

**Copyright,
A Property of Communication,
A Link Between Creativity and Control**

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Abstract

Copyright represents a delicate partnership between public and private interests. Situated amid the two, copyright reveals itself as a form of private property and an instrument of public policy. It offers a means of compensation to creators by granting time-limited monopoly rights of reproduction and distribution, after which the creative output enters the public domain.

Copyright evolved during the Industrial Revolution in England, entangled within the history of the commodification of literature. In the process, creation was deemed an inspired, solitary endeavour. This perspective obscures an important truth about cultural and scientific production—advancements in culture and science require appropriation and transformation. The control exerted by copyright allows portions of the public domain to be allocated as property. Some may consider property rights as means of possession, yet they represent a relationship between individuals and a community. True for the intellectual as well as the physical realms, it is a relationship where one individual is granted the privilege of excluding the community from access to the property. Against the backdrop of new media development in the United States, I illustrate a strengthening in the position of the individual, to the detriment of the community. By following

copyright negotiations and judicial outcomes of the twentieth century, we see increasing support for the rights of the individual, and the partitioning of the public domain.

As the twentieth century closed, Adam Smith's eighteenth century dictum that the wealth of nations rested upon a triad of capital, labour, and resources, shifted to the triad of patents, trademarks, and copyrights. This has implications for another triad—information, meaning, and knowledge are continuously in flux with the elasticity of societal practices binding them together. But when the binding element loses its flexibility, the movement of all three elements becomes stilted. Copyright is one such societal practice—it influences that linkage between creativity and control, between knowledge and information, and, between the rights of an individual and the resources of a community.

Dedication

For my mother, Leila Nair. Your unfailing love has been and continues to be my greatest source of strength. All that I am today, and all that I hope to be tomorrow, is due to your courage, wisdom, and grace.

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Chapter 1

Introduction

Communication and intellectual property are seemingly distinct areas within academic discourse. If either subject is studied purely in the context of means and applications, then this view is warranted. Yet, if these subjects are studied beyond questions of “how,” to questions of “why,” the areas shift closer together and intersect. My thesis lies within this realm of intersection—I contend that intellectual property and communication shape the environment of innovation either by advancing the expansion of ideas, or by constraining the boundaries of creativity.

For some time now we have been living in, what has been called, an Information Society; though the breathtaking wonder that was once implicit in the term has now settled to passive cliché. Numerous explanations attempting to define our Information Society are available—theorists using the term emphasize that a social transformation is occurring, and that there is an implicit need for social analysis and understanding—but no single definition has emerged (Mackay et al 2001, 11; May 3, 2002). Still, amidst this ambiguity, the rhetoric surrounding the information age became the backbone of political arguments, legislative changes, and industrial planning (Boyle 1996, 6; Gutstein 1999, 9-11). And the outcome stemming from the actions of government and industry have direct

consequences for the public. I contend that whichever moniker one chooses, our society today is a result of a network of relationships, intertwining information and knowledge, individual and community, and, creativity and innovation. As the interplay of these elements shift, the reality of our society changes. And, I feel, the means of this interplay is carried through communication. In my thesis I focus upon efforts to control the communication of information and knowledge between individuals today, and consider the impact this will have upon creativity in our community tomorrow.

From the work of James Carey, I see communication as a social process by which reality is constructed, maintained, or transformed (Carey 1989, 33). He described communication as having two modes, transmission and ritual (Carey 1989, 14-18). Transmission¹ arose from a geographical context as a metaphor for transportation, but later came to include the aspect of an instrument of persuasion and control. By contrast, the mode of ritual² conceives of communication as a process through which a shared culture is created, modified, and transformed. This view was formed within the context of commonness, and can be described with terms such as communion and community. My perception is that the prevailing Western intellectual property regime relies on communication in the transmissive sense. In the spirit of Carey's work, I perceive our current information society as the reality created by the juxtaposition of increased

¹ The roots of transmissive communication lay within the drive for religious expansion in the age of exploration and discovery. However, as scientific capability increased and religious secularity decreased, the missionary metaphor fell away from the meaning of communication. Instead, the technological aspects of communication became the meaning; communication became a process of imparting information, with an emphasis on controlling space and people (Carey 1989 15-17).

² While also derived from religious beliefs, the ritual view downplayed the need of sermon as instruction or admonition, and instead, emphasized prayer or ceremony. As symbolized by the ceremony of communion, communication draws people together in conversation, not lecture. "A ritual view of communication is directed not toward the extension of messages in space, but the maintenance of society in time; not the act of imparting information but the representation of shared beliefs (Carey 1989, 18)."

technological abilities and the lagging social practices surrounding the use of these abilities. One such practice is that of honoring individual claims of quasi-ownership for representations of mental constructs. Such a claim (or communiqué) is described as an intellectual property right. In my thesis I posit that approaching the subject of intellectual property with a perspective of ritual communication would serve the community better.

The purpose of intellectual property rights is to provide a creator with a time-limited monopoly over the proceeds resulting from a creation—the intent being that investments will be recouped and that profits realized will reward the inventor’s ingenuity. Such reward is considered necessary because, without encouraging ingenuity, creativity may be lost to society. The monopoly right is deemed a property right, for an individual’s private use. In *An Enquiry concerning the Principles of Morals* (first published in 1751), David Hume presented the significance of private property in the economic system. Property had no purpose if nature bestowed all her blessings evenly and in abundance upon the human race. “For what purpose make a partition of goods, where everyone has already more than enough (Hume 1998, 15)?” Yet, this idyllic situation is not the norm. Hume continued by describing systems of justice as protecting property purely on the merits of utility. To encourage useful habits and accomplishments, individuals were assured that the security of their property would prevail. The end result was that society benefited from the commerce of such accomplishments:

Render possessions ever so equal, men’s different degrees of art, care and industry will immediately break that equality. Or if you check these virtues, you reduce society to the most extreme indigence; and instead of preventing want and beggary in a few, render it unavoidable to the whole community. (Hume 1998, 26)

Hence the idea of property became necessary in all civil society, and this emphasis on private property continued through the evolution of the intellectual property regime. Humes' sentiments are still prevalent and applicable in our postmodern existence—Kenneth Arrow, a Nobel laureate in economics, stated that without a strong system of intellectual property rights, too little information will be generated because producers will not be able to capture its true value (Shulman 1999, 17).

The very name “intellectual property” attributes an element of tangibility to mental constructs. This linguistic term adds credence in legal circles to the belief that intellectual creations are fundamentally like land, or other tangible property, and should be protected in the same manner (Fischer 1999; Vaver 4, 1997). Intellectual creations, or ideas, can be protected in various ways depending on their representation; for instance, copyright law protects an idea through its expression, while patent law protects an idea through its function. Yet property and ideas are not the same. The distinction between properties of an idea, and ideas of property, is worthy of further examination.

Perhaps the most eloquent (and often quoted) passage regarding the nature of ideas came from the writings of Thomas Jefferson. In a letter to Isaac McPherson (written in 1813), Jefferson wrote:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. (Post 2002, 114-115)

Jefferson³ illuminates a critical difference between intellectual properties and tangible properties—resources like ideas are nonrivalrous in consumption (meaning that use by one does not remove the use from another). In contrast, physical property is a rivalrous resource and is at risk of overconsumption. Famously depicted by Garret Hardin as a “tragedy of the commons,” Hardin wrote:

Picture a pasture open to all. It is expected that each herdsman will try to keep as many cattle as possible on the commons. As a rational being, each herdsman seeks to maximize his gain. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in the commons brings ruin to all. (Hardin 1968, 1244)

To preserve physical property for all residents, governments may protect green spaces in cities, large tracts of forested land, and even the oceans’ inhabitants (for instance, fisheries on both coasts have been either constrained or closed entirely.) The underlying principle is that these physical regions are common resources for all, and should not be subject to the exclusive desires of either a person or an industry. Instead, governments may implement varying degrees of control to manage⁴ common resources and ensure such resources are not depleted.

In the more ethereal realm of creativity, the region of common resources which people draw upon is called the public domain. Some may argue that the public domain is in fact growing—ideas are not objects plucked from the environment and hoarded to the

³ Further reading of this letter shows that Jefferson was arguing against a natural principle of patenting, “... inventions then cannot, in nature, be a subject of property (Post 2002, 115).” What is especially striking of this passage is, at the time of writing, Jefferson was the first patent commissioner in the United States.

⁴ Carol Rose offers an in-depth historical analysis of an alternate management perspective, that of a commons managed by custom, “a means different from exclusive ownership by either individuals or government ... they vest property rights in groups that are indefinite and informal, yet nevertheless capable of self-management (Rose 1986, 742).”

detriment of others, instead ideas spring from an individual or group and, upon dissemination, are given to the public domain. While entirely in agreement with such a view, my concern is that the conventional means of dissemination place artificial constraints upon the representation or communication of an idea. By constraining communication, future creative efforts involving the underlying idea are suppressed.

I have narrowed this study to focus on the areas touched by copyright—as more and more information is presented or preserved in digital form, access to this information is held in check by copyright. Copyright represents an uneasy partnership between private individuals and the public. To compensate authors, musicians, and artists for their genius and effort, time-limited monopoly rights of reproduction and distribution are implemented by statute and granted to these creators or their representatives. After a prescribed period of time has elapsed, the creative output enters the public domain. Standing squarely on the boundary between the two, copyright manifests itself both as a form of private property and an instrument of public policy. In my thesis I argue that intensifying the depth and breadth of copyright terms is leading to a deterioration of the public domain, which in turn threatens to diminish future creativity. Our Information Society is becoming less conducive to creativity. Compensation for individual creators is morally, philosophically, and economically necessary, but such compensation should be balanced with the needs of the public (which includes future creators.)

A question that arises is one of method—how is such a sweeping claim about the future to be defended? For support I turn to Ursula Franklin who observed that patterns of use of a technology become a part of society's life, and that “Most new patterns are elaborations and continuations of older patterns ... (Franklin 1990, 55).” Limiting my

exploration to communications technologies, I believe that investigating the historical background of our past communicative practices is a fundamental step to understanding the patterns of behaviour ongoing in our current society. To counter criticism of my method I rely on Paul Duguid—in describing the merits of this method, Duguid vividly conjures up a meeting of angels:

If as Benjamin (1969: 257) suggests, the Angel of History goes backward into the future, “face turned towards the past” and wreckage piling at its feet, technology’s angel usually advances facing determinedly the other way, trying to sweep objects and objections from its path. There is much to be gained, I believe, from getting the two angels to see eye to eye. (Duguid 1996, 65)

Duguid further elaborates that, among those advocating technological advancement, there are two groups who do not support a historical investigation of old technologies as a means to understanding new technologies. The first group includes those espousing supersession (the notion that each new technology conquers or assimilates its predecessors); the second group instead believes in liberation (that the pursuit of new technology is also a virtuous pursuit of liberty). That is to say, liberationists espouse the often quoted, “information wants to be free” implying that new technology will free it. Each position is a paradox unto itself. From a technological viewpoint, supersession relies on the expectation of progress from technology (which leads to the inevitable demise of technology); while liberation looks for freedom from technology by technology. Taken together in a more cultural argument, they are most unlikely bedfellows—supersession relies on the language of postmodernism, while liberation’s principles of emancipation arose from the Enlightenment, the great adversary of postmodernism.

Duguid suggests that these conflicting views reflect an uncertainty regarding the relationship between form and content, or, more specifically, technology and information⁵. I would like to take this one step further, and consider the uncertain relationship between information and knowledge. The two are distinct, and yet are often treated the same. Perhaps because as Philip Agre said, "... the term 'information' rarely evokes the deep and troubling questions of epistemology that are usually associated with terms like 'knowledge' and 'belief' (Nunberg 1996, 107)". The word information itself carries an important modern ideology, but its usage is anchored in unexceptional, ordinary terms:

... the word information, in this theory, is used in a special sense that must not be confused with its ordinary usage. In particular, information must not be confused with meaning. In fact, two messages, one of which is heavily loaded with meaning and the other of which is pure nonsense, can be exactly equivalent, from the present viewpoint, as regards information. (Shannon 1964, 8)

From Shannon's words, I believe that the missing link between information and knowledge is *meaning*. Meaning is obtained through the practices of a community using information, and from these practices forms of knowledge can be created (Williams 1961, 54-56). The triad of information, meaning, and knowledge are continuously in flux with the elasticity of societal practices binding them together. But when the binding element loses its flexibility, the movement of all three elements becomes stilted. Copyright is one such societal practice—it influences that linkage between creativity and control, between knowledge and information, and, between the rights of an individual and the resources of a community.

⁵ Supersessionists and libertarians alike presuppose that information stands detached from the technology that carries it.

I drew upon numerous sources to explore this topic, but the works of Ronald Bittig, James Boyle, Lawrence Lessig, Jessica Litman, and Siva Vaidhyanathan were invaluable in clarifying the relevance of copyright to society—that is, removing the intellectual property debate from the esoteric language of law, and recasting the discussion as a discourse relevant to community. The authors mentioned also contributed to a historical review of the events leading to the establishment of copyright, but greater detail was to be had from the works of Lyman Ray Patterson, Mark Rose, William G. Rowland Jr., Raymond Williams, and Martha Woodmansee. And finally, Peter Drahos offers a clarity of reason through which I could synthesize the relationship of property, between community and individuals, where property could be either physical or intellectual.

The history of the concept of intellectual property rights is entangled within a discourse of individualism and creativity (Coombe 1996, 1360). In particular, the copyright statute focused on the solitary creator and a unique creation. Thus, in Chapter One I explore the problematic surrounding the emergence and evolution of the concept of the romantic, isolated author. I begin by investigating the origins of modern copyright law—found within the conflict and opportunity following the development of the printing press in eighteenth century England. However, I believe this perspective is merely one facet of a more significant cultural consequence of the Industrial Revolution—the enabling of a mass literary marketplace. The effects thereof contributed to changes in the meaning and use of the printed word. Paradoxically, literature functioned on behalf of human agency, as a cultural force to shape thought and mind, and simultaneously as a

structure of society, a conduit through which commercial endeavors were perpetuated.

The romantic author arose from the opposing tensions of the use of literature.

Unfortunately, basing a system of intellectual property rights upon the concept of an author obscures perhaps the most important truth about cultural and scientific production. Advancements in culture and science require collaboration and transformation (Fischer 1999, Rose 1998). As legislators extend the depth and breadth of our intellectual property laws, they speak of the need to protect current and future creators, all the while diminishing the public domain from where collaboration originates. The public domain and its intersection with private property is my focus of Chapter Two, where I explore the philosophical underpinnings of the concept of private property. While it is tempting to think of property rights as means of possession, essentially they represent a relationship between individuals and a community. True for the intellectual as well as the physical realms, it is a relationship where one individual is granted the privilege of excluding the community from access to the property. In both realms, one's labour is the means by which this privilege is received. Such privilege coexisted with an overall goal of public betterment, as illustrated by the events leading to what is often referred to as the Intellectual Property clause of the United States Constitution.

Thus, in Chapter Three, I use the background of new media development within the United States to illustrate a diminishing trend in the position of community in copyright law. Using judicial outcomes and copyright negotiations of the twentieth century, I demonstrate that copyright law was increasingly cast in narrower terms, as well judicial interpretation moved away from goal of public betterment towards upholding the

rights of the individual. In particular, I describe the evolution of the copyright clause of Fair Use⁶ and the consequences for the public domain.

The public domain could be described as a set of “free” resources, but a point of clarification must be made—it should not be regarded as free for the taking, but instead freely accessible by any individual. Such resources are key to future creativity and innovation, “that, without them, creativity is crippled (Lessig 2002, 14).” Lessig states:

All around us are the consequences of the most significant technological, and hence cultural, revolution in generations. This revolution has produced the most powerful and diverse spur to innovation of any in modern times. Yet a set of ideas about a central aspect of this prosperity—“property”—confuses us. This confusion is leading us to change the environment in ways that will change the prosperity ... In the understanding of this revolution and of the creativity it has induced, we systematically miss the role of a crucially important part ... This blindness will harm the environment of innovation. (Lessig 2002, 5-6)

The control exerted by copyright allows portions of the public domain to be allocated as property. As a fundamental right of property is exclusivity (Rose 1986, 711) access to parts of the public domain is curtailed, and the community as a whole is deprived of sources of innovation. This presumption of the private nature of property underlies the basis of intellectual property rights. Yet, in and amongst the development of the intellectual property regime, there was a parallel development of an alternate regime. Inverting the presumption of private, the open source software movement was premised upon the necessity of the public. In the closing pages of Chapter Three, I include a brief

⁶ Through the mechanism of Fair Use (Fair Dealings in Canada and the United Kingdom) the public receives some access to copyrighted materials under certain conditions. Some may argue that Fair Use is only a defense against infringement (thereby insisting that actual infringement occurs) while others regard it as an affirmative right of copying (Samuelson and Davis 2000). In either case, it is the means through which the needs of the public are balanced against the temporary monopoly afforded to the creators.

discussion of the role played by open source software development in the evolution of the Internet, and its ongoing commitment to the public domain.

In Chapter Five (the conclusion) I touch upon the changing technological climate of the late twentieth century and the promise and peril such changes represent. I consider the uncertainty surrounding innovation; in light of such uncertainty what are the ramifications of constraining the ingredients of innovation? Intellectual property rights affect access to information; yet it is only through public communication and practices that information can become a resource of knowledge. Although much clichéd, the warning that those who forget the past are condemned to repetition is still apt. The debates of the late eighteenth and twentieth centuries regarding the cultural implementation of technological advancement are eerily similar. In both cases, a public reinvention of intellectual community followed, along with a heightened consciousness of the regime of intellectual property. This consciousness encourages individuals to withhold public access to intellectual creations and, left unchecked, will lead to the overall detriment of society.

The electronic revolution of the past half century has not so much changed modes of human inquiry as it has rendered opaque some of the most seemingly transparent and fundamental cultural choices faced by modern societies: how we determine—as individuals, communities, and nations, and perhaps as a globe—to use these information technologies and toward what ends. (Hess 1996, 29)

A few individuals and organizations are endeavoring to curb the partitioning of the public domain, and reinvigorate the public domain—of note are the efforts of Lawrence Lessig, a professor of law at Stanford Law School. Lessig's intent is not to pit commercial against noncommercial forces—instead he convincingly shows that society

as a whole is better off with a thriving public domain. Looking for an ontological framework to buttress Lessig's arguments, I turn to Philip Pettit's discussion of holistic individualism. Pettit's ontological basis allows for a different means of thinking about creativity where individuals assume dual and contrary roles. During the act of creation, individuals assume the role of a borrower, linked through cultural tradition. Upon completion of creation, each individual dons the guise of pioneer or innovator. "It endorses some version of individualism, for it recognizes an autonomous capacity of individuals to create. But it also implies that individuals only reach this capacity with the help of others, for in the role of borrower, the creator sits at the table with others (Drahos 1996, 62)."

If we are indeed an Information Society, should there not be an accompanying commitment to the preservation of information for all society? Otherwise, are we merely an Individual Society, where the society will forever serve the individual?

Chapter 2

The Origins Of Copyright

Introduction

Western theories of intellectual property are crafted upon the acceptance of the notion of a solitary, creative genius (Boyle 1996, 175-176). In particular, the legal construction of copyright emanated from the belief of the autonomous, imaginative author. Although, it is not clear that such an author ever exists—as Northrop Frye eloquently said, “Poetry can only be made out of other poems; novels out of other novels....All this was much clearer before the assimilation of literature to private enterprise concealed so many of the facts of criticism (Frye 1957, 96).” At the time of Frye’s writing the prevailing belief within interpretative criticism shared the romantic and individual assumptions of copyright (Rose 1993, 2). Critical studies focused on establishing the structure and meaning of a text, with the assumption that texts exist independently of each other. Since that time, the notion of an author has been criticized in theory all the while substantiated by legal structures.

In this chapter I explore the problematic surrounding the evolution of the romantic, isolated author. Private enterprise and the technological opportunity presented by the printing press were contributors to this evolution by enabling a mass literary

marketplace. The works of Ronald Bettig, Lyman Ray Patterson, and Mark Rose guide my discussion of the legal mechanisms used to regulate printing in eighteenth century England. However, I believe this perspective is merely one facet of a more significant cultural consequence of the Industrial Revolution—at the time, a general discord surfaced between individual and society. Literature functioned both as an outlet for expressing these feelings, as well as a means of perpetrating the discontent itself. William G. Rowland, Martha Woodmansee, and Raymond Williams provide excellent insight into the cultural consequences of printing technology and the Industrial Revolution. Furthermore, Raymond Williams' tools of cultural analysis gave me a means through which I could view the paradox that became literature.

Privileges And Censorship

The praecursor to copyright were printing privileges—exclusive rights granted by the crown either as reward for service, or as encouragement for useful activities. This practice first appeared in fifteenth century Venice and was later emulated in England. Printing privileges, or printing patents as they were known, were granted most often to printers, but could be given to individual authors for a specific creation. The most powerful members of the book trade were those that received broad patents for classes of books such as catechisms, bibles, ABCs, and lawbooks. Elizabeth Eisenstein suggests that in granting these privileges, governments' entanglement between intellectual property ownership and the preservation of a public domain began—five centuries later legislative bodies are still struggling to determine what areas of literary creativity can be appropriated for private use and profit (Eisenstein 1979, 120).

In addition to the system of printing privileges the book trade was regulated through a guild known as the Stationers' Company. According to the rules of the Stationers' Company, the right to print a manuscript was given through entry in the company register and such entry was permitted only to members—printers, bookbinders and booksellers. The authority of the Stationers' Company was enhanced when in 1557 Queen Mary issued a charter granting the Stationers' Company a monopoly on printing. Under the terms of the charter only members of the company could obtain a license to operate a printing press, and, the number of eligible members was strictly controlled. The objective of the charter was not to secure property for the stationers, but to establish an effective surveillance of the press. When Mary ascended the throne in 1553, she assured the English public that she would not force Catholicism on them (Patterson 1968, 26). But her reign was not a happy one—Patterson implies that she did attempt to impose her religion on the nation—by the end of her reign Mary was desperate for an effective means to control the press. In exchange for policing its members (preventing the production of heretical or seditious material), the Stationers' Company was granted an exclusive monopoly over titles or classes of books:

According to the preamble of the charter granted in 1557, Philip and Mary incorporated the stationers to provide a suitable remedy against seditious and heretical material printed by schismatical persons. Such material, they felt, moved the sovereign's subjects not only against the crown, but also against the "faith and sound catholic doctrine of Holy Mother Church" (Rose 1993, 12)

To ensure compliance amongst its members, the Stationers' Company kept a registry of all eligible publications where each entry was associated with a particular printer. Patterson observed a subtle change in the form of the entries in the register—earlier a printer would indicate that he had received a "lycense to prynte" a particular

manuscript from an author, whereas later the word “copy” began replacing “print” (Patterson 1968, 52-54). In the language of the times, the term “copy” referred not only to the right to make duplicates of a manuscript, but also the manuscript itself. By the seventeenth century, the form of entry evolved away from one that emphasized the action of copying, and instead to possession. Entries in the register would refer to a “book or copy” as belonging to a particular member. Once a member secured a copy, his rights continued in perpetuity. Members could transfer the right to another member, but only members could register titles for publication.

Consequently, authors were in an ineffectual position if they wished to bargain over the value of their creations—manuscripts were simply objects of trade, subject to the caprice of the Stationers’ Company members. The British law protected the economic rights of the members, but made no provision for the rights of the authors. “... the economic rewards generated by the commodification of literature flowed to printers and booksellers, not to authors (Bettig 1996,18).” Booksellers did seek new and original work to meet the demands of the reading public, and by the second half of the seventeenth century began paying authors to publish their work. But, such payments were based on economic reasons as the investment necessary to maintain a book trade rather than legal or moral grounds (Patterson 1968, 64-77). As the book trade increased greater powers were concentrated in the hands of the booksellers:

The copy owners were men of the future. By 1640, they were firmly entrenched as the leaders of the trade ... long standing family businesses were beginning to develop; intermarriage between these families was not uncommon and over two or three generations dozens of valuable copies were being concentrated in a few firms. (Feather 1988, 41)

The monopoly enjoyed by this elite group came increasingly under attack—when their Licensing Act came up for renewal in 1692, many people challenged the monopoly rights, including John Locke. Locke's philosophy would play an important part in the modern development of private property (as shall be shown in Chapter 2.) As part of his effort to reduce the monopoly privileges associated with aristocratic authorities, Locke included the Stationers' Company on his list of unproductive capital holders (Bettig 1996, 21). Locke condemned all monopolies as hoarding money and property to the detriment of the kingdom. With respect to the Stationers' Company, Locke felt especially piqued at the high prices the booksellers could charge for poorly produced books (Bettig 1996, 20). However, at that time, Locke's complaints did not address censorship or freedom of the press.

When the Licensing Act came due for renewal again in 1694, Locke prepared an eighteen-point memorandum (which now included freedom of the press.) More forcefully though, he stressed the detriment of the book trade caused by monopoly practices, and argued towards a greater precision in describing public and private literary domains. Among his suggestions were that anyone should be allowed to produce or import books whose authors lived a thousand years ago, and that work of current authors should be publishable by anyone fifty or seventy years after the author's death. Herein lay two vital aims. First, publishers of classical materials would need to increase the quality of their works and decrease their prices in order to remain competitive. Second, while the rights of the author must be protected, it should be for a limited time so that literature as whole is preserved for public benefit. In a manner revealing of the times, the House of Commons voted to repeal the Act and the House of Lords voted to renew the Act. At this

juncture, the Commons submit to the Lords a paper citing Locke's memorandum, and emphasized the commercial benefits of repealing the Act. The arguments were successful and by 1694 the final renewal of the Licensing Act expired.

Making A Copyright Law

With the expiration of the Licensing Act, a printer or bookseller could (with impunity) reproduce books that were not secured to them as their own copy (Rose 1993, 55; Saunders 1992, 52). The stationers made repeated attempts to restore either copyright regulation or press licensing or both. One such attempt included collaborating with the High Church party who favoured censorship on ideological grounds. Daniel Defoe, who had served time in pillory and prison after writing *The Shortest Way with the Dissenters* (published in 1702), objected to such licensing schemes as they subjected the press to an arbitrary mercy. While Defoe agreed that some form of licensing of the press was necessary, he advocated protection for authorial rights—perhaps the first such appeal in English history. Defoe's reasoning followed the complementary issues of punishment and reward. If an author could be punished for libelous or seditious writings, it naturally followed that the author should be rewarded for useful writings: “‘Twould be unaccountably severe, to make a Man answerable for the Miscarriages of a thing which he shall not reap the benefit of it well perform'd...(Rose 1993, 35).” Throughout the next year (1704-1705) Defoe continued to advocate for authors' rights in his journal, *The Review*. He took umbrage with the practice of booksellers publishing manuscripts without authors' permission—the booksellers excused such behaviour as authors, nonmembers in the Stationers' Company, had no property in their copies—in response, Defoe called for an act of Parliament to establish property of copies. With Defoe's agitation, the stationers

realized a new means of pursuing proprietary interests through the avenue of authors' rights. Instead of further attempts to restore the prior system of press regulation, in 1707 the stationers submit a petition to Parliament for a bill to secure property in books. The stationers claimed securing such property would alleviate the negative effect that disorder in the book trade caused to the lives of the authors. Defoe continued to support the notion of literary property and was joined by Joseph Addison of *The Tatler*, who found it shameful that authors had no protection from unscrupulous printers. This eloquent piece appeared in *The Tatler* in December 1709:

All Mechanick Artizans are allowed to reap the Fruit of their Invention and Ingenuity without Invasion; but he that has separated himself from the rest of Mankind, and studied the Wonders of Creation, the Government of his Passions, and the Revolutions of the World, and has an Ambition to communicate the Effect of half his Life spent in such noble Enquiries, but has no Property in what he is willing to produce, but is exposed to Robbery and Want, with this melancholy and just Reflection, That he is the only Man that is not protected by his Country, at the same Time that he best deserves it. (Rose 1993, 36-37)

Throughout the introduction, amending and passing of a statute to address trade issues, the Booksellers vehemently attempted to redraw the bill to the original terms of the Stationers' Company. Recognizing the importance of the author the booksellers insisted that the author had an inherent right to his work, which could be assigned to a bookseller. Then the bookseller's right of property existed in perpetuity, based on common-law trade practices. For their part, the legislators also seized on the issue of "author" as pivotal to implementing the changes needed to break the long-standing monopoly enjoyed by the booksellers. Previously the author had never been accorded the means to hold copyright; the draftsmen of the bill saw the efficacy of permitting authors to register their own titles. But, even if they were sympathetic to the authors, the

draftsmen stopped short of making any type of statement implying authors had property rights in their writings. The preamble of an early draft of the act contained reference to authors possessing property in their books and writings; this was removed in order to forestall the booksellers claim that the act supported authors' common-law rights (Patterson 1968, 142; Rose 1993, 45).

In the spring of 1710, the Statute of Anne⁷ was passed by Parliament—it identified the author, and gave such a person a fourteen-year term of copyright (renewable for another fourteen years.) Furthermore, the Statute of Anne created the first codified notion of the public domain—the Statute allowed publishers a twenty-one year copyright term to publish previously published works. Such works were considered outside the scope of the law, and regarded as belonging to the public at large. While the Statute purported to serve the interests of the authors, and recognized the public's interest in the process of publishing books, the Statute once again served mainly as a means of trade-regulation in the printing industry. By limiting the booksellers' term of previously published books to twenty-one years, the Statute dissolved the perpetual monopoly enjoyed by the booksellers. And by limiting terms of copyright to fourteen (or even twenty-eight) years, the Statute clearly intended to prevent future monopolies.

With the passage of the Statute of Anne there was now a legislative means to pursue renegade printers. This in itself was not so novel; previously disputes of this nature had an avenue of dispute resolution, namely the Stationers' Court. Yet, for the first time, an author could go to court as a proprietor of his own work. Invariably though, as it

⁷ The title of the legislation read: "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 (Patterson 1968, 142)."

was the custom for an author to assign his or her rights to the booksellers, the booksellers were the main litigators, arguing on behalf of authors. As their twenty-one year grace period came to a close the booksellers sought to perpetuate their monopoly by petitioning Parliament to extend copyright terms, stressing the labour, time, and money expended by authors to create a useful book. Such useful books would foster learning and knowledge for society as a whole. If successful, the booksellers would have enjoyed a further monopoly of the works of Shakespeare and Milton (due to enter the public domain) until 1756. The House of Lords denied the extension, but the campaign by the booksellers shifted the focus of the debate to encompass authors' rights. A fundamental question was raised—how to characterize the authors' relationship to their writings? Some interesting metaphors were proposed: a tiller of the soil, vessel of divine inspiration, a magician (Rose 1993, 38). By far the most common metaphor was that of parent and child. This notion of likeness (as opposed to property) was consistent with a patriarchal society concerned with bloodlines and pedigree. In Defoe's *Review* of February 2, 1710, he speaks of literary theft as a form of child stealing:

A Book is the Author's Property, 'it's the Child of his Inventions, the Brat of his Brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, 'tis as much his own, as his Wife and Children are his own—But behold in this Christian Nation, there Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity, and there is none to redeem them. (Rose 1993, 39)

But, there was an awkwardness with this analogy. If piracy was akin to stealing a child, what can one say in defense of a parent who consciously sold his own child in the marketplace? An alternative metaphor entered the discourse⁸—the trope of literary work

⁸ In April 1735 an anonymous author penned, "Letter to a Member of Parliament," decrying the duplicity of the booksellers. The author claimed that the booksellers' campaign of advancing authors' rights was merely

as landed estate (Rose 1993, 56). Literature became property, and, ownership of literature became proprietary. The metaphor of land offered a familiar sense of tangibility; all the while the discourse surrounding authorship moved towards more metaphorical discussions, focusing on issues of originality and personality. The term “copyright” entered general circulation, with “copy” now established as the material basis (the manuscript) and “right” as the abstract, legal claim based on an author’s creative labour (Rose 1993, 58).

Despite the booksellers continued efforts to shape the discourse of literary property as being an author’s issue (the booksellers themselves merely representative agents of the authors) “... polite authors were reluctant to see themselves as deeply involved in commerce, and in any case most authors continued to sell the works outright (Rose 1993, 59).” A noted exception to this group was Alexander Pope, who considered himself as a gentlemen and a scholar but nonetheless was acutely concerned with all aspects of the book trade. Pope made frequent and regular use of the statute to defend his copyrights in court, but the most important was his suit in 1741 against Edmund Curll over the publication of Pope’s private letters (Rose 1993, 145-153). The case became a pivotal moment in the intellectual property debate of the times, introducing the essentially immaterial nature of the object of copyright, as well as the scope such objects can have. Briefly, the questions put to the court were (1) were letters protected under the terms of the statute (recall that the official title of the Statute described books as an

an instrument towards increasing their own profits. In response, the “Letter from an Author to a Member of Parliament,” came forth and introduced the concept of literary property as real estate. Interestingly, this letter asserted that “... it cannot be said that an Author’s Work was ever common,” and yet, described authorship in terms of acquiring ground from the common field of knowledge (Rose, 1993, 57).

instrument in the encouragement of learning) and (2) who owned a letter, the writer or the receiver? In handing down his decision, Lord Chancellor Hardwicke said:

... I think it would be extremely mischievous, to make a distinction between a book of letters, which comes out into the world, either by the permission of the writer, or the receiver of them, and any other learned work.... Another objection has been made by the defendant's counsel, that were a man writes a letter, it is in the nature of a gift to the receiver. But I am of the opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at the most the receiver has only a joint property with the writer. (Rose 1993, 153).

Hardwicke also said that familiar letters could be of more service to mankind than those elaborately written and intended for the press. A point well taken, and, Hardwicke's statement also served to shield the judiciary from making literary critical decisions of what was worthy of protection. Hardwicke's decision affected the representation of authorship—an author's words could exist freely, without reliance on the material aspects of ink and paper. "In that moment, the concept of literary property as a wholly immaterial property in a text, was born (Rose 1994, 229)."

Six years later, Pope's literary executor William Warbuton further elucidated upon this concept. Warbuton, also heir to Pope's properties, published a pamphlet where he offered a systematic development of the immateriality of literary property as well as a rationale for perpetual ownership (Rose 1994, 72-74.) Warbuton asserted that creation could be mixed in nature, requiring either manual expertise or mental expertise, or both. Thus, when an artisan employs purely manual expertise, it is appropriate that property accorded to the artisan be confined to the object prepared by his physical efforts; an inventor employing the capabilities of both mind and body should be offered property

beyond the physical creation, for a limited length of time, and finally, literary composition, being purely an effort of the mind, is property which should be protected in perpetuity. A byproduct of Warbuton's analysis was a hierarchical ordering of creation, lying parallel to contemporary society, whereby authors occupied the upper stratum, moving from a designation of professional writer to a more patrician creator. In doing so, an ethereal space was defined where notions of an author as an exalted, inspired individual could take root.

From Property To Personality

Following the enactment of the Statute of Anne, the question of literature as authorial property dominated judicial and public discussion for approximately thirty years. In the next thirty years (the 1740s to the 1770s) a new discussion arose—what kind of rights did an author have to an intellectual creation? Again, the booksellers dominated the courts⁹, and pressed for the widest possible interpretation and answer to this question—seeking a common-law, natural right of property that would establish copyright in perpetuity. As the author's property was usually consigned to the hands of the booksellers, perpetual copyright would extend the profitability of literature indefinitely, capable of producing vast wealth for some booksellers.

The case history of this time period is worthy of a more detailed study, but for the sake of brevity I shall limit my discussion to describing the outcome of two court cases concerning the same property, John Thomson's poem, *The Seasons*. First, in *Millar v. Taylor* (1769) the court was asked to determine if an author of a book had a common-law

⁹ During this period of time a growing commercial struggle emerged between the printing and publishing trade of Scottish printers, and the London booksellers who wished to maintain their centralized control of all publishing in Britain (Rose 1993, 68).

copyright after publication, and was this right removed by the Statute of Anne? The court answered (in a three to one decision) that authors did have such a right, and the Statute did not remove the right. Five years later, in *Donaldson v. Beckett* (1774) the court overturned the earlier decision, stating that the Statute of Anne had taken away the common-law copyright of authors; thus copyright became a statutory right. This extreme pendulum swing over the rights' debate helped foster two aspects of the concept of literary property—the role of personality in authorship and the literary composition as a collection of ideas.

Advocates of a perpetual copyright would emphasize the creative labour expended by an author, implying then that authors had a natural right of property to their creations¹⁰. Opponents would then claim such a right of property would perpetuate a monopoly and instead copyright should be treated as a patent privilege¹¹, these being purely statutory in nature. To counter the charge of monopoly, proponents would insist that the public was not being deprived of anything that existed before the composition was created. At its onset the campaign for authorial rights had drawn parallels to the

¹⁰ Such an argument was consistent with the classical liberal discourse of the time, and its assumptions about the priority of the individual and the sanctity of property (Rose 1993, 85). In Chapter Two, I explore the philosophical underpinnings of the relationship between an individual and property.

¹¹ The English system of patents originated within a practice of privileges granted by the sovereign (ostensibly to encourage the transfer of technology, and, the growth in trade in England.) Implemented by the whims of cash-strapped monarchs, the practice often interfered with freedom of trade. In 1623, the English Parliament passed the Statute of Monopolies which revoked earlier privileges and monopolies granted. An exception to the blanket annulment concerned patents, "...any declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years or under ... of the sole working or making in any manner of new manufactures... (Walterscheid, 1994)." The statute clearly stated that patents claimed by inventors were a privilege; in no way was the inventor exercising a natural right (Drahoš 1996, 32).

practice of patenting as justification for establishing literary property, but now the discourse shifted, taking pains to distinguish authors from mere inventors¹².

The remaining strategy for the opponents of natural rights was to shift the debate so as to raise doubts about the nature of the property itself. As the dissenting opinion in *Millar v. Taylor* Joseph Yates articulated the premise that literary compositions were simply collections of ideas:

But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. (Rose 1993, 86)

But in the hands of those advocating natural rights, this shift towards an ethereal nature of literary property implied the greater prominence of the source of the ideas—namely, the original genius of the author. In addition to the sense of ownership desired with intellectual creation, such creations were now stamped with a dimension of personality, infused with an aspect of the author's self. The originality of creation justified the property rights.

The dimension of originality was not merely an aspect of literary theory, but closely linked with a general movement in society (Williams 1958, 37). From one of the early documents of English Romanticism, *Young's Conjectures on Original Composition* (1759):

An Original may be said to be of a vegetable nature; it rises spontaneously from the vital root of genius; it grows, it is not made; Imitations are often a

¹² By and large, the guiding philosophy of English law was "... authors create something, whereas inventors uncover what was already there (Drahos 1996, 29)." While debatable, this instrumentalist treatment of patenting suggests that due to their social utility, inventions were too valuable to risk claims of permanent ownership.

sort of manufacture, wrought up by those mechanics, art and labour, out of pre-existent materials not their own. (Williams 1958, 37)

Edward Young's condemnation of imitation is indicative of criticisms toward the general transformation of English society by the Industrial Revolution. His contrast between the organic nature of an original composition, as compared to one manufactured from pre-existing materials offers a glimpse of the antagonism felt by some in the wake of the changes unfolding in society. While eighteenth century England was lauded as the most politically, socially, and economically, advanced country in Europe (Rose 1993, 4) these advancements were accompanied by abject poverty for many, and conflicts between the social classes. (Hibbert 1988, 466-472). Literary expression was a means of vocalizing the tensions and conflicts of the society in transition. Charles Nodier wrote, "Romantic poetry springs from our agony and despair. This is not a fault in our art, but a necessary consequence of advances made in our progressive society (Butler 1981, 3)."

My historical examination thus far has emphasized a political economical foundation to the concept of the inspired author. Such a foundation would gain in stability when laid with the mortar of a cultural study. A contestable statement perhaps, but in *Romanticism, Economics, and the Question of 'Culture'* (2001), Philip Connell offers an intriguing historical analysis of the relationship between political economy and culture:

... our inherited sense of the incompatibility between literary sensibilities and economic science has obscured the extent to which early nineteenth century political economy, and the debate on its legitimacy, scope, and function, played a formative role in the idea of 'culture' itself, as a humanistic or spiritual resource resistant to the intellectual enervation produced by modern, commercial societies. (Connell 2001, 7)

This new dimension of culture served to emphasize the notion of the isolated, creative author. Borrowing Raymond Williams's analytic procedure of looking to "structures of feeling" (Williams 1961, 64-88) I examine the emotional effect of the commercialization of literature upon the authors themselves and the impact of their feelings upon the notion of authorship. Williams' concept offers a vantage point within the intersection of studies of objective structures versus those of subjective feelings. More specifically, Williams suggested that personal emotions and experiences are shaped in thought and consciousness, and take a social form in observable texts and practices. To this end, I delve into the changing relationship between author and patron, and, author and reader. Prior to the growth of the middle-class reading public, patron and reader were often one and the same. A consequence of this growth was that the system of patronage passed into subscription publishing, and then into general commercial publishing. The issue of audience became a determining factor in literary success.

Structures Of Feeling – The Social Change During The Industrial Revolution

During the eighteenth and nineteenth centuries in England, the concept of the writer as an authoritative genius took hold as part of the self-definition occurring within the middle-class. The word genius itself underwent a change in meaning, shifting from a "characteristic disposition" towards "exalted special ability" (Williams 1958, 44). Similarly, other terms associated with Romanticism such as "original," "creative," and "imagination," changed from descriptions of general characteristics to descriptions of individual traits. These changes were indicative of a new relationship emerging between individuals and society. The emphasis of this relationship lay upon individual experience,

and placed great prominence on the value of private life. This result of the Industrial Revolution was prompted by the upheaval in social, economic, and cultural structures and relationships.

Writers confronting the literary marketplace were another aspect of this turbulent world where individuals faced industrial society. Not only did writers have to adjust to a new social order, but their profession required them to comment on the new social and economic forces that were creating the very conditions within which they worked—conditions which bred a sense of alienation and disenchantment with the world. For instance, the phrase “reading public” came into use as certain social developments evolved through the eighteenth century. Such developments included an increasing number of readers, new forms of reading material such as reviews and newspapers, prolific increases in the production of new books, and new methods of distributing reprinted works (Williams 1961, 182-184). While favourably intoned by publishers and critics who saw the new literary market as a progressive movement (making more books available to more readers), more often than not the Romantic writers uttered the phrase with disdain. From their perspective, the market and the public were contributing to the degradation of literature (Williams 1958, 35).

Initially the writers were indifferent towards their new audience. Prior to the creation of the literary market, successful authors were either independent gentlemen of leisure, or were sponsored by such men (Williams 1958, 32). In either case, writing was intended for a select audience. Poets were confident of the “trained taste and expert connoisseurship of a limited circle of readers (Abrahms 1953, 17),” and publication was a matter of choice. This system changed by 1800 when authors discovered they needed a

publisher as well as the reviews controlled by the publisher. "Clearly the literary market had as much power over authors' lives as the capitalistic social and economic arrangements had over those of other individuals in bourgeois society (Rowland 1996, 25)." Romantic writers began to view the market as responsible for vulgarizing literature through its commodification.

One of the more memorable publications of 1798 was William Wordsworth's *Lyrical Ballads* (Connell 2001, 14). The ballad form was considered a more egalitarian style of verse—this was part of an effort by Wordsworth to identify with the "real language of men (Connell 2001, 14)." Yet his efforts were stilted at best. In the advertisement for the 1798 edition, Wordsworth wrote:

The majority of the following poems are to be considered as experiments. They were written chiefly with the view to ascertain how far the language of conversation in the middle and lower classes of society is adapted to the purposes of poetic pleasure. Readers of superior judgment may disapprove of the style in which many of these pieces are executed it must be expected that many lines and phrases will not exactly suit their taste. It will appear to them, that wishing to avoid the prevalent fault of the day, the author has sometimes descended too low, and that many of his expressions are too familiar and not of sufficient dignity. ... An accurate taste in poetry, and in all the arts, Sir Joshua Reynolds has observed, is an acquired talent, which can only be produced by severe thought, and a long continued intercourse with the best models of composition. This is mentioned not with so ridiculous a purpose as to prevent the most inexperienced reader from judging for himself; but merely to temper the rashness of decision, and to suggest that if poetry be a subject on which much time has not been bestowed, the judgment may be erroneous and that in many cases it necessarily will be so. (Wordsworth 1927, i-iv)

Unfortunately, this awareness of the newer readers did not extend to matters of pricing.

The price for the 1798 collection was five shillings, expensive for the small collection of poetry.

Through the late eighteenth century to the early nineteenth century, Wordsworth's attempts to forge a relationship with his new readers halted (Rowland 1996, 39-62). To alleviate the existing uncertainty between himself and his diverse groups of readers, Wordsworth transformed the reading public into an idealized audience of his creation, a mass of humanity, and believed he could subordinate social reality to individual perception. A general feeling of the time, that the individual was a distinct soul locked in opposition to society, became confirmation of the individual's power to harmonize social turmoil through an act of individual consciousness.

So as a response to the social changes wrought by the Industrial Revolution, Romantic writers endeavored to create a private space of freedom from where they could address mankind's needs. Even though Romantic writers often decried and attacked the capitalistic belief system for its insistence on the supremacy of the individual, Romanticism as it was evolving supported, "... the capitalistic and bourgeois assumptions about the ultimate value of private experience (Rowland 1996, 174)." Furthermore, in an effort to define their work as a special or privileged form of writing, Romantic authors unintentionally mirrored the division of labour that was occurring in other avenues of industrialized society. As a result, even in the cultural realm, some human capabilities were elevated while others were devalued.

By attempting to define literature as an activity which encompassed all human function, the Romantic writers detached literature from society. The omnipotent, ethereal conception of authorship served to protect the writer from the demands of the marketplace, while isolating him from his audience.

Conclusion

From the perspective of the booksellers and publishers Gutenberg's creation dramatically altered the book trade, thereby requiring new mechanisms from which to address the market. Through two centuries of print production, writing was transformed into a mechanical trade. Copyright, initially a publisher's right, was recast as an author's right as a means towards regaining a publisher's monopoly. Yet, as authors feared being reduced to mere producers of commodities, the notion of the "creative genius" was born and offset this degradation. In the process, the ephemeral nature of literary property was introduced as well as the prominence of the individuality of an author. Individuality and originality became essential to assert a right of property in the formation of the Western intellectual property rights regime.

In Chapter Two I explore the historical underpinnings of private property as a relationship between individual and community. Interpretation of this relationship can lead to differing views of intellectual property rights. Such rights allow knowledge and skill to be incorporated into the capital necessary to ensure economic progress but at a cost to the community. The importance of balancing the benefit and detriment was illustrated in the drafting of what is now referred to as the Intellectual Property Clause of the United States Constitution.

Chapter 3

Property And The Community

Introduction

In Chapter One I endeavored to isolate the events that shaped the concept and entrenchment of an author as a solitary, creative genius. In doing so, I drew attention to the work of John Locke—his role during negotiations for the termination of the Stationers' Company Licensing Act may have earned him a place in history as an early copyright lobbyist. Even more influential than his views on copyright policy, were his views on property—John Locke is credited with establishing the classical conception of property (Singer 2000, 12).

Described as a philosopher of individualism (Kirk 1966, xi) Locke's theory of private property was born out of opposition to an absolutist monarchial English government¹³. In the late seventeenth century, laying a major philosophical foundation for modern socialism, Locke articulated the principles of (1) workers' rights to the results of their labour, and (2) possession regulated by need. But, by the twentieth century, Locke was the darling of the capitalists, a spokesman for private property. Using Locke's principles, intellectual property rights proponents can postulate that a person has a right

¹³ Although Locke's writings were intended to conserve English social institutions, his work became an instrument of persuasion for both the American and French revolutions.

of property to any abstract object which he or she creates through his or her own labour. Locke's work has iconic-like status; upon his foundation of labour, intellectual property rights appear indisputable (DeLong 2002, 25; Fischer 1999).

In this chapter I explore two differing interpretations of John Locke's philosophy with the aid of analyses by James Tully and C.B. Macpherson. My intention in utilizing these interpretations is to underscore the importance of the role of the community in determining an individual's property rights. To extend Locke's work into the realm of intellectual property I turn to Peter Drahos' articulation of abstract objects and the intellectual commons. I show that a mechanism which allows control over abstract objects, encourages the partitioning of the intellectual commons, and places at risk the ability of a community to enhance its knowledge. This risk was carefully considered during the efforts to build the fledgling nation of the United States.

John Locke, *Two Treatises Of Government* – The Impetus Of Labour

Locke maintained that private property is a human institution, justified by a natural law. Desiring to oppose the notion of political power founded upon patriarchal heritage, Locke instead constructed an argument within natural law that showed equality and the commons could coexist with individual appropriation and property rights. In *Of Civil Government Second Treatise* (first published in 1690), Locke describes humanity's origins within a state of nature. Locke begins Chapter 5 by referring to a great difficulty, "If God gave the earth to mankind in common... how any one should ever come to have property in anything (Locke 1966, 21)?" A question as relevant now as it was in 1690. Locke's solution began with the assumption that every man has property in his own

person, which in turn led to Locke's claim that every individual's labour belonged to the individual. Paraphrasing from Locke's axioms:

God who hath given the world to men in common hath also give them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being, ..., and nobody has originally a private dominion exclusive of the rest of mankind as they are thus in their natural state; ...

Though the earth and all inferior creatures be common to all men, yet every man has property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. ... For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

That labour put a distinction between them and common; that added something to them more than Nature, the common mother of all, had done, and so they became his private right.

The same law of nature that does by this means give us property, does also bound that property too.... As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in; whatever is beyond this, is more, than his share and belongs to others.

(Locke 1966, 22-25)

In Locke's view, goods were held in common through a grant from God. Before ownership can be established, individuals must exert labour and add value to the goods. Then such goods can be claimed as private property. Locke also claimed that in the original state of nature, there were enough unclaimed goods to avoid conflicting claims of ownership.

Locke's concept of a commons is well suited to utilitarian arguments supporting intellectual property rights (Hughes 1988). An intellectual commons upholds one of the

essential conditions upon which Locke's theory of property was articulated—namely, the enough-and-as-good condition. Locke required that the commons had enough goods of similar quality such that one person's extraction did not prevent the next person from extracting something of the same quality and quantity. While the commons did not have to be infinite, to all practical consideration, it needed to be inexhaustible. This poses obvious difficulties in the physical realm, yet a person's use of ideas need not deplete an intellectual commons at all. Ideally speaking, a field of ideas is likely to expand with use. And while the labour expended in harvesting an idea from the commons may be more creative than physical, it is labour nonetheless.

Even among those who do not subscribe to the notion of a commons, there is strong justification of intellectual property rights based on Locke's views on labour and his mixing metaphor. By focusing on these aspects of Lockean theory one could argue that there is no such thing as an intellectual commons, "Abstract objects, whether discovered or created, are always the product of individual, intellectual labour and, therefore, the property of the intellectual worker responsible for their generation. (Drahos 1996, 49)."

With or without the foundation of an intellectual commons, Locke's theory that property results from personal labour is a persuasive one for intellectual property rights proponents. But Peter Drahos shows that the condition of labour has a comparatively minor role in the labour theories of property to which Locke is associated. According to Drahos, "The real value of Locke's writings on property is that it shows us that the coherence or truth of an argument that relies on natural rights to justify intellectual property rights primarily depends on a concept of community and an accompanying

metaphysical scheme (Drahos 1996, 41).” To illustrate the importance of the concept of community and its place in the labour argument, it is useful to examine two differing interpretations of Locke’s theory¹⁴. Briefly, James Tully describes Locke’s writings as a “philosophy of religious praxis (Tully 1980, 174),” justifying not the right to private property, but the necessity of the commons. However, C.B. Macpherson saw Locke as a faithful capitalist, whose ideology served as the “moral foundation for bourgeois appropriation (Macpherson 1962, 221).” These interpretations rely upon a classification of community as being either positive or negative. Tully’s Locke hails from the realm of positive community—a common that belongs to all—where all have the right to be included in the use of it. Private property in this case referred to joint ownership. Negative community, the domain for Macpherson’s Locke, was the opposite—where the world is given to all, but belongs to no-one. Any individual can claim private property and exclusively own objects taken from the commons.

John Locke – Theologian Or Capitalist?

In Tully’s interpretation, the basis of Locke’s theory of property is the special relationship between God and mankind, where mankind fulfills God’s intentions. This allows the argument that mankind has a prescribed purpose in this world, which forms the basis of man’s rights and obligations. One such obligation is a duty to self-preservation and the preservation of others. This legitimizes natural property rights as a means to the subsistence necessary for preservation (as long as there is the continued

¹⁴ I am indebted to Drahos for bringing to my attention the work of James Tully (a political scientist from McGill) and C.B. Macpherson (a political economist from University of Toronto.) Each interpretation of Locke’s theory of private property lead to publication at approximately the same time (1980 and 1978, respectively.) I felt this timing, as well as the complementary nature of their positions and institutions, suggested that the two interpretations were well positioned for comparison.

existence of the original commons and original community.) Community, in this sense, was a positive community where the commons belongs to all.

Locke's challenge in defending a positive community was to articulate the means through which individuals can utilize parts of the commons without having to obtain the consent of all commoners. Otherwise, lack of consent was tantamount to theft. In Tully's writings, Locke's solution was to redefine positive community. As the commons belongs to everyone, each person has the right to be included in the commons and the right to exercise the means necessary for their subsistence and comfort. This does not imply that each person had a right to every thing in the commons. In describing his means of extracting objects from the commons, Locke presents his argument that labour begets property. Property refers to the right to use the commons and those objects extracted from the commons, with the proviso that the commons itself is not despoiled. The commons itself does not come under the term of property, merely the products created from it. Thus the commons remains common to all. Tully concludes with the determination that labour by itself does not confer a right of property; instead labour justifies the English Common. The common being the domain from where to serve God's purposes for man, and labour is the means through which man can employ the commons and realize God's will.

The fundamental and undifferentiated form of property is the natural right and duty to make use of the world to achieve God's purpose of preserving all his workmanship. A commonwealth which arranges men's action accordingly is the complementary kind of society. Property and political society thus stand as the means necessary for the practice of man's other set of moral duties, those religious duties over and above supporting and comforting oneself and others. (Tully 1980, 175)

In contrast to Tully, Macpherson uncovers capitalist Locke—Locke derives from natural law a right of property while dispensing with the natural law traditions that

restrict the execution of that right. As with Tully, Locke's argument begins by accepting that the earth and its fruits were originally 'given to mankind in common. Then from two of his postulates (men have the right to self-preservation as well as a man's labour is his own) Locke justifies individual appropriation of the products from the commons. As noted Locke explicitly limits such appropriation with two statements—firstly, men must leave enough and as good for others and secondly, as much as any one can make use of any advantage of life before it spoils—but he transcends these limitations by the introduction of social benefit and currency.

In the case of the former, Locke presents the argument that greater productivity of appropriated land can reconcile for a lack of land available for others:

Private appropriation, in this way, actually increases the amount left for others. ... if there is not then enough and as good land left for others, there is enough and as good (indeed a better) living left for others. And the right of all men to a living was the fundamental right from which Locke had in the first place deduced their right to appropriate land. (Macpherson 1962, 212)

Macpherson shows that if one measures the results of appropriation beyond a limit by the fundamental test of subsistence instead of the instrumental test of availability, appropriation becomes a virtue.

With respect to currency, " ... for in governments the laws regulate it; they having, by consent, found out and agreed in a way how a man may rightfully and without injury possess more than he can make use of by receiving gold and silver, which may continue long in a man's possession ... (Locke 1966, 39)." Locke emphasizes that money is a commodity whose characteristic purpose is to serve as capital. From this step, it is reasoned that since a person can now exchange what previously were perishable

quantities of product for currency, it is no longer injurious to accumulate land with the intention of producing a surplus. The exchange of the surplus to money allows for one to accrue capital (Macpherson 1962, 208). Despite his spoilage and sufficiency limitations (derived from natural law) Locke rationalized an unlimited capitalistic appropriation of land and money.

One cannot but ask, given these two interpretations, was the same text being read? This perplexity suggests that notions of both community and commons are contestable constructs; murky, gray areas which can be read as black or white depending on the desires of the reader. Discussions of an intellectual commons are fraught with the same challenge. In an effort to reduce the haze surrounding the concept, it is necessary to introduce a more precise definition of an intellectual commons:

... that part of the objective world of knowledge which is not subject to any of the following: property rights or some other conventional bar (contract, for instance;) technological bars (for example, encryption) or a physical bar (hidden manuscripts). (Drahos 1996, 54)

Intellectual Commons And Abstract Objects

Drahos emphasizes that the premise behind the intellectual commons is that of an independent resource open to use; but open to use does not necessarily mean all objects in the commons are accessible to everyone. Accessibility may be limited by the abilities of a “commoner” as far as having the relevant capability and competency to utilize the objects (for instance, natural divisions of language or scientific literacy.) However, before indulging in concerns of access, we must begin by considering what is an object in the intellectual commons? My starting premise is that the object is abstract, but tangibly captured in some form of representation. The representation may be a physical one (for

instance, a book or a compact disk) or simply defined by its function (for instance, a new technique of gene therapy). In both cases, the abstract object could be described as information, or perhaps even knowledge. Accessing the object provides the utilization of the underlying information. Therefore, if one wishes exclusive use of the underlying information, there must be a means of removing the access to the abstract object (as it is implausible to remove an abstract object itself.) This is accomplished through the mechanism of intellectual property rights. Control of the mechanisms is assigned to the individual who prepared the representation of the abstract object. Such control can give the owner of the abstract object a competitive edge over a rival. Furthermore, the means of access to the abstract object is now a commodity which can be bartered in the marketplace. This is added incentive for individuals to desire control or ownership of abstract objects. If society is structured as a positive, inclusive community, then ownership of abstract objects is not possible. Intellectual property rights are best suited in the conditions of a negative, exclusive community.

With the constant encroachment of individual claims to tracts of the intellectual commons, we risk stifling future creativity as well as impede the communitarian potential of our technological capabilities. Some advocates of strong intellectual property rights believe that such a system leads to the enrichment of knowledge and well-being for the entire community (Lehman 1998, 85). If we assume this to be true, then it logically follows that if the knowledge and well-being of the community are not enriched, then we cannot maintain a strong system of intellectual property rights¹⁵. Enriching community

¹⁵ This is a valid form of argument, commonly taught in first-year philosophy courses (Phil 110 at Simon Fraser University). Known as Modus Tollens, it states that, given a proposition if P then Q, and, presented with not Q, one can deduce not P.

knowledge is tied to human capital theory. While a full discussion of human capital theory is beyond the scope of this thesis, I can illustrate that there is a clear overlap between human capital and intellectual property rights. Furthermore, the region of intersection encompasses the intellectual commons.

Drahos presents human capital as “embodied knowledge and skill (Drahos 1996, 179).” Intellectual property rights are a means to controlling such knowledge or skill. Two aspects of human capital theory are (1) that human beings have a personal base of knowledge, skills and habits which they further through forms of education and training, and (2) any one individual is unlikely to exploit fully all the relational aspects of a body of knowledge. Within a society where there is a highly developed consciousness of intellectual property, individuals may be tempted to set or increase the price for the dissemination of their particular stock of knowledge. An unfortunate result of such behaviour is that fewer people will be capable of investing in or increasing their own stock of knowledge. And even if an individual is incapable of fully exploiting their own body of knowledge, with the heightened consciousness of knowledge being capital, such individuals are more likely to keep their knowledge to themselves, thus further reducing the opportunities for others. Society will be thwarted in efforts to enrich itself. And the economic and cultural progress of a society is contingent on the strength of its foundation of knowledge (Drucker 1993, 8).

Nation Building And Creativity

This link between the betterment of society and the foundation of knowledge was apparent to the founders of the United States. The original federation of thirteen states

authorized limited and restricted grants of power to Congress—one such grant of power was for what is often referred to as the Intellectual Property Clause of the United States Constitution (Walterscheid 1994). Article 1, section 8, clause 8 states that Congress shall have the power, “to promote the Progress of Science and the Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

In the context of eighteenth century language, the term “Science” encompassed “knowledge,” and “Useful Arts” depicted “helpful or valuable trades” (Loren 2000; Walterscheid 1994). There, explicitly articulated, was the empowerment to Congress to further education as well as economic progress, through the granting of a temporary monopoly. If one reads all of Article 1, Section 8 of the United States Constitution, it is evident that this is the only clause specified with both a purpose and a means of exercising Congressional power.

The architects of the Constitution (among them James Madison, who introduced the copyright and patent clause at the Constitutional Convention) were wary of the misuse of power that an exclusive monopoly¹⁶ could wield. Avoiding the language of “rights” or “property” Madison focused on the utilitarian nature of the incentive stating that copyright was an act of government, “... where the public good fully coincides ... with the claims of individuals (Bell 2002, 4).” Necessary as an incentive, copyright was an encouragement, not a reward.

¹⁶ The colonists were cognizant of the abuses perpetrated by Britain’s monopoly-dominated mercantile system (supported by state-conferred privileges) and ensured that their democracy could not regress to autocracy. The Constitution was drafted and ratified for the purpose of building their fledgling nation, with power granted to the Federal government in a controlled and balanced manner.

Thomas Jefferson was disappointed in the proposed Constitution—when he received a draft he wrote to Madison that it did not contain a Bill of Rights. As well it should “abolish ... Monopolies.....saying there will be no monopolies lessens the incitement to ingenuity ... but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression (Bell 2002, 5).” Despite Jefferson’s reluctance, the Constitution (with its Intellectual Property clause) was ratified¹⁷ and paved the way for the Copyright Act (and the Patent Act) of 1790. Jefferson’s continued aversion to monopolies would be expressed again—in Jefferson’s proposal for revision of the Patent Act of 1790, he referred to the exclusive right granted by a patent as an exclusive property instead of a monopoly. Jefferson may well have been trying to remove the connotation of a patent as a representation of a monopoly. As far as can be determined, this was the first proposal whereby an intellectual creation was considered to be property by statutory enactment (Walterscheid, 1998). The choice of language was significant and far-reaching in its consequences.

Conclusion

Allocating private property is regarded as the honourable (and necessary) outcome to promote an individual’s labour (whether the labour be physical or creative.) When exclusively demarcating property, there is a risk of diminishing the commons from where such property arose, and where future labour can take place. Underlying the

¹⁷ Monopoly by patent or copyright was not the only option presented as a means of incentive, but pragmatically speaking, it was the best solution. The issue of cost was relevant to the new government burdened with the debts of the Revolutionary War. Proposals that offered land (or other premiums) were considered too expensive. And the offering of honorary titles held no appeal in the new Republic. Instead, granting an inventor or author limited term rights to his creation did not require rewarding the individual directly, yet still provided an incentive to foster innovation and industry.

principles of private property is a relationship with community that must balance reward with risk, against the backdrop of continued sustenance for all.

The two theories surrounding Locke and the commons, as presented by Tully and Macpherson, suggest a steady march in opposing directions, each to the tune of different drummer. A means to resolving the disparity is to consider a different representation—two partners engaged in a dialectical dance. One individual may lead the other, but without both, the dance ceases to exist. In the context of intellectual labour and property the need for this harmony was clearly illustrated by the United States founding fathers. As the twentieth century unfolded in the United States, Macpherson's Locke undeniably set the lead but with Tully's Locke in accordance. In Chapter Three I follow the judicial application and legislative evolution of copyright law, showing that for much of the twentieth century elements of both positive and negative community coexisted. Yet, by the end of the century, copyright law and its application advanced the position of the individual beyond that of a partner with community.

Today, the United States has impressive assets of cultural commodities and is a net copyright exporter. Their growth in new media and new media products consistently occurred under the copyright exemption of Fair Use. Equally consistent were the actions of the established media industries to maintain their supremacy by broadening the scope and term of copyright law as each new media form developed.

Chapter Four

In The Shadows Of Copyright

Introduction

In Chapter One I described the origins of copyright law by studying events that took place in the book publishing trade, and the effects felt in the literary community, following the advent of printing technology. Copyright law was based on the concept of an individual, autonomous creator—a concept that was shaped in seventeenth and eighteenth century England. In Chapter Two I described in detail how the system of property is governed by a relationship between individuals and their community, and can be characterized by elements of access and control. I extended my arguments to intellectual property where intellectual property rights are the legally enforceable means of excluding access to or controlling creative activity. I presented the necessity of balance between such rights and creative activity—and used the formation of the Intellectual Property Clause of the United States Constitution as an illustration.

In this chapter, using the parameters of creativity and access, I situate copyright law upon the historical plane of new media development within the United States. By reviewing some of the legal disputes involving copyright, as well as the evolution of copyright law, I show that through much of the twentieth century the relationship

between the individual author/creator and the community was held in balance by the judiciary's interpretation of copyright law.¹ For my judicial review I chose cases that contained elements of dispute similar to those in contemporary litigation. For instance, what is the meaning of the word "copy"? What limits of ownership should be imposed upon creative efforts produced through public funds? How can the courts set boundaries between advancing public good, and protecting the trade of commodities? What happens when an industrial media form becomes accessible to consumers? Throughout new media development and the ensuing disputes, courts were asked to interpret statutory meaning for technology unfathomed at the time the statute was drafted. An additional criterion for my selection was that each case proceeded through all three levels of the United States judicial system (the District Court, the Court of Appeals, and the United States Supreme Court.) Although it did not meet this last condition, I also refer to the judicial events surrounding the use of Napster (most notoriously known for its contributory role in the piracy of music files.)

Unfortunately, as the century came to a close, a heightened consciousness of intellectual property rights eclipsed the bargain with community that copyright law embodied. The system of intellectual property rights, founded upon the belief of the creative individual, is threatening the continuance of innovation and creativity despite its assurances to securing those very activities. To underline my insistence of the necessity of freely available resources to processes of creativity, I offer a reminder of the pivotal role played by open source software in the early development of the Internet. Software is

something of an oddity¹⁸ in intellectual property—prior to the 1980s, software was protected by copyright, but today software may also seek shelter under the umbrella of patenting. Irrespective of which department software may fall into, I argue that the open source movement melds with my thesis as an illustration of creativity crafted upon the collective efforts of a community, and, the necessity of access to underlying content. Code is content for software development, just as artistic, literary or musical compositions are content for new media development.

New Media In Court

Historically, new media as a means of disseminating creative composition evolved in the shadows of copyright regulation. Copyright itself was never a guarantee of perfect control by copyright owners over the use of their copyrighted content (Lessig 2002, 106). Through limitations upon, or exemptions from copyright, the public receives access to copyrighted materials—a balance is achieved between the needs of the public and the temporary monopoly afforded to creators. But as new media evolved, existing content/copyright holders lobbied vigorously to maintain control of their assets. The earliest case history I found illustrating this tendency began with player pianos and (most recently) has continued to electronic publishing.

Interpreting The Word “Copy”

Henri Fourneaux invented the basis of the player piano in the early 1870s. As a musician played a piano the music was recorded on a perforated roll of paper, which

¹⁸ Copyright shelters the expression of ideas, and patent shields the function of ideas, both being a form of disclosure of ideas. However, software is protected after compilation, meaning the underlying idea is hidden from the public eye.

could then be copied and played on other machines. Relative to the phonograph recordings of the time, this innovation produced a high quality copy of music. Furthering Fourneau's work, in 1902 Melville Clark created the first full range (88 key) player piano combining the player and piano as a self-contained unit. A market for the innovation quickly followed, as did judicial disputes over the ownership of the music. From the preamble of the judicial proceedings of *White-Smith Music Publishing Co. v. Apollo Co.*¹⁹:

The manufacture of such instruments and the use of such musical rolls has developed rapidly in recent years in this country and abroad. The record discloses that in the year 1902 from seventy to seventy-five thousand of such instruments were in use in the United States and that from one million to one million and a half of such perforated musical rolls, to be more fully described hereafter, were made in this country in that year.

It is evident that the question involved in the use of such rolls is one of very considerable importance, involving large property interests and closely touching the rights of composers and music publishers.

Composers of popular music had previously fared well under copyright law as the principal source of revenue from popular music was the sale of the sheet music—although public performances of the music generated no royalties, the musicians and singers required purchased sheet music in order to perform. Now it was possible to exclude the composers or the copyright holders from sales of copies of the compositions. In a manner reminiscent of the recording industries cries today, copyright holders complained vehemently, arguing that the content of their published sheet music had been stolen. All three levels of the United States judiciary disagreed—the circuit court of the District of Southern New York, the Court of Appeals for the second circuit as well as the

¹⁹ *White-Smith Music Publishing Co. v. Apollo Co.* 209 U.S. 1. 21 (1908)

United States Supreme Court. Within the bounds of the copyright statute in effect at that time, members of the judiciary did not deem piano rolls as copies—the replication of music in a manner only readable by a machine did not constitute copying. Therefore, piano roll manufacturers were free to use the content of sheet music to further their industry.

From Judge Colt of the first circuit²⁰:

I cannot convince myself that these perforated strips of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument.

From Justice Sheppard of the Court of Appeals, District of Columbia²¹:

It is not pretended that the marks upon the wax cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph. Conveying no meaning, then, to the eye of even an expert musician, and wholly incapable of use save in and as a part of a machine specially adapted to make them give up the records which they contain, these prepared wax cylinders can neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope. In these respects there would seem to be no substantial difference between them and the metal cylinder of the old and familiar music box, and this, though in use at and before the passage of the copyright act, has never been regarded as infringing upon the copyrights of authors and publishers.

Justice Day, delivering the opinion of the Supreme Court on February 24, 1908 further concurred that piano roles were not copies, but he also acknowledged that under

²⁰ Ibid.

²¹ Ibid.

the terms of the copyright statute, musicians and publishers did not receive compensation when manufacturers of piano rolls utilized musical compositions²²:

These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative, and not to the judicial, branch of the government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.

Feelings within the Supreme Court were not unanimous—Justice Holmes expressed concerns that the spirit of copyright protection was being denied, and that anything that mechanically reproduced a musical composition should be deemed a copy. He refrained from dissenting from the judgment of the court, but offered the following comments²³:

The notion of property starts, I suppose, from confirmed possession of a tangible object, and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit.

....The restriction is confined to the specific form, to the collocation devised, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence. ... A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds

²² Ibid.

²³ Ibid.

ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act.

Justice Holmes concurred with Justice Day that the legislative branch of the government was the appropriate arena from where to harmonize the different interests of the affected parties.

In 1908 revisions to copyright law were undertaken by representatives of the established industries affected by copyright law (a pattern of revision that has continued to this day (Litman 2001, 91)). The first such meeting occurred in 1905 when the Librarian of Congress invited representatives of “authors, dramatists, painters, sculptors, architects, composers, photographers, publishers of various sorts of works, libraries, and printers’ unions to a series of meetings,” (Litman 2001, 39). Representatives omitted from the invitation list were those from media industries that had not yet received statutory recognition— the phonograph industry, the motion picture industry, and, the piano roll industry. A year later, the proposed copyright bill granted significant advantages to those who participated in the meeting, at the expense of those who did not. In the proposed bill copyright owners would have gained the exclusive right to manufacture or sell any mechanical device that reproduced a composition in sound, thereby making the unlicensed manufacture of piano rolls or phonograph records illegal. The propriety of this conference of self-interest was immediately questioned, and considerable opposition arose from the piano roll and phonograph industries. Various changes were proposed and debated, and eventually the newcomer industries were invited to join the negotiations. The bill that was presented in February 1909²⁴ offered a

²⁴ The 1909 Copyright Act awarded copyright owners a new exclusive right—the right to copy a copyrighted work. Section 1(a) of the act provided that “any person entitled thereto, upon complying with

compromise to all parties—it included a compulsory license for mechanical reproductions of music and entirely exempted the performance of music on coin-operated devices²⁵. By granting this mechanical reproduction right, Congress allowed authors the exclusive right to determine when and on what terms a recording could be made. Once the recording was made, others had the right (upon payment of a small fee) to make further recordings of the same composition without necessarily receiving permission from the original author. This was deemed a “compulsory licensing right” to ensure that copyright owners could not obtain too much control over further innovation with their work. The statute, not the market, set the amount of the fee—two cents per copy in 1909 (Lessig 2002, 109).

Maintaining Balance – Fair Use

A further means of ensuring that copyright owners could not exert too much control over access and use of their work is accomplished by the condition of fair use (fair dealings in Canada and the United Kingdom.) This exemption to the law can be traced back to early English legislation. It began as the doctrine of fair abridgment; translations and abridgments of copyrighted work were considered original works in their own right. Copyright infringement only occurred when exact duplicates of an original were made and sold. These new works (through a good faith, productive use of the

the provisions of this Act, shall have the exclusive right ... to print, reprint, publish, copy, and vend the copyrighted work.” (Loren 1997)

²⁵ The coin-operated phonograph had been invented in the late nineteenth century. At the time of the copyright negotiations penny arcades would utilize the unamplified, single-play novelty machine, to play whatever song the local sheet music store had designated as the song-of-the-week. The U.S. Congress exempted these machines so that the operators of penny arcades would not need to buy a copy of sheet music for what was a device used to promote the sale of (copyrighted) sheet music. Yet by 1927 the American Music Company was marketing the first jukebox with amplified speakers. Exempt from the copyright law, owners of jukeboxes could collect multiple fees (a nickel per song) without paying any licensing fees or royalties to composers or publishers (Litman 2001).

original authors' works) further contributed to the public's knowledge. This laid the ground for further development of this doctrine. Included in the development became the issue of competition. If a defendant could demonstrate that his product did not harm the market of the original work, he was more likely to be successful under the rule of fair dealings (Loren 1997).

Fair use in the United States was not as encompassing as in England. Instead, it was treated as guidance. In 1841, Justice Story articulated the first instructions in deciding fair use in *Folsom v. Marsh* (two publishers each producing a biography of George Washington):

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. (Loren 1997)

While the United States copyright act was revised four times between 1790 and 1909, the provision of fair use was not codified within the Act. Instead, courts continued to follow Justice Story's guidance. In contrast to English proceedings, in the United States the offended copyright owner needed only to show that a publication of a new work was not fair use, and could then prohibit publication of the new work. Certainly, one logical conclusion to a ruling that a particular work was not fair use was that the defendant had utilized too much of the original material, thereby creating a copy. But the doctrine as interpreted by the United States courts had the potential to strengthen the rights granted to copyright owners by focusing on the latter conditions of Justice Story's guidance (the aspects of "prejudicing sales" or "diminishing profits.")

The 1909 United States copyright act became the arena of dispute between copyright holders and copyright users through the advent of radio, motion pictures, television and computers. Each new technology posed further strains upon the law. As greater controls were interpreted for the benefit of copyright holders, the defense of fair use was heard more and more in the courts (Loren 1997). A noteworthy case involved the issue of photocopying.

In 1970 the publishing firm Williams and Wilkins brought a charge of copyright infringement against the National Institutes of Health (NIH) and the National Library of Medicine (NLM), two nonprofit organizations of the United States federal government. The basis of the suit was that NIH and NLM had violated the publisher's copyright by photocopying academic journals for medical professionals. While private use of photocopiers was not unheard of, what was unprecedented was the scale of the copying. Among the findings, "in representative years the NIH library filled 87,000 requests, the NLM 120,000. Some small but measurable portion of these were from the plaintiff's journals (Kaplan and Brown 1978, 281)."

The district court judge deemed this volume of copying constituted infringement. However, the Court of Claims reversed this decision in 1973 stressing that the libraries involved were "... devoted solely to the advancement and dissemination of medical knowledge.... medical science would be seriously hurt if such library photocopying were stopped (Morgan 1996)". In their ruling the court appeared to focus on the spirit of the copyright act, making the distinction between "copying" and "printing or publishing". Despite the fact that the 1909 Copyright Act expressly forbade the copying of copyrighted materials, the majority felt compelled to make the distinction between the

commercial act of publishing and the non-commercial (or private) act of copying. Justice

Davis, for the majority, wrote:

The photocopying process of NIH and NLM does not even amount to printing or reprinting in the strict dictionary sense; and if the words were to be used more broadly to include all mechanical reproduction of the number of copies, they would still not cover the making of a single copy for an individual requester. If the requester made a photocopy of an article for his own use on a machine made available by the library, he might conceivably be "copying" but he would not be "printing" or "reprinting." (Morgan 1996)

Although fair use had not been codified into copyright law, the court followed the guidance and ruled that the conduct by NIH and NLM was permissible under the terms of fair use. The majority decided that the quantity of photocopying was not excessive and Williams and Wilkins were unable to demonstrate that photocopying had hurt their market sales²⁶. Furthermore, some of the authors of the copied articles testified that they favoured photocopying as a means of advancing science and knowledge. As in earlier cases, once again the judiciary called upon Congress to clarify the conflict between the public good and copyrighted materials. From Justice Davis:

The truth is that this is now preeminently a problem for Congress: to decide the extent of photocopying that should be allowed, the questions of a compulsory license and the payments (if any) to copyright owners, the system for collecting those payments ... the special status (if any) of scientific and education needs.... The choices involve economic, social and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion. (Bettig 1996, 162)

²⁶ Chief Judge Robert E. Cowen dissented arguing that Williams and Wilkins need only show potential revenues foregone because of the new technology. He believed that due to the difficulty in demonstrating actual harm, making a copyright proprietor prove the degree of injury violated legal precedent (Bettig 1996, 162).

The United States Supreme Court reviewed the case again in 1974, but the outcome was an even four to four split²⁷; thus the lower courts' decision was affirmed (although now the lower courts' decision was without value as a precedent.)

As in the case of the piano rolls, the outcome of the courts appeared to violate the spirit of copyright, to the detriment of the copyright holder. Once again, Congress modified the legislation to circumscribe copyright violations that could occur with the aid of new technology. In the 1976 revision to the copyright law, copyright holders were given further exclusive rights. Copyright holders were not only protected against printing an exact replica of the work, but (amongst other new privileges) were also protected against replication of portions of a work, and the preparation of derivative works based on a prior work (even for noncommercial purposes). As before, representatives of the established copyright owning industries dominated the revisions process (Litman 2001, 50-52). Spanning sixteen years of negotiation and compromise, the copyright law that emerged conferred broad expansive rights upon copyright holders, while the limitations of such rights were cast in narrow, specific language.

Those who criticized the privileges accorded to copyright holders were reminded that at the same time (1976) the issue of fair use was codified into the Act. From the copyright web site²⁸ of the United States government:

One major limitation is the doctrine of "fair use," which is given a statutory basis in section 107 of the 1976 Copyright Act ...

²⁷ Due to a conflict of interest Justice Blackmun did not take part (Bettig 1996, 182).

²⁸ Copyright Law of the United States of America, Chapter 1, Subject Matter and Scope of Copyright

Section 107 Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A²⁹, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

But the comfort derived from the existence of the fair use exemption was deceptive given the manner in which the exemption was often applied. Of the four conditions under which fair use may be asserted, two concern monetary issues. While courts were required to examine all factors in assessing a claim of fair use, the two non-monetary factors were often considered of lesser importance (Loren 2000). With the author-centric philosophy of copyright, showing a decline to a potential market became equated to a loss of dollars—a conceptual argument that could be appreciated more tangibly than claims of detriment to the public caused by a copyright monopoly suppressing access to information and cultural works.

²⁹ Sections 106 and 106A detail the exclusive rights in copyrighted works and the rights of certain authors to attribution and integrity, respectively.

Testing The Boundary

The bounds of fair use were tested again with the advent of video tape recorders (VTR's). In November 1976, Universal City Studios Inc. brought action for contributory copyright infringement against Sony Corp.—the plaintiffs claimed that the defendants were fully aware that the use of VTR's would result in copyright infringement, yet they had intentionally marketed and sold the machines.

The presiding federal district court judge in the case was Warren Ferguson. Following the death of his son in Vietnam, his personal ideology had shifted from an adamant belief in upholding the law to questioning government intrusion in personal lives (Bettig 1996, 153). Throughout the trial his aversion that copyright was a means by which either the government or the studios could control what people watched, was readily apparent. The ruling of Judge Ferguson would later be heavily relied upon by the United States Supreme Court when the case returned to trial.

The case was a lengthy one; three years later Judge Ferguson found Sony not guilty of the charges and declared that home taping was a fair use of copyrighted materials. In his opinion, Judge Ferguson wrote³⁰:

Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording. ...

Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. ...Plaintiffs attack the weight of the testimony offered and also contend

³⁰ Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

that an injunction is warranted because infringing uses outweigh noninfringing uses.

Whatever the future percentage of legal versus illegal home-use recording might be, an injunction which seeks to deprive the public of the very tool or article of commerce capable of some noninfringing use would be an extremely harsh remedy, as well as one unprecedented in copyright law.

As codified in the Copyright Act of 1976, fair uses were traditionally those that lead to the furthering of knowledge. The Williams and Wilkins case clearly follows this line of reasoning. Judge Ferguson's rationale fell outside this traditional interpretation; most VTR users do so for the purpose of watching a show at a more convenient time. This departure from convention on the part of Judge Ferguson, and his strictures that harm must be defined in terms of actual loss from infringing activity became key points during the appeal process.

In October 1981 the United States Court of Appeals reversed the lower court's decision. The Court of Appeals did not set aside any of the lower court's findings of fact but instead considered the four points of fair use, and determined that the lower court had incorrectly applied the law—home use of a VTR was not fair use because it was not a productive use. Therefore, it was not necessary for the plaintiffs to prove harm to their potential market of copyrighted materials, instead it seemed clear that the cumulative effect of mass reproduction which could be made available by the VTR would tend to diminish the potential markets.

In 1984 the Supreme Court of the United States in a five to four decision overturned the Court of Appeal's ruling, to finally confirm that home recording of copyrighted programs was fair use. Justice Stevens, for the majority, wrote³¹:

In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ... When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."

In the dissenting opinion, Justice Blackmun expressed dissatisfaction with the Court's continual evasion of difficulties imposed with technological innovation and copyright law. Constant referral to Congress was, "not the answer," instead Blackmun felt the Court should recognize that the statutory changes of 1976 were intended to cover both old and new technologies³²:

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. A VTR recording creates no public benefit sufficient to justify

³¹ Ibid.

³² Ibid.

limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.

The tension between the ruling and dissenting opinions capture the emotional conflict that occurs with copyright disputes. In the first three quarters of the twentieth century, while observing the creative efforts of authors, composers and the like, the courts maintained an interest in preserving the overall objective of enhancing the public good. But, as digital technology became a consumer technology, and the implications of the information highway became apparent, corporations whose assets rely on intellectual property began lobbying for greater powers under the guise of copyright law.

Napster and MP3.com – The Promise And Perils Of Innovation

A file sharing system called Napster is largely credited for placing the issue of intellectual property in mainstream media. Its fame (or notoriety) surrounded the novelty of a peer-to-peer (P2P) music file sharing system³³. Outraged music industry executives claimed that Napster and its followers were stealing copyrighted works, denying the industry and its artists their fair compensation (Post 2002, 108). Napster's defense

³³ More precisely, Napster did not utilize peer-to-peer technology as its file sharing system required a central server to identify each musical composition as well as where the music resided (Lessig 2002, 135). Nevertheless, Napster is described as helping to launch the new programming movement dedicated towards client-based Internet software (Greenfield 2000).

counsel David Boies³⁴ argued that the technology merely facilitated the legally allowed copying of music (Section 1008³⁵ of the Copyright Act provides a prohibition on certain infringement actions—consumers may make recordings of either digital or audio musical recordings, for noncommercial use). The defense arguments included reference to the Sony decision in the dispute of video tape recorders as well as the current provisions within existing copyright law to shelter Internet Service Providers from liability for the actions of their users. Both Boies and the Recording Industry Association of America (RIAA) concurred that Napster itself had not violated the copyright statute. But record companies, composers and musicians sought to hold Napster accountable for contributory infringement—claiming Napster’s sixty million users were violating the law and the service should be shut down.

Unlike the cases involving Sony, the Napster trials were over swiftly. The recording industry successfully argued that Congress did not have Napster in mind when it passed Section 1008, and, the Sony decision was not applicable as Napster’s noninfringing uses were minimal compared to its infringing uses (Post 2002,110). Furthermore, the Internet Safe Harbour exemption was defined with sufficiently narrow language to exclude services like Napster (Litman 2001, 159); even if Napster could be interpreted as an Internet Service Provider, the Safe Harbour exemption incorporated various procedural pre-requisites that Napster had failed to comply with³⁶. Judge Marilyn Hall Patel ordered the site shutdown pending trial. Given two days to comply, Boies

³⁴ David Boies acted as the prosecuting counsel for the United States Department of Justice during the Microsoft anti-trust proceedings (Heilemann 2000).

³⁵ Copyright Law of the United States, Chapter Ten, Digital Audio Recording Devices and Media.

³⁶ In 1999 Napster did not have a copyright policy in place to offer infringed sites the means of being removed from the Napster directory although it scrupulously followed the policy after requested by various artists to remove their material from the service.

obtained a stay of order from the Ninth Circuit Court of Appeals. After hearing arguments, the court affirmed much of Judge Patel's decision. Napster's file trading network was shutdown on July 2, 2001.

Some advocates of fair use still shudder at the mention of Napster (Clark 2002, 158). It was perceived as a blot on the otherwise pristine page of the nobility of enhancing the public domain³⁷. The popular perception was that college students were unwilling to pay for what are mere commodities, and musicians already struggling in a cut-throat industry were being denied what was rightfully theirs. Lost in the rhetoric was the dimension of the startling innovation—Shawn Fanning and Sean Parker, the creators of Napster, utilized the strength of the network of the Internet itself, and built a community as the notion of the Internet epitomized:

To the extent that you view Napster as nothing more than a device for theft, there is little usefulness in this new mode of distribution. But the extraordinary feature of Napster was not so much the ability to steal content as it is the range of content that Napster makes available. ... A significant portion of the content served by Napster is music that is no longer served by the labels. This mode of distribution—whatever copyright problems it has—gives the world access to a range of music that has not existed in the history of music production. (Lessig 2002, 121)

The potential of this community was lost on the recording industry. For years the recording industry collected the majority of the revenues from music sales arguing they underwrote the expense of music production—the recording studios, the record pressing and compact disc burning plants, and the distribution networks. Even though technology

³⁷ An excerpt from the New York Times, "Copyright law requires a balancing of the interest of copyright holders against the rights of everyone else. Artists are entitled -- despite the arguments of Napster and its defenders -- to a property interest in their work for a reasonable period of time. But the public also has an interest in seeing that copyrights eventually lapse, and that creative work enters the public domain with no need to pay royalties. Contemporary artists are then free to borrow from these older works, a creative tradition that dates back to the ancients (*The Abuse of Copyright*, 2002)."

reduced these costs, none of the major labels proposed a new business model where the revenue distribution between artist and recording company could be rebalanced. No recording company suggested that the costs saved in the production process should be passed to the consumer. Instead, the early proposals for an online music delivery system suggested that, "... consumers should pay the same \$17.99 for an encrypted, downloaded digital file (protected from copying, sharing, lending, or resale) that she pays for an unencrypted, loanable, copyable, resaleable CD (Litman 2001, 168)."

Such disdain (or arrogance) for one's consumers is troubling. The RIAA was determined to eliminate all digital music file trading, including those that were engaging in legitimate distribution of MP3 files. The misfortunes of MP3.com are worth noting. The site was launched by Michael Robertson in 1996 and offered upcoming (unsigned) artists the opportunity to upload their material to the site, add any advertising or promotional material they had prepared, and MP3.com would announce the artist on their new songs list. Individuals could then download or listen to a copy of the song. In January 2000, Robertson also offered users the ability to listen (but not save) music tracks from any compact disc they owned, from any remote location. To utilize this service, users needed to first demonstrate they possessed an actual compact disc by inserting the disc into their CD-ROM drive and transmitting certain identifying information to MP3.com. Then by referring to its own library of compact discs (legally, commercially purchased) MP3.com allowed the user to play their music from different locations. Akin to the time-shifting purpose of the video tape recorder, this was a new era of space shifting. Despite the clear efforts of Robertson to operate within the confines of copyright law (he had negotiated licenses with composers to perform their music and he

was relying on consumers' legal privilege to make copies of their own music) the courts ruled that he hadn't obtained permission from the recording companies to make copies of the recordings. The courts imposed \$110 million³⁸ in damages for Robertson's experiment in providing consumers a different means of accessing their own commodities. Systematically, all efforts to remake the relationship of the Internet consumer were undermined by the entertainment industry³⁹. Instead, the industry pressed for greater control over the consumers, again through copyright law revisions.

1998, A Landmark Year

1998 saw the passage of two acts modifying copyright law, the Digital Millennium Copyright Act (DCMA) as well as the Copyright Term Extension Act (CTEA). Valuable copyrighted material was due to enter the public domain by the close of the century (including early depictions of Mickey Mouse) and the cycle of lobbying by the affected interests began. Lobbyists eyed the European Union where copyright existed as the author's lifetime plus seventy years. As a result the United States copyright terms were increased to match.

Eric Eldred of Eldritch Press challenged this extension in the courts. Eldred was a passionate e-books publisher, placing HTML versions of works that had fallen into the public domain on a free web site. Following CTEA, works that were scheduled to enter

³⁸ Lessig Blog Archives for September 2003.

³⁹ In the summer of 2003 Sony and Universal Music announced plans to reduce the fees for file downloads and allow CD-burning of music files. In a report released by Forrester Research, analyst Josh Bernoff predicted that the popularity of file downloading could revive the flagging industry (overall, global CD sales declined by five percent last year, and are expected to decline a further six percent this year.) However, if the major music conglomerates offer better pricing, and make their full catalogue of music available on line, Bernoff predicted that revenue from downloads could offset the current decline (Weaver 2003).

the public domain became unavailable until the year 2019. In January 1999, in a district court in Washington DC, Eldred filed his complaint, arguing in part that it was unconstitutional to permit Congress to repeatedly extend copyright terms (the Intellectual Property Clause promised an authorial monopoly only for a "limited time.") Both the district court and the court of appeals rejected Eldred's argument, indicating that the copyright clause did not limit Congress to a single "limited time." However, on February 19, 2002, the United States Supreme Court agreed to hear a further appeal on the subject of the Copyright Term Extension Act.

On October 9, 2002 oral arguments began with the final decision handed down on January 15, 2003. The United States Supreme Court, in a 7-2 decision, rejected the plaintiff's claim. Justice Ginsburg, for the majority, wrote⁴⁰:

....The CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a "limited Time" as applied to future copyrights. Petitioners contend, however, that existing copyrights extended to endure for that same term are not "limited." a time span appropriately "limited" as applied to future copyrights does not automatically cease to be "limited" when applied to existing copyrights. And as we observe, ... there is no cause to suspect that a purpose to evade the "limited Times" prescription prompted Congress to adopt the CTEA.

.... In sum, we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the CTEA--which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress' power under the Copyright Clause.

⁴⁰ Eldred et al. v., Ashcroft, Attorney General – No. 01-618 (citation pending)

In his dissent, Justice Stevens wrote⁴¹:

... the respondent relies on concerns of equity to justify the retroactive extension. If Congress concludes that a longer period of exclusivity is necessary in order to provide an adequate incentive to authors to produce new works, respondent seems to believe that simple fairness requires that the same lengthened period be provided to authors whose works have already been completed and copyrighted.

This is a classic non sequitur. The reason for increasing the inducement to create something new simply does not apply to an already-created work.

....

One must indulge in two untenable assumptions to find support in the equitable argument offered by respondent--that the public interest in free access to copyrighted works is entirely worthless and that authors, as a class, should receive a windfall solely based on completed creative activity. ... as our cases repeatedly and consistently emphasize, ultimate public access is the overriding purpose of the constitutional provision.

And in his dissent, Justice Breyer wrote⁴²:

What copyright-related benefits might justify the statute's extension of copyright protection? First, no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works. No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.

.... This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation's historical and cultural heritage and efforts to use that heritage, say, to educate our Nation's children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.

⁴¹ Ibid.

⁴² Ibid.

The outcome was a disappointment to those championing the public domain. The majority opinion shows a letter-of-the-law interpretation of the copyright act without the overall regard of the public well being which had characterized the earlier copyright disputes. Justice Ginsburg reiterated that it is through the mechanism of fair use that the means through which the balance of monopoly of and access to creative works is preserved⁴³:

... the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. ... The fair use defense affords considerable "latitude for scholarship and comment," and even for parody, ...

The CTEA itself supplements these traditional First Amendment safeguards. First it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright ... for purposes of preservation, scholarship, or research" if the work is not already being exploited commercially and further copies are unavailable at a reasonable price.

But, the library exemption neatly implies that private individuals may not engage in such conduct (Litman 2001, 136) and fair use is now threatened by the other modification passed into law in 1998, the DCMA.

Bruce Lehman, chair of the Intellectual Property Working Group, a former copyright lobbyist, and a commissioner of the Patent and Trade Office, led negotiations for the DCMA. The Working Group based its arguments for enhanced copyright protection upon the premise that existing content holders would be unwilling to make material available for the National Information Infrastructure (Lehman 1996, 86). In September of 1995, the Working Group released a White Paper that documented

⁴³ Ibid.

necessary changes needed to adapt the existing copyright act to accommodate digital technology. Those familiar with copyright law agreed that the White Paper interpreted the existing law with the aim of resolving any ambiguity in favour of copyright holders⁴⁴ (Litman 2001, 94-95).

At that time, the United States was emerging from a period of falling productivity (Heilbroner and Thurow 1998, 36). In the 1980s industrial productivity rose by less than one percent annually and in 1989-90 fell by one percent. It recovered marginally in 1992 with productivity at 2.7 percent. Shortly after taking office then President Clinton, directed the Commerce Department to promote investment in the areas which were technology-driven, hoping to spur job creation and bolster exports. Within the Commerce Department, the Patent and Trademark Office was the primary source for creating incentives for technological investment and for protecting American creativity.

The importance of knowledge to our new society is repeated many times over. In both mainstream media as well as academic literature we are bombarded with assertions that our most valuable assets in the world today are what we know.

In the next century U.S. economic growth and competitiveness will largely be determined by the extent to which the United States creates, owns, preserves, and protects its intellectual property (Lehman 1996, 78).

This political directive coupled with the fact that the entertainment industry made an impressive contribution to the U.S. balance of trade—in the range of US\$40 billion in 1993 (Samuelson 1996)—meant that, as before, the existing content holders had

⁴⁴ “Most notably, since any use of a computer to view, read, reread, hear, or otherwise experience a work in digital form would require reproducing that work in a computer’s memory, and since the copyright statute gives the copyright holder exclusive control over reproductions, everybody would need to have either a statutory privilege or the copyright holder’s permission to view, read, reread, hear, or otherwise experience a digital work, each time she did so (Litman 2001, 95).”

considerable influence in the copyright revisions process. Included in the final act signed by President Clinton on October 28, 1998 were measures designed to defeat piracy. Lehman had argued to Congress that international piracy⁴⁵ of U.S. copyright materials (predominantly software and entertainment commodities) would not stop unless the United States Congress showed leadership by enacting tough antipiracy laws (Litman 2001, 134). Again, from the copyright web site⁴⁶ of the United States government:

1201(a) (1) Violations Regarding Circumvention of Technological Measures.

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

The above section declared that it was a criminal offense to circumvent a technological protection measure that inhibits access to a copyrighted work. Of no concern is motive, merely the action. Circumventing a technological protection measure for utilizing the content under the terms of fair use became a criminal act. It is feared, with the law on their side, content holders will now utilize strict technological controls to restrict access to digital copyrighted work with the added effect of preventing legitimate fair use of copyrighted material.

⁴⁵ The music industry claimed to have lost \$2.45 billion worldwide. The software industry claimed to have lost \$15.2 billion in 1994. Later, these estimates were revealed as being flawed (Boyle 1996, 3).

⁴⁶ Copyright Law of the United States, Chapter 12 Copy Protection and Management Systems.

By now I hope I have offered sufficient persuasion that the trend towards strengthening copyright is leading to a diminishment of freely available resources. Property of the individual is held in greater esteem than the public domain of the community. However, readers may still challenge my second assertion, that a diminishment of free resources will prevent future creativity from occurring. To accept the claim that future events will not occur requires some imagination; at best I can only guide the imagination of my readers. Thus, I leave this chapter with a final section to highlight the integral role played by openly accessible resources in the development of the backbone of our Information Society, the Internet itself.

The Open Source Movement

Through the birth and early development of the Internet, much of the commons of code was freely available. This content depended upon the thriving public domain fostered by an atmosphere of open communication and the ability to innovate.

This commons had three aspects. One is a commons of code—a commons of software that built the Net and many of the applications that run on the Net. A second is a commons of knowledge—a free exchange of ideas and information about how the Net, and code that runs on the Net, runs. And a third is the resulting commons of innovation, built by the first two together—the opportunity, kept open to anyone, to innovate and build upon the platform of the network. (Lessig 2002, 49).

Code encompasses two forms, source code and object code. Source code prepared by developers is composed of logical linguistic phrases whose meaning are vaguely intelligible to the human eye, whereas object code is a string of ones and zeros, all but meaningless to individuals. Object code is the machine translation of compiled source code and it is object code which instructs a computer's actions. Modifying the computer's

behaviour is accomplished through the object code, by adjusting the source code. For this to occur, freely available access to the source code is necessary.

The ambiguity in the English language surrounding use of the word “free” can lead to confusion as free means both “available without charge” and “not under the control or in the power of another” (*Concise Oxford Dictionary* 1999, 563). For this reason, many people use the French or Spanish “libre” to refer to open source software. For the purposes of my discussion, I will confine my usage to “open source” as identifying freedom within software development, versus “proprietary” which indicates closed systems (users are forbidden to amend the code.) The following principles guide the open source software movement—users have the freedom to run, copy, distribute, study, change and improve the software. More precisely, users may⁴⁷:

- 1) Use the software as they wish, for whatever they wish, on as many computers as they wish, in any technically appropriate situation.
- 2) Have the software at their disposal to fit it to their needs. Of course, this includes improving it, fixing its bugs, augmenting its functionality, and study its operation.
- 3) Redistribute the software to other users, who could themselves use it accordingly to their own needs⁴⁸. This redistribution can be done for free, or at a charge, not fixed beforehand.
- 4) Users of a piece of software must have access to its source code.

⁴⁷ *Free Software Open Source: Information Society Opportunities for Europe?* was prepared in 2000 by the Working Group for Libre Software, at the initiative of the Information Society Directorate-General of the European Commission.

⁴⁸ Paradoxically, if this freedom is to be guaranteed for a given piece of software, with current legislation, it is necessary to protect the software with a license which imposes certain restrictions on the way it can be used and distributed.

Advantages

One of the prevailing perceived advantages of open source models is that open source software is made available at little or no cost. This characteristic is not limited to open source software—for instance, Microsoft®'s Internet Explorer was bundled into the Windows operating system and both are proprietary software. The most significant difference between open source and proprietary software is the synergistic impact caused by the interaction of the characteristics cited above. Beginning with the fourth characteristic—providing access to the source code—open source software has greater potential for improvements. Combined with the second characteristic—adjusting software to suit ones needs—improvements can range from fixing errors to adapting the application for different hardware environments.

The third characteristic—allowing developers to redistribute modifications or code improvements—enlarges the community of developers for a single application. With greater numbers of developers accessing and studying the code, there are greater opportunities to reach a detailed understanding of how an application works. Useful applications will propagate large user populations, broadening the range of people engaged in the application's improvement. A thriving user base is the best means of ensuring a market for support and further customization.

In as much as these characteristics actively promote better conditions for software development, what is also critical to note is what these characteristics do not allow—unilateral control imposed upon the decision of future software development. With proprietary software, a vendor may choose not to upgrade software originally developed for older platforms. In this case, customers are forced to switch to another product (or

platform) or remain constrained with the older version of the software. Even if the company fails, no one is permitted to continue with their work (unless one takes the steps of purchasing the assets of the failing company—an unlikely scenario for hobbyist programmers.)

Disadvantages

Open source projects are not without their disadvantages, three of which I will describe here. First is the concern that there is no guarantee that development will happen. But, this is also a concern with proprietary software, although more evident in the case of the open source software. Projects that begin without commitment from established development groups may not achieve the critical mass of engagement that is necessary to sustain and promote development. Second, there is the issue of intellectual property. With many countries accepting software patents it is very difficult to know if development on a project will infringe someone's intellectual property rights. To avoid infringement, some developers implement switches that disable offending segments of code, depending on which country the program is operating in. The effort required to verify intellectual property rights as well as to develop such switching mechanisms is effort that could have been better utilized towards development of the actual program. Again, this applies as much to proprietary software as to open source software projects. Open source advocates suggest that the availability of source code in open source projects makes it easier to detect patent infringement before a product is released. And third, there could be a lack of information regarding open source projects and their status (open source projects usually lack the resources for marketing campaigns.) With limited information available, the general public may be unaware of open source products.

One open source product which has reached mainstream availability and greater consumer awareness is Linux, or GNU/Linux⁴⁹, “... the fastest growing operating system in the world (Lessig 2002, 55).” Credited to the efforts of Linus Torvalds and Richard Stallman, this operating system has been ported to every major chip and is supplied by commercial as well as non-commercial companies.

The Foundation Of The Internet

Linux is merely one of several successful open source projects. We take the Internet for granted today, not realizing the extent to which its structural foundation relied upon earlier open source development—notably, the Apache server. Servers are the components of the Internet that deliver (or serve) content. It was expected that commercial entities would build and sell servers. Microsoft did, as did Netscape—however, there was one version of a Web server that was made available for free, the HTTP'd server produced by the National Center for Supercomputing Applications (NCSA). As the NCSA was publicly funded, the source code for their server was freely accessible to others. A group of developers who adopted the HTTP'd protocol began to share fixes, or patches, to the server. As development proceeded, the group decided to create a new server on top of the NCSA server. This server, called the Apache server, was a free, open source offering to the world. In July 2003, the Netcraft Web Server Survey reported that 63% of the web sites on the Internet are using Apache servers, thus making it more widely used than all other web servers combined.

⁴⁹ Linus Torvalds created an operating system (based on an educational operating system call Minix), and released it openly to the Internet in 1991. Many developers contributed to improve the system. Richard Stallman, a researcher at MIT and an early proponent of the necessity of openness, was building a free version of Unix called GNU. Stallman lacked a kernel; by combining with Torvalds creation, the new operating system, GNU/Linux, was born.

Two more integral aspects of the Internet also resulted from open source development:

It's easy to argue that the open-source BIND (Berkeley Internet Name Daemon) program that runs the DNS is the single most mission-critical Internet application⁵⁰. Even though most web browsing is done with proprietary products (Netscape's Navigator and Microsoft's Internet Explorer), both are outgrowths of Tim Berners-Lee's original open-source web implementation and open protocol specification. (Oreilly 1999)

There are many more examples relating to the role of open source projects in the development of the Internet. A detailed study is worthy as a thesis in its own right. I will confine my illustrations to those noted above, and simply emphasize that proponents of open source have ensured the continuation and growth of their public domain by providing within their development model a legal framework to ensure equitable access for all future developers. Originally devised by Richard Stallman, the legal framework is sometimes referred to as copyleft (Vaidhyathan 2001, 156). Copyleft licenses require that any modifications to open source software be released within its user community. Anyone who progressively modifies such software retains the copyleft license. The software itself is not given to the public domain; it may be more appropriate to say it never left.

As I write these last pages, a cloud has moved over the open source horizon—legal disputes amongst contributors to Linux threaten the future of the open source movement. SCO/Caldera alleges that an AT&T license acquired by SCO gave control to SCO over extensions to the Unix kernel. In the parlance of intellectual property rights, SCO is claiming ownership over derivative works of the operating system. If their claim

⁵⁰ This application allows website names to be connected to IP addresses.

is successful, SCO/Caldera will be entitled to a licensing fee from all commercial users of Linux. The case is currently awaiting the courts' decision.

The Open Source Initiative (OSI) prepared a detailed position paper describing the historical events surrounding development of the operating system and systematically refuted SCO/Caldera's claims. Eric Raymond, the president of OSI and a principal author of paper, offers the following remarks:

... judgment in favor of SCO/Caldera could do serious damage to the open-source community. SCO/Caldera's implication of wider claims could turn Linux into an intellectual-property minefield, with potential users and allies perpetually wary of being mugged by previously unasserted IP claims ...

On behalf of the community that wrote most of today's Unix code ... we protest that to allow this outcome would be a very grave injustice. We wrote our Unix and Linux code as a gift and an expression of art, to be enjoyed by our peers and used by others for all licit purposes both non-profit and for-profit. We did *not* write it to have it appropriated by men so dishonorable that after making profit from our gift for eight years they could turn around and insult our competence.

Damage to the open-source community would matter, because we are both today's principal source of innovation in software and the guardians and maintainers of the open Internet. ... Our creative energy is what perpetually renews and finds ever more exciting uses for computers and networks. The vigor of our culture today will translate into more possibilities for everyone tomorrow. (Raymond 2003)

Conclusion

Proponents of strengthening intellectual property rights argue that creativity will not occur without assurances of protection and compensation; society must provide adequate incentives for entrepreneurs or innovators to invest the time and resources required to develop (in this case) new media. Yet the brief historical picture I painted suggests otherwise. My research to-date illustrates that until the late twentieth century,

intellectual property regulation in the United States co-existed with an environment conducive to creativity and innovation, ushering in a period of ingenuity unparalleled since the Industrial Revolution (Lessig 2002, xxii). Within my focus of copyright law, I have offered specific instances where the law protected owners and creators, and yet was cast in sufficiently broad terms that the judiciary could engage in a wider interpretation towards upholding the overall goal of public betterment. Unfortunately, the changing landscape of intellectual property regulation systematically narrowed the allowable interpretation of copyright law, and this now poses a threat to harmony between creativity and compensation.

Chapter Five

Conclusion

Contemporary justification for property rights in immaterial or intangible objects is often based upon a metaphorical link to property rights in material objects (May 2002, 165). From this relationship, the foundation of the Western regime of intellectual property rights amalgamated three main themes—the right of reward for one’s labour, the element of personality imprinted upon one’s creation, and the necessity of creative activity to the well-being of a society. The first two themes flow from philosophical origins while the third is of a more pragmatic basis. When intellectual property rights are discussed these arguments appear, to varying degrees, in academic literature, mainstream media, and by industry advocates. These three choices are by no means an exhaustive list of the taxonomy of property rights, intellectual or otherwise. However, arguments favouring strong systems of intellectual property protection are usually drawn from these areas (Palmer 2002, 43-46).

In Chapter One I explored the origin of these themes; elements of all three surfaced during the transformation of copyright from a trade regulation to means of protecting authorial property. Changes in the statute were indicative of general changes in society—the idea of the individual, creative genius was taking root. At its zenith, the

essentially immaterial (and thus noble) disposition of literary creation further justified the rewarding and protection of authorial labour by a grant of property.

The evolution of the concept of private property was my focus for Chapter Two. Drawn from the writings of John Locke, the incentive of property provides the necessary encouragement for individuals to engage in productive and creative activity. Locke's philosophy is well suited to justifying intellectual property; omitting the problems that usually arise when the philosophy is applied to physical property (Hughes 1998). I utilized two differing interpretations of Locke's work, those of James Tully and C.B. Macpherson, to emphasize that claims of private property are contingent upon a community's conceptual view of property. In particular, what is the purpose of property—to serve the individual or the community? I concluded Chapter Two by situating the encouragement of intellectual development as necessary for the growth and well-being of a community.

In Chapter Three, through a review of some of the judicial applications and legislative changes of the United States' copyright law, I illustrated that the boundaries of the public domain are affected by the application of private interests. I began with a dispute over the meaning of the word "copy." Early in the twentieth century the copyright of musical compositions was considered as infringed by the new industry of player pianos. While the claim of infringement was rejected at all three levels of the United States judiciary, one Supreme Court justice voiced his concerns that the abstract nature of copyright implied that the essence of a musical composition should be protected. Further amendment to the copyright statute endeavored to establish such protection while

maintaining an equitable balance between composers and music publishers, and, the new industries.

From this point I examined the means by which the judiciary balanced (in the absence of a statutory provision) the rights of the public with the monopoly allowed to creators. In *Williams and Wilkins Co. v. The United States* the medical publisher sued the National Library of Medicine for infringement (for providing photocopies of articles to medical professionals.) The significance here is the claim of infringement was made against a public sector institution. The publishers argued to protect the integrity of copyrighted materials, even though the source of the materials themselves, scientific research, was largely produced and made available by public funding (Bettig 1996, 161). Again, this case passed through all three levels of the United States judiciary but with mixed results—illustrating the complexity of this issue. At that time, the judiciary placed the issue of the furthering of public knowledge as a productive use of copyrighted materials and denied the claim of infringement.

The debate over productive use was furthered in the cases surrounding the use of videocassette recorders (VCRs). Universal City Studios, Inc. claimed that Sony Corp. was liable for contributory copyright infringement—by marketing their new technology Sony Corp. allowed individuals to make recordings of copyrighted work which had been aired on commercial sponsored television. Like the Williams and Wilkins case, the outcome differed between the district court and the court of appeals. Two salient points that emerged were (i) the consideration of individuals engaging in noncommercial use in the privacy of their homes, and (ii) a technology may have infringing capability but if the

same technology was capable of non-infringing use, it would be to the detriment of the public to ban the technology entirely.

These elements, upheld by the United States Supreme Court in 1984 with respect to videocassette recorders, were not recognized with the advent of digital music files and peer-to-peer file trading. Nearly twenty years later, in a climate of heightened intellectual property consciousness, innovation and the public good ceased to be the prevailing concerns within the judiciary. Instead, observance of the letter of copyright law became the issue. And, unfortunately, the letter of the law of copyright has become so stringent that courts are protecting commercial assets of established industry through a law that purported to advance the progress of arts and sciences. With each copyright revision through the past century, the depth and breadth of copyright expanded. In a pattern repeated with each revision, existing industry crafted newer copyright laws to combat the threat posed by any upcoming media industry. Culminating in the 1998 revisions (the Digital Millennium Copyright Act as well as the Copyright Term Extension Act, DCMA and CTEA respectively) copyright law is now a network of restrictions where public access is hidden from easy view.

Barriers to accessing the public domain are legally justified through the intricacies of copyright law. During the twentieth century in the United States, a shift in intellectual property policy occurred—subtle at first, then with a brazen outburst—intellectual encouragement moved to intellectual protection and individual property became of paramount importance. Property rights are justified, “... on the basis that they underpin a market structure which ensures an efficient use of valuable knowledge resources.” (May, 2002, 167).

The language of efficiency has become part of both the public and market consciousness—glorified especially with respect to an efficient production of knowledge (Stein 2001, 51). Within the rhetoric of the knowledge economy and information society, it is touted that knowledge is our most important resource. Yet, lurking within our collective consciousness is a distrust for government control of valuable resources—in the *Cult of Efficiency*, Janice Gross Stein quotes Robert Mundell (a Nobel Prize winning economist) as saying, “Whatever you let the government run, it runs badly (Stein 2001, 39).” Our media, political leaders, and private corporations endlessly debate whether the state or market is the most efficient provider of public goods. The debate has ended with respect to private goods, “... in our postindustrial society; the market reigns supreme and unchallenged (Stein 2001, 37).”

At this juncture of my thesis I do not wish to enter the debate regarding public/private efficiency in controlling resources. Instead, I will simply reiterate my concern that increasing the control of knowledge resources will result in an environment less hospitable for innovation. Earlier I noted that there are no logical means of verifying claims of the future—instead one must keep an eye on the past while moving forward. The difficulty lies in the unpredictability of creativity. From past history, we see it takes time for a successful creative endeavor to reach its full potential—at their inception many of the technological innovations of the twentieth century were not clearly evident (Rosenberg 1998, 24). Said another way, the full meaning of an innovation may arrive well after the innovation itself. In my introduction I suggest that the link between information and knowledge is meaning—then, if we cannot quickly and easily determine a meaning, should we attempt to control and constrain the information that may convey

the meaning? What will the ramifications be with respect to future knowledge?

Regardless of ones' position regarding strong or weak intellectual property rights, I believe all will agree on the necessity of a strong knowledge base to creative endeavors.

Control is exerted primarily by private concerns, a force which originated from the Stationers' Company, and emanates today primarily from the entertainment industries. Backed by government legislation, through the mechanism of intellectual property rights, these industries have created an artificial market. While in the physical realm, value is usually determined by scarcity, in the intellectual realm value is ensured by creating scarcity (Plant 1974, 36). So despite the exaltations that knowledge resources are unlimited, to reap value from these resources an environment of artificial scarcity must be imposed.

I should note that the conditions of control and scarcity, which have been lobbied into law by the entertainment industry, are not unique to that industry alone. A rich source for the public domain is scholarly publication, yet journal subscriptions to private publishers have steadily increased over the last ten years (*The Bowker Annual* 2003, 492). This despite the advent of electronic journals, which can reduce the costs of production and distribution (*Create Change*, 2001.) Some argue that the electronic age will serve to further increase costs for these publications—site licensing, previously cast in generous terms, can now be controlled on a per user basis (Bergstrom and Bergstrom, 2002). As publication is a vital component of academic advancement, private publishers enjoy a captive audience as their consumer. However, various initiatives are underway to address the issue of rising prices including journal subscriptions through consortia and the

implementation of electronic archives as a viable alternative for access to scholarly materials (Fernandez, 2003).

In 2001, the Massachusetts Institute of Technology (MIT) took the unusual step of posting their courseware online. The goals of this initiative were described as:⁵¹

Provide free, searchable, access to MIT's course materials for educators, students, and self-learners around the world.

Create an efficient, standards-based model that other institutions may emulate to openly share and publish their own course materials.

The issue of access to scholarly work (either in the form of courseware or peer-reviewed publication) is symptomatic of a more general issue of access to information. The technological basis of our Information Society can vastly improve access to information while simultaneously inhibit access. Information is now deemed a wealth in society, a property in fact. We speak of information “haves” and “have-nots”—digital technology and the distribution capabilities of the Internet could equalize access to the world’s information resources or deepening the gulf between the information-wealthy and the information-poor.

The Promise And Peril Of New Technology

The information infrastructure of our society offers both promise and peril. On the more positive side, the availability of moving information through the Internet (be it as sharing or marketing) is potentially unlimited as expenditures for storage media and distribution are greatly reduced. Just as striking are the concerns on the negative side—

⁵¹ MIT Open CourseWare

from the perspective of creators, if global distribution is capable from one electronic library copy how many copies of a work will be legitimately sold?

Two factors contributed to this dilemma, “First, a trio of technological advances has produced radical shifts in the economics of reproducing, distributing, controlling, and publishing information. Second, the information infrastructure has become a part of everyday life, and thereby run headlong into intellectual property law as never before. (Samuelson 2000).” The first factor, the technological advancements, has altered prior means of reproduction and distribution. Information in digital form can be perfectly replicated, each replica a potential seed for further duplication. The right of reproduction, the copyright of a work, was the hallmark of intellectual property law concerning ownership and distribution of a creative work. Intellectual property law was established with the assumption that reproduction of an original was a costly affair, prone to degradation, and not easily engaged in by individuals. This leads into the second factor, namely that computer usage has permeated daily life. “Today, the average individual can easily do with his or her own computer a kind and extent of copying that would have required a significant investment (and perhaps criminal intent) only a few years ago (Samuelson 2000).” Because of this ease, some copyright owners have pressed for greater control over the means by which digital works are accessible by private individuals. In the past, copyright focused on the control of public exploitations of protected works; now it is becoming a means of regulating private use.

The problems created by advancement in information technology are difficult to resolve within intellectual property law for many reasons, three of which I will touch on here. First, copyright law is complex—relying on general principles such as the “right to

reproduction”, subtle conceptual distinctions such as “idea versus expression,” and, a raft of special cases⁵². Second, over the past century, copyright law was molded by affected industries at each stage of media development, resulting in continually increasing depth and breadth of entities eligible for copyright protection. Protection once given is particularly difficult to retract or even amend. As new media enters copyright law, existing rights holders are unwilling and unlikely to concede for less protection than what they have previously enjoyed. And third, intellectual property laws are now a matter of global negotiation, with the United States leading the way in calling for greater measures of protection for intellectual products and greater harmonization in the interests of competitive trade (Tisdall 1990, 18).

In my judicial review of Chapter Three, I found that elements of these problems occurred continually through the twentieth century. At any time, the existing copyright law could not present a clearly delineated path through the obstacles introduced by an emerging technology. It fell to the judiciary to interpret the law, in its ever-increasing complexity, and settle each dispute. As the century unfolded, established industry ensured that greater emphasis was accorded to the individual right of property with only lip service paid to the rights of the public. The eighteenth century classical economics position, “... exclusive private property would foster the well-being of a community (Rose 1986, 711),” was evident. Macpherson’s Locke took centre stage, eclipsing the movements of his partner in Tully—the public domain was increasingly partitioned and trespassing sternly discouraged. In Chapter Three I concluded with a striking anomaly to

⁵² For instance, under the terms of Canadian copyright law, “ownership of a portrait vests in the creator of that portrait,” whereas, “even though a photographer may be the person principally responsible for the composition of a photograph, he or she does not automatically own that photograph unless he or she is the owner of the negative or plate from which it was made.” (Harris 2001, 83).

these sentiments, namely the open source movement. The fluidity of environment played a significant role in the development of the Internet (a fundamental component of our Information Society.) Not every project developed under open source guidelines has led to commercial or even technical success. However, even those that failed contributed to a deepening of knowledge in that area, allowing others to move ahead. The effect being that the confines of the public domain were pushed further back, and innovation abounded. Unfortunately, the public domain of the open source movement may yet fall prey to proprietary claims.

Despite these difficulties, many individuals are working to re-invigorate the concept of the public domain in copyright law. I wish to draw attention to the work of Lawrence Lessig, a professor of law at Stanford Law School. Lessig is a passionate promoter of equitable intellectual property rights; his writings beautifully articulate his belief that with balance, intellectual property and creativity operate in a symbiotic relationship and will foster a thriving public domain (Lessig 2002, xvii).

Renewing The Public Domain

Lessig has pursued his beliefs of equitable intellectual property rights with functional proposals for change. He is the chairman of Creative Commons (a nonprofit organization dedicated to promoting the re-use of creative intellectual work), he was the advocate for Eric Eldred in the Supreme Court challenge to the CTEA in 2002, and he was the architect for a proposal to amend copyright policy in the United States—the Public Domain Enhancement Act (PDEA)—which was introduced by representative Zoe Lufgren on June 25, 2003. Lessig's proposals are in themselves innovations, combining

the capabilities of digital technology, the distributive reach of the Internet, and the strength of a likeminded community.

Creative Commons

Creative Commons presents a viable alternative to the current intellectual property regime, maintaining a commitment to the principles of intellectual property rights while regaining a balance between individual and community. Any intellectual creation (text, film, photographs *etc.*) is eligible for publication through the site. Without changing current law, creators can obtain a “Founders Copyright” by a contractual agreement (for a fee of \$1.00) with Creative Commons. The term of the copyright is for 14 years, and may be extended to 28 years. Precisely the duration of the original term of copyright as set out by Thomas Jefferson, James Madison and the other founding fathers of the United States. A central registry is kept of all content with the expected date that the creation will enter the public domain. Individuals who wish to share their work immediately are presented with a range of licensing options that will allow others to build upon the creation while upholding the desires of the creator. That is to say, creators may specify the extent to which others can utilize a work, insist upon attribution rights, and protect themselves against commercial exploitation of their creative endeavors.

The process of due diligence for each license is verified by qualified members within the Creative Commons staff, yet the overall process of entering into this contract is remarkably user-friendly. Each license is provided in three forms, one easily read, one composed in strict legal language, and one in a machine-readable form that can be easily incorporated into electronic offerings. As the Creative Commons network grows, parallel

licenses are offered in other countries, observing those countries' statutory requirements. At present, Brazil, Finland and Japan are member countries of the International Commons (iCommons) project.

Eldred et al v. Ashcroft, Attorney General

The outcome of the challenge in 2002 to the CTEA was disappointing with the statutory term of copyright confirmed to near perpetuity (provided extensions are enacted on an "installment basis"⁵³.) Yet, there is hope amongst the disappointment, as the activity surrounding the case brought the issue of the public domain to mainstream media, with the New York Times leading a wave of support.⁵⁴ Furthermore, the court case itself was crafted upon the principles of the open source software development—utilize the strength of a community to better an application (or in this case, a legal argument). In the challenge to CTEA, Lessig and others formed OpenLaw, an experiment in crafting legal argument. Through a website at Harvard Law School's Berkman Center for Internet and Society, lawyers and non-lawyers alike were encouraged to participate by developing arguments, drafting pleadings, and editing briefs. Despite the loss in Eldred et al, the OpenLaw project continues.

In his dissenting opinion in the Eldred case, Justice Stevens stated that only one year of copyrighted work (those copyrighted in 1923) entered the public domain during

⁵³ Testimony of Professor Peter Jaszi during the "Copyright Term Extensions Act of 1995: Hearings on S.483 Before the Senate Judiciary Committee" 104th Cong. (1995) (Lessig 2002, 198).

⁵⁴ The late edition of the New York Times on January 16, 2003 said, "... Supreme Court decision validating 1998 law extending duration of copyright protection may signal beginning of end of public domain ... the public domain has been grand experiment bearing fruitful creative ferment, and should not be allowed to die (*Supreme Court Docket*, 2003)."

the last eighty years⁵⁵. Justice Breyer; in his dissent, provided an economic analysis showing that only 2% of copyrighted material between 55 and 75 years old would have any commercial value. In the aftermath of the Eldred loss, Lessig once again set to work to address the issue of the public domain; his efforts took the form of a bill, the Public Domain Enhancement Act (PDEA).

PDEA

If Lessig's proposal is ultimately successful, he will bring more material to the public domain than if the Eldred challenge had won. The Eldred challenge sought to halt an increase in copyright term so that material due to enter the public domain (by the previous copyright term of an author's lifetime plus fifty years) would not continue to held as private property. This encompassed material created prior to the Second World War. Instead, the PDEA approaches the issue of protection by linking it to commercial value. If a creation loses its value before its term of copyright expires, it is of no loss to the creator to facilitate its movement to the public domain. In addition to the concern of the shrinking public domain, Lessig crafted a bill that also addressed the following: 1) the inability of artists and public to determine whether a work is protected by copyright law; and 2) the difficulty in locating a work's owner. Currently, these two issues are obstacles for would-be creators, even those who wish to legally utilize an existing work for further creative endeavor.

The concept behind the bill is straightforward, requiring copyright holders to pay a nominal fee (*i.e.*, \$1.00) after fifty years, and then every ten years thereafter to maintain

⁵⁵ "...only one year's worth of creative work--that copyrighted in 1923--has fallen into the public domain during the last 80 years (Eldred et al. v., Ashcroft, Attorney General – No. 01-618 (citation pending))"

his or her exclusive rights—note that Lessig is not attempting to change the duration of copyright. Also, electronic submission and monitoring will ease the administrative burden placed on the Register of Copyrights.

The commercial and public benefits of this bill would be numerous. Publishers could cheaply print literary classics without the burden of royalties. Filmmakers would be more able to create new adaptations of previously forgotten stories. Artists could pull from works in the public domain without having to pay exorbitant licensing fees or the cost of locating copyright holders. Educational institutions and libraries would be able to teach and provide students access to a greater amount of information and new ideas.⁵⁶

But Lessig's early attempts to find a member of the United States Congress willing to introduce the bill were unsuccessful. Benign as this proposal was, it still represented a challenge to the entertainment industry. And, without any (perceived) benefits⁵⁷, the political risks of displeasing the entertainment industry are significant. Only after Lessig launched an online petition, gathering more than 15,000 signatures, did Members of Congress take note. This unawareness on the part of government representatives of the necessity of a public domain, let alone the domain in actuality, is testimony to the entrenchment of the notion of the creative, isolated genius.

Holistic Individualism

As illustrated in Chapter 1, the concept of creativity resulting from personal labour gained societal acceptance through the course of the eighteenth century. Prior to the Romantic Movement, creativity was the domain of God where man was merely the intermediary through which creative endeavors passed. Following the Romantic

⁵⁶ Public Knowledge Supports Bill to Rebuild Public Domain

⁵⁷ Lessig Blog Archives for May 2003.

Movement, creativity was seen as an individual act. In this interpretation, the ontological basis for creativity was some form of individualism. At the polar opposite, creativity can consume the notion of individuality, where an individual becomes entirely subordinate to various collectives or impersonal forces.

Drahos states that neither view is entirely appropriate, “It is incomplete at best to say that creativity is exclusively an individual act or alternatively that it is the manifestation of greater forces outside the individual (Drahos 1996, 61).” The former overlooks the necessity of tradition—creativity is linked to tradition. This is true even among the avant-garde of creators—such creators are reacting against tradition, yet tradition sets the context of their new creation. In the latter case, those who see creativity as solely an outcome of social forces and conformity ignore the creators who begin as rule-breakers, who develop ways of looking at the world which have no immediately recognizable fit with pre-existing norms.

The tension between these differing views of creativity can be alleviated with a different ontological basis—one described by Philip Pettit as holistic individualism (Pettit, 1993, 112). Pettit argues that social ontology has two axes, and defends individualism on the vertical axis and holism on the horizontal axis.

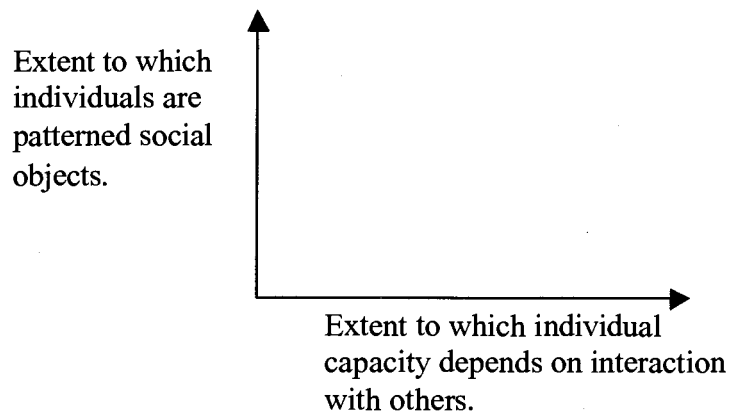


Figure 1: Cartesian Representation of Holistic Individualism

Pettit's ontological basis allows for a different means of thinking about creativity. Individuals assume dual and contrary roles. During the act of creation, individuals assume the role of a borrower, linked through cultural tradition. Upon completion of creation, each individual dons the guise of pioneer or innovator. "It endorses some version of individualism, for it recognizes an autonomous capacity of individuals to create. But it also implies that individuals only reach this capacity with the help of others, for in the role of borrower, the creator sits at the table with of others (Drahos 1996, 62)." Pettit's framework builds the stage for a return of our dialectical dance, partnered by the two identities of John Locke. If we remind ourselves that Locke's intentions were to preserve social institutions, we see a place in the spotlight for both Tully's and Macpherson's Locke. As intellectual property rights confirm the role of the creator, it falls upon the intellectual commons to strengthen the role of the borrower. The interaction required during the creative process may occur with a physical presence of others, or consist of drawing from abstract objects which embody the thoughts of others.

I contend then that this interaction is communication—metaphorically speaking, a conversation. Words take on meaning from other words, and in their relation to the context in which they are spoken and written. For innovation and creativity to survive, conversation is essential. By erecting more and more boundaries around ideas, intellectual property rights are leading to a stifling of conversation.

In my introduction I offered a famous quote by Thomas Jefferson, likening ideas to a flame. Eloquent as it was, it masked the importance of the environment to the flame. When deprived of oxygen or fuel, a flame is extinguished. Similarly, without conversation and collaboration, ideas will never be more than ideas. Carey argues that language is not a system of representation but a form of activity, and speech captures this activity best. He chooses the metaphor of hearing over seeing and offers these insights from Dewey which are still (if not even more so) appropriate in our new millennium:

Vision is a spectator: hearing is a participator. ... There is no limit to the intellectual endowment which may proceed from the flow of social intelligence when that circulates by word of mouth from one to another in the communication of the local community. ... We lie, as Emerson said, in the lap of an immense intelligence. But that intelligence is dormant and its communications are broken, inarticulate and faint until it possesses the local community as its medium. (Carey 1989, 79).

Erecting boundaries (complete with no trespassing signs) discourages and prevents contact. Within the world of intellectual property, this discourages conversation. For innovation and creativity to survive, conversation is essential.

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