewer merely used the technology available to capture it for later enjoyment. There is no particular intent here to infringe upon the movie makers copyright. Yet, if this person subsequently trades his video recordings with those of his neighbor, he is engaged in a barter trade of copyrighted material. In such cases, the rule of property law would expose such behavior to legal action if the copyright owner wished to press the case.

As utilitarian ethical thought spread, however, the courts were less willing to extend property right protection by way of common law rulings when new forms of reproducing copyrighted property developed. When the common law approach to protecting new property failed or was not employed, positive laws were typically enacted. In some cases these new laws just served to muddy the waters further because they tended to embrace the same utilitarian framework. For example, the Audio Home Recording Act of 1992 made it legal for individuals to engage in the kind of barter trade of home recorded music that ought not be permitted from a property rights perspective.

Every new technology, from the printing press to the MP3 audio player, has presented a stark choice for lawmakers: to expand copyright protection so that authors and publishers can capture the work=s value in the marketplace; or to withhold that protection, in which case people can enjoy copies of the work free. Is the copyright an author=s right of property, giving the originator a claim on every

market in which consumers will pay for copies? Or, can such property right protection be abandoned if the user=s enjoyment exceeds the costs imposed on developers of such material? That is, can the user make a copy free so long as the author or publisher cannot show that if they are not paid, they will not create and distribute the work? The moral impulse to protect authors is much older than the copyright. The Roman poet Martial inveighed against the unauthorized recitation of his works as *plagium*C kidnappingCleaving no doubt about his idea of the bond that ties an author to his work (Goldstein, 1994).

The Napster case

The court case involving Napster Inc., the San Mateo, California company that has reshaped the public=s view of music distribution in the Internet Age, provides an excellent example when considering the current problems associated with copyright protection. The firm allows its clients to download a free software program that is designed to enable users to exchange music files with each other. Employing the firm=s program, a user is free to search for songs stored on other people=s machines. Once a desired song is found, it can be copied to one=s own computer hard drive for free. The MP3 file format Napster uses, compresses music data so that a song downloads quickly, takes little memory space, and yet maintains the quality of sound that nearly parallels that of the original recording. This technology provides for worldwide copying of an extremely large number of songs (Marshall, 2000). As the NBC=s Pete Williams reports, Napster has 20 million users, of whom only 42% are 30 years old or older.

In defending itself against the charge of copyright infringement, the company insisted that a non-commercial exchange of music files over the Internet is legal. They based the claim on the 1992 law that applies to digital audio tape which recognizes the right of such non-commercial copying. In addition, Napster pointed to the 1998 Digital Millennium Act as proof that the company was not violating copyright laws because it did not meet the legal test for having the knowledge that copyright infringements were occurring on its site (Lee, 2000). However, the court rejected the firm=s defense and ordered it to block copyrighted songs from being exchanged. In

this case, the court ruled according to the property rights perspective and recognized the implicit barter nature of what Napster=s users were doing.

Since its defeat in court, the executives at the firm have been thinking of different entrepreneurial solutions that could incorporate the technology within the framework of a legitimate business model. Several proposals have developed that include blocking copyrighted music files from being exchanged, charging its users fees for downloads, and offering only samples of the artists= songs. The goal is to minimize consumers= incentives to deal with illegitimate music copying while promoting a shopping experience for music that is reliable, fast, and convenient. These were always the strengths of the new technology. As Dale Steinreich pointed out in an article, Napster software improves the information flow between consumers who are searching for particular songs they may have heard on the radio. In addition, those interested in exploring certain musical styles, music retailers, or little-known singers/musicians can do so in an efficient way using Napster=s technology (Steinreich, 2000). The trick is for Napster to determine how to promote this kind of use without infringing upon the copyrights of others. This is an entrepreneurial exercise.

This case provides a guideline that ought to be employed generally in both legal cases and in drafting new legislation. What is needed is that utilitarian ethics be abandoned in favor of more traditional forms of moral evaluations that recognize the individual=s right to property. Under such institutional arrangements, creators of new technology are not led to believe that the copyright issue is solely one of utilitarian importance, but one of basic morality. As such, it would be of fundamental importance to such creators of new technologies to promote the legitimate uses of their devices while respecting the property of other people. What is problematic today is that modern legislation and past court rulings provide market participants with a confusing message. In some cases, property is disregarded in the interest of utilitarian ends, while in others it is adequately protected. This mixed message has, no doubt, caused more than a little bewilderment and may well serve to undermine

entrepreneurial developments of both copyrighted material as well as technological devices that might advance human well-being.

The evidence of this is rather apparent. Even as Napster seeks some permanent solution to its current legal problems, other Internet file services such as Gnutella and Aimster are attracting Napster=s client base. Given the overarching adoption of utilitarian thought, the industry may have a tougher time proving copyright infringement by some variations that other programmers are developing. This is simply to say that the technology that Napster popularized with its song-swapping technology will remain with us and what is needed is a means of putting that technology to work in legitimate ways. While the recording companies may have been initially interested in squashing the technology, their long term interests are more likely promoted by these legitimate uses. It takes many professionals to make and record a musical composition and if the technologies of the digital age can be employed to extend the marketplace, then those engaged in such enterprises should prosper. The Net is potentially a powerful tool in the entertainment industry.

In part, economic progress is fueled by predictable law and protection of private property rights, which the government administers (Bartley, 2000). Current inconsistencies in the legal code, coupled by inconsistencies in judicial rulings have resulted in widespread uncertainty. What occurred in Napster=s example is the company=s presumption that the utilitarian legal code condoning Asharing@ will be extended to its own operation. However, what actually occurred was the imposition of the older property rights law. The ruling may put in jeopardy the obvious benefits that the legitimate uses the product promotes.

The utilitarian view might portray RIAA as a predator and not a victim because of its market power (the five major labels supply about 90 percent of the world=s popular music) and because of its interest in controlling future business. That RIAA is a predator may well have some truth if it can use the court ruling to force Napster to subsequently sell its technology at a bargain basement price. To be sure, RIAA has Napster over a barrel so to speak and may try to force the company=s hand. Evidence of this is available. They have not been open to Napster=s proposals nor have they offered their own

plan to protect artist compensation (Steinreich). In Napster=s defense we might say that the murky waters of the legal code led them down one path that has resulted in this poor bargaining position. Of course, however, the problem remains one that the company could have avoided by pursuing such agreements much earlier into the process of technological development.

If copyright laws are to be revised, we would argue that they need to be restructured in a way that recognizes the importance of private property. That is, any new legislation should be constructed so that it marks a return to the affirmation of traditional morality. What we do not want with new copyright law is what happened with federal environmental statutes which eroded traditional private property rights in favor of central government control of property, so that Americans began to abandon their traditional rights to stop pollution problems through the courts and gave that responsibility to government regulators. Therefore, since the detection and enforcement of the copyright is relatively easier for large-scale infringers, legal prohibitions are useful. Nevertheless, it should be left to the copyright owner to choose those cases where restitution is sought rather than to rely on some government agency. In the latter case, private property may actually be violated as government regulators enforce all sorts of rules and restrictions that serve the interests of the agency, but not necessarily those of the marketplace.

A modified copyright law should protect the rights of artists= works. But, leaving the initiation of enforcing that law to copyright holders puts the burden on them to devise means to construct reasonable safeguards for their own property. Therefore, the music industry entrepreneurs will have a direct interest in finding solutions to implementing the new technology into a better consumer product or service and, yet, can still seek legitimate restitution for gross violations of its property.

In his article AThe Role of Rights,@ Roger Meiners comments:

> The common law has never been perfect. However, it plays a key role in promoting responsible behavior and allows citizens to decide for themselves if they want to enforce their rights. The common law of torts, contracts, and property provides

> the key legal framework for the free market system. Individuals decide what actions they will take. Other persons injured by their actions have recourse to private litigation when their protected rights have been violated. Occasional mistakes by thousands of independent judges are subject to review by courts of appeal, and legal rules, if mistaken, can be countered in other jurisdictions. As a result, decisions are more likely to be correct. The common law, like markets, evolves to take advantage of new knowledge, technology, and the desires of consumers (Meiners, 1995).

Another quote sums up the direction that the courts should take in Napster=s case. Jonathan Hughes, in his assessment of American economic history noted that, APeople were willing to make extreme sacrifices to acquire property rights, to engage in undertakings with distant pay-offsCfrom clearing lands to building steel millsCin hope of personal or family gain from property ownership@ (Hughes, 1987). For this reason, he believed that they should have their property protected. Hughes noted that the framers of the Constitution considered such private contracts of property were more important than the legislative acts of the state.

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