Intellectual Property Law and the Arts

A Discussion of Copyright Law, Its History and Its Relationship to Twenty-First Century Creativity

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Introduction

In the litigious climate of twenty-first century America, intellectual property law impacts nearly all aspects of the arts and humanities, and teaching in those disciplines. Whether creating, consuming, disseminating, commenting, criticizing, researching or teaching about intellectual property, some facet of copyright law will almost surely affect each of us.

Changes in technology, attitudes, education and life expectancy, have all contributed to the evolution of contemporary intellectual property law. In this paper, we will examine a short history of copyright law and how it has been shaped. We will discuss how the law has tried to embrace technological innovation of the new twenty-first century. We will examine some of the commonly misunderstood and confusing components of intellectual property law. And, we will present alternative perspectives on the relationships between ownership of intellectual property and profitability.

A Brief Pre-History of Copyright

Prior to the invention of the printing press, the issue of protecting copyright was largely moot. “Intellectual property,” in terms of the written word, was far from widely available. Printed matter was the nearly exclusive domain of the literate nobility, and few others. Most of us are familiar with the images of the monastic scribes laboriously hand copying the illuminated texts. Thus, printed materials were rare, expensive and of no interest to the largely illiterate populace.

With the invention of the movable type press, the cost and availability of the printed word made literacy a worthwhile endeavor. It was the invention of the press, some argue, that also precipitated the need for copyright protection as the printing press made it easy and inexpensive to make copies of the limited literary works, including the Bible. This view seems to set the precedent that the interests of the publisher, not the creator (author), are paramount. It is predicated on the premise that the investment of time and resources of the printer/publisher require protection.

This was the view that ultimately precipitated the extension of “privileges of publication,” also called “monopolies,” to publishers in the sixteenth century. According to Elizabeth Armstrong, monopolies were granted to certain publishers for a period of two years, during which they had the exclusive rights to publish specified works (Armstrong, 1990).

Many intellectual property rights scholars maintain that the modern copyright can be traced to the “copyright act of 1709,” or “Statute of Anne,” which was enacted under Queen Anne’s rule in that year, and took effect one year later in April of 1710. The full title of the statute was “*An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.*” (Feather, 1980)

Most significantly, the Statute of Anne extended copyright protection for 14 years to the authors of all newly created works, and the copyright was renewable for an additional 14 year term, for a total of 28 years. After that, the work fell into the public domain. Pre-existing works were protected for a period of 21 years.

The Statute of Anne did not specifically extend to Great Britain's North American Colonies, because of certain territorial exclusions. But, it is apparent that the Statute did set the tone for copyright law in the newly formed United States.

History of Copyright in the United States

The first piece of legislation in the United States which specifically addressed intellectual property rights was the Copyright Act of 1790. The Act borrowed liberally from the Statute of Anne, and provided for a copyright term of 14 years, renewable for a second 14 year term.

The Copyright Act of 1909 offered the first significant update of the 1790 Act. Under the 1909 Act, the period of copyright was extended to 28 years, renewable for a second 28 year term, thus doubling the length of the term for copyright protection. In order to be protected under the 1909 Act, a work must be "published" and exhibit a notice of copyright. Failure to place the copyright notice on the work left it in the public domain. Works created prior to 1976 are still governed by the provisions of the 1909 Act.

The Copyright Act of 1976

The most significant revision of copyright law in the U.S. came with the Copyright Act of 1976. The 1976 Act provides the foundation for all present intellectual property rights in the United States. Noting the advancements in technology and the U.S. participation in the Universal Copyright Convention, the Congress extended copyright protection to recordings, motion pictures and other twentieth century technologies. The 1976 Act also extended the period of copyright protection to the lifetime of the creator, plus fifty years after the creator's death ("life plus 50").

Other significant provisions of the 1976 Act include the granting of several exclusive rights to copyright holders. Among those rights are the rights to reproduce to work, to create derivative works, to sell or rent copies of the work, to perform the work publicly and to display the work publicly.

The Copyright Act of 1976 also articulated the doctrine of "fair use." The concept of fair use of copyrighted material has been in existence and invoked by the courts since at least the nineteenth century. But the 1976 Act spelled out more definitively the uses of material that could be viewed as legitimate under fair use. Prior to the revision, fair use purposes were generally limited to criticism, teaching and research, and news reporting. Perhaps the most significant change to the fair use exclusion was the consideration of the effect of the use, not just its intent. Further discussion of fair use can found later in this paper.

The Copyright Term Extension Act of 1998

In 1998 the United States Congress extended the term of copyrights by another 20 years. This provision was championed by the late Congressman Sonny Bono, and so it is now often referred to by his name: “the Sonny Bono Copyright Extension Act.” Others refer to the 1998 Act as the “Mickey Mouse” protection act because its effect was to extend the protection for some Walt Disney creations for an additional 20 years, thus keeping them out of the public domain. The result of the Act is to extend copyright protection to the life of the author plus 70 years (“life plus 70”).

The Act is retroactive in the sense that it extended copyright protection for works that were published before 1978, and that were still protected by copyright in 1998.

The Copyright Term Extension Act of 1998 has been controversial and actively debated. Some view it as protection for powerful media conglomerates like the Disney Corporation, while others see it as a way to encourage creative endeavor by assuring a longer period of profitability for one’s intellectual property.

The Digital Millennium Copyright Act (1998)

The DMCA was an effort to bring the U.S. into compliance with World Intellectual Property Organization (WIPO) treaties by amending the United States Code.

Among the significant provisions of the DMCA for media professionals are Titles I through IV, some of which have been fairly controversial. Title I, for example, requires that analog video recorders are equipped with a copy protection technology, even though the Act does preserve fair use exemptions for research and reverse engineering. Title II creates a so-called “safe harbor” for online providers which limits their liability by meeting certain requirements. This section also provides for often-cited “take down notices,” which copyright holders can use to claim infringement and request that their materials be removed from an unauthorized web site.

Title III allows computer repairers to make temporary copies (backups) of copyrighted materials while working on computers. And, Title IV’s several sections include provisions for the promotion of distance education, for libraries keeping copies of sound recordings, and for “ephemeral recordings” for the purposes of broadcast or re-transmission.

In summarizing the evolution of the contemporary system of copyright law then, we see that the original “monopoly” protections awarded to publishers evolved into protections for the creators, as the art and science of publishing became more easily accessible and available. The terms for these protections have been extended, in part as a response to the longer life spans of the creators, and the longevity of the material’s value.

It appears that recent revisions to copyright laws are simultaneously trying to preserve the protections for the creators of intellectual property, while attempting to embrace the potential of emerging digital technologies. And therein lays the rub.

As new technologies put the capabilities for sophisticated media production into the hands of all producers, the same technologies allow the illegal reproduction of nearly perfect copies by unscrupulous pirates. Some hail new technology as the means to finally democratize the creation of intellectual property, allowing everyone to have a voice in the marketplace of ideas. Others argue that the ease of copying and file sharing created by new technology can just as easily hinder the profitability of the creative property, and thus stifle creative industry by removing the primary incentive.

As technology fosters wider distribution and sharing of materials for teaching and research, some creators fear that the value of their materials will be diminished. For many the question is simply, “What use is ‘fair’ use?”

Fair Use

Fair use is quite likely among the most misunderstood, if not “abused,” tenants of intellectual property law. Fair use, some claim, may also be the most erratically interpreted aspect of copyright, therefore frequently raising concerns over its chilling effect on technologies and free speech.

Fair use is unique to United States law, and is intended to permit use of copyrighted materials for education, research, scholarship, review, news reporting, or comment. At its simplest, fair use allows portions of a copyrighted work to be used without compensation or permission under these special circumstances. Of course, defining the specifics of these various specific uses falls to the courts.

According to the United States Code, Section 17, Chapter 1, Subsection 107, to be judged a fair use of copyrighted materials, these four factors must be considered:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> (United States Code, Title 17, Chapter 1, Subsection 107.)

One could argue that most recently the courts have looked increasingly to the fourth test listed above, the effect of the use upon potential value, despite the

assertion by those same courts that all four factors must be weighed equally. In other words, the 1976 Act applies the test of how the "fair use" of the material will impact the creator's ability to profit from his or her work. Fair use is determined on a case-by-case basis, and court decisions can be quite unpredictable. Some uses that might seem intuitively "unfair," have been ruled to be legal.

In some anecdotal examples of the strict application of the test of the present definition of fair use, the act copying or exhibiting material for friends have both been construed as violations of copyright. If a consumer rents a DVD and invites six friends to view it, the renter has denied the creator of the DVD of the profit from six rentals. Similarly, if a consumer copies a CD for a friend's listening, the creator is denied the opportunity to sell the friend a CD, and thus the marketability of the material is adversely affected. Under the previous interpretations of fair use, the absence of a profit for the copier avoided any infringement.

In "*Campbell v. Acuff-Rose Music, Inc*" the courts ruled that the use of an entire work for profit is legal when the use is parody (U.S. Supreme Court, 92-1292, 1994.). But on the other hand, the courts ruled that it was a violation to use 400 words of President Gerald R. Ford's memior in "*Harper & Row, Publishers, Inc. v. Nation Enters*" (U.S. Supreme Court, 471 U.S. 539, 1985). The courts also permitted the videotaping of entire programs in "*Sony Corp. v. Universal City Studios*" (U.S. Supreme Court 464 U.S. 417, 1984). In "*Kelly v. Arriba Soft*

Corporation," the lower courts found that it was a violation to use copyright protected images as "thumbnails" on web site (U.S. 9th Circuit Court of Appeals, No. 00-55521, D.C. CV-99-00560-GLT, 2003). But ultimately that decision was reversed on appeal.

Common Law Copyright

A widely misunderstood area of intellectual property law is the "common law" copyright. Many people believe that the term common law copyright refers to some simple form of asserting ownership, or attempting to fix the date of creation, through some "unofficial" method, such as mailing a copy of the work to one's self through the U. S. Postal Service.

In its simplest form the common law copyright doctrine posited that the mere act of creation granted rights to the creator. That is, regardless of registration or proclamation, the creator owns the work. Before the 1976 revision, unpublished work was covered by states' common law. After the revision, all works, whether published or unpublished, were granted copyright protection under federal copyright law. Thus, technically, common law copyright was rendered invalid after January 1, 1978, when all copyright protection was made statutory, rather than common law.

Another way to conceptualize common law copyright may be to contrast it with registered copyrights. The best protection against copyright infringement is, of

course, to register the work with Library of Congress. Historically, those materials that were not registered were protected by the common law copyright.

Another point of confusion that is closely related to the issue of common law copyright derives from the method and timing of declaring or asserting copyright ownership. It is still true that the mere act of creation is all that is required to invoke copyright ownership and protection. Once the work is “fixed,” or takes on some tangible form, the work is protected. For example, once a web page is created and saved to disk or posted on the Internet, or a musical composition is recorded, the copyright is effective.

Even though no copyright notice is required, adding a notice may strengthen the rights of the creator. Web pages, for which no registration method presently exists, may be effectively copyrighted by the addition of a suitable notice: “Copyright [year], by [owner].” Neither the copyright symbol (©), nor the phrase “all rights reserved” are required to exert ownership and reserve all future rights. Web pages pose a particularly complicated conundrum as intellectual property due to the inherent dynamic nature of the content.

Nearly all other forms of creative property, at some point in time, are set or fixed and their appearance and/or sound remain unchanged. Web pages on the other hand may change often, or be customized by the end user/consumer. The

question arises then, what is copyrighted? Can every conceivable configuration of the web site's appearance be protected?

Trends in Regulation

Where once the courts would most likely be called upon to decide on questions of copyright violations, the codification of more and more specifics of intellectual property rights infringements has expanded Title 17 of the United States Code (copyright) and resulted in the specific definition of several additional violations of Federal Law. Violations of copyright law are felony crimes, and carry penalties in excess of $2500.

Many of the recent amendments to Title 17 of the United States Code have been aimed at accommodating technological change. Much of the content of contemporary media and multi-media is an amalgamation of preexisting content. Provisions have obviously been added in relatively recent history to deal with transmission and broadcasting, sound recordings, video recordings, computer software, satellite transmissions and Internet content.

Recognition of the changing lifestyles of the American consumer may have driven some of the revision. The expansion of fair use to include the copying of recordings for personal use, the recording of broadcasts for time-shifting, and the duplicating of software for back-up purposes seem to point to an understanding of the consumption habits of the twenty-first century American.

Similarly, the acknowledgment of the role of technology in instruction has broadened the allowable uses of copyrighted materials in education. So long as a bona fide instructor leading a class in a recognized education institution is using the material, the law is quite liberal concerning how material is used or even transmitted for distance education.

Concurrently the U.S. Code seems to show a better understanding of technology by including ever-greater specificity in its discussion of technology. The law now spells out the inclusion of certain copy protection schemes for digital audio (SCMS) and video recordings (Macrovision). Allowances exist for commercial, food service and drinking establishments to “re-transmit” radio broadcasts, provided they meet very specific requirements for the number of speakers within a specific sized venue.

What might be one of the most publicly visible and a debated area of copyright is the question of “sampling” used by many recording artists. It appears that the Congress has left this issue to the courts for the present. Title 17 is mute on details of the legalities of sampling. Therefore it falls to the courts to weigh the merit of fair use, or the doctrine of “de minimis” use. De minimis provides for the use of very small fragments of existing protected materials, but lacks the specifics of how many seconds or beats are allowable, thereby assuring

continued debate and disagreement. (U.S. 9th Circuit Court of Appeals, 794 F. 2d 432 n. 2 1986)

International

Protecting copyright in the global marketplace has long been a challenge on several levels. Sheer distance has historically presented impediments to monitoring and enforcement. But as those hurdles have been overcome through technology, cultural differences have continued to hinder a truly universal compliance with intellectual property rights. Asia poses a particularly difficult problem in this respect.

Asia has long been regarded as a nexus for copyright piracy. This disregard for intellectual property rights may be linked to several factors, including a low risk to benefit ratio as enforcement in the region has been inconsistent and ineffective, and the rewards are high. But a fundamental cultural emphasis on the "group," versus the individual, has been offered as contributory to the problem. That is, the prevailing attitude toward intellectual property has historically been that it is the property of the community, and not for the benefit of the individual. It is well documented that individuality is discouraged throughout Asia, as evidenced in the common proverb "the nail that stands up, gets pounded down," which is known across the entire region. (Swinyard et. al.,1990.)

Another reason that some Asian students have offered to this author for the general disregard for copyright is the high cost of western-produced intellectual property. In countries where the local currency is weak against the dollar, a compact disk or DVD could cost the equivalent of sixty U.S. dollars. This attitude is further fueled by the overall high cost of coveted American-made products in foreign markets. U.S. media conglomerates are seen as profiteering global monopolies, from which a little stealing is more a right than a wrong.

Still, the fight rages on. The U.S. became a signatory to the Berne Conventions in 1998. Presently 168 countries are parties to the Berne Conventions. The U.S. has also joined the World Intellectual Property Organization (WIPO), which has 184 member states. (WIPO, 2007) The United States incorporated the WIPO treaty into the DMCA in 2000.

Attitudes

While some might argue that the trends in copyright enforcement are toward a more restrictive legal framework, one can also see some evidence of a backlash against the traditional models of ownership and compensation in some types of intellectual property by the creators.

For example, on the one hand, many of the websites offering information on copyright provide stern advice on copyright that can be best summarized by the statement “assume everything is copyrighted, don’t use anything without

permission.” This sort of attitude implies that only content that is entirely original may be used in any way. Obviously this ignores fair use, public domain or other allowable uses.

But at the same time, a new generation of creative professionals is encouraging file sharing, development of open source software, and the creation of works for the public domain.

In the music industry, an increasing number of emerging artists are offering their music free to web-based consumers, and encourage “bootleg” copying and sharing of disks. This movement is most-often attributed to a new generation reacting to what has become the “music industry establishment.” Many young artists view the handful of big record labels as profiteers, who make millions of dollars from the sale of the artists’ creative work without adequately compensating the composers and performers.

Certainly the availability of low cost, high quality digital recording equipment has allowed the contemporary composer/performer to produce very high quality recordings without the need for big studios and big budgets. The expansion of the Internet and wider availability of broadband connectivity have given those same artists a medium for reaching their audiences, without the need for big marketing budgets and complex distribution channels. Musicians don’t “need” the big record companies like they once did to get radio airplay.

Many young creative professionals feel more closely allied with their consumers than some of their predecessors. These artists are more motivated to get their creative products into the hands of the audience, than to achieve quick financial success. More contemporary musicians view recorded music as a part of marketing, with the real revenue stream coming from concert tickets sales and merchandising. (Leonard, 2006.)

Open source software has steadily grown and gained acceptance with a wider audience of consumers, not limited to technically savvy “geeks.” Developers are creating and distributing very powerful and stable applications that rival or surpass their expensive proprietary counterparts. Again, at least some of the motivation for this initiative is a reaction to power and control of giant hardware and software manufacturers, who are seen as controlling the computer industry.

The “alternative” view of copyright has many champions. Chief among them is the Electronic Frontier Foundation (EFF), which generally argues against the chilling effect that restrictive intellectual property law has on creative endeavor. Founded in 1990, the EFF confronts issues of free speech, privacy, innovation, and consumer rights, as they are impacted by ever-restrictive copyright laws which are frequently at odds with technological innovation.

Summary

In reviewing the evolution of intellectual property law, we could summarize by observing that early copyrights were monopolies granted to the publishers. With the advent of the press and spread of literacy, the protection of ownership shifted to the author/creator. Over time, the trend has been to extend copyright protections for longer periods of time, driven at least in part by the longer life spans of contemporary creators.

Moreover, changes in copyright law through the twentieth century have tended to grant more rights to the creator, and place more restrictions on the uses of the creative materials. These restrictive policies appear to have been a reaction to technological innovation which allowed materials to be easily and perfectly copied and electronically shared.

The codification of copyright law has attempted keep to pace and to embrace technological change, and to provide specificity in defining allowable uses of protected material. And the U.S. has become a partner in international agreements, in efforts to expand the geographic reach of copyright law.

Reaction to the expanding control of intellectual property from some creative professionals has been adverse. Some view the restrictions on copyrighted materials as inhibiting free speech, especially on the Internet, which many argue is the most democratic medium for expression available.

The progressively more complex technological milieu and the increasingly high profit potentials from creative property will assure that copyright law will continue to evolve. Those same trends will also assure that the disagreement will continue between those who wish to expand the law and those who wish to avoid it.

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