Do Copyrights Help or Hurt in a Digital World?

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Abstract

This paper examines the historical development of copyright law and makes some observations about its confluence with technological change. The constituencies of creators, distributors and users have driven copyright law to a restricted business model that seems to be no longer applicable in the digital world. Copyright can both help and hurt in the digital world. In reality, traditional principles of copyright law are becoming increasingly irrelevant to the flow of content and information in the present digital world.

To effectively evaluate copyrights in a digital world, a few critical observations must be made about copyright law and its intersection with changing technologies.

First, throughout history, three categories of primary players appear in the realm of copyright law: *creators* - those who create copyrightable works, *distributors* - those who promote and distribute copyrightable works, and *users* - those who use copyrightable works. Creators include authors, journalists, composers, lyricists, choreographers, painters, illustrators, sculptors, software developers, photographers, and the like. Distributors include printers, booksellers, publishers, record labels, movie studios, etc. Users, of course, include those who are at the end of the commerce stream of copyrightable works, and include those who acquire certain rights or copies from *distributors*, and those who read, view, purchase, download, listen to, store, copy, display, translate, and adapt works, whether copyrightable or not. Some may wear more than one hat, or even all three. For example, a newspaper publisher may create its own content (*creator*) and also distribute it (*distributor*). In some instances, it may also copy the copyrightable works of another (*user*). But each category has different rights and has influenced the development of copyright law in different ways. These influences have changed over time in ways that affect the fairly discernible bright line distinctions among the categories.

Second, and also throughout history, copyright law has generally lagged behind the development of technology, including the technologies of creation, distribution, and use. As such, copyright law has been reactionary in nature. For example, after the introduction of Gutenberg's printing press to England by William Caxton in 1476, the Stationer's Company was granted a monopoly by the monarch over all printing and distribution of books in England, *i.e.*, the first copyright – some say to enable censorship of information by the crown.[10] While the printing press greatly expanded the opportunities for creation and distribution of printed works, the Stationer's Company attempted to restrict the same opportunities by controlling both the creation and distribution of works. Consequently, the

[10] *The Stationer's Company: A History, 1403-1959*. Cyrpian Blagden, Harvard University Press, 1960

first copyright was established on a business model of scarcity that restricted the flow of information.

The Statute of Anne in 1709 moved the monopoly from the printers of the Stationer's Company (*distributors*) to the authors of the created works (*creators*) and established the framework for the copyright law that we have today, which is a market monopoly in the *creators*,[11] and continuation of the business model based on scarcity. But enforcement of those rights was honored more in the breach. Where the Statute of Anne sought to continue restrictions on *creation* and *distribution* of printed works, copying (unauthorized *use*) nevertheless expanded. The statute was territorially limited. Copying and distribution of unauthorized copies moved to territories not covered by the statute. And the scope of the copyright was unclear.

By the 1770's, Britain's North American colonies, fueled by Scottish and Irish expatriates, became a hotbed of copying and selling British copyrighted works without permission - perhaps one of the many conflicts that ultimately led to the Revolution. Copyright law in the colonies themselves was spotty, limited, and reactionary to special interests.[12] In the seminal case of *Donaldson v. Beckett* in 1774[13], the House of Lords officially contracted the monopoly of *creation* and *distribution*, affirming that there was no common law copyright and that copyright shall not be perpetual but have a limited duration. The British power to protect the rights of authors in their creations became enshrined in our Constitution, where Congress is given the power to secure for limited times to authors the exclusive right to their writings.[14]

In the United Sates, technology continues to challenge the Constitutional language and the laws enacted to further the Constitutional power. For example, the scope of exactly what constituted "writings of authors" was questioned in the early 20th century, by new technology. A new product called the piano roll became very popular where music could be played mechanically on a piano. A music publisher (a *distributor*) sued a maker of piano rolls (a *user*) for copyright infringement. The Supreme Court held that piano rolls were not copies of a copyrighted musical work under the copyright law as it existed at that time.[15] In other words, in the early 20th century the scope of protectable writings did not extend to something readable only by a machine.

Bringing us closer to the world we examine here, digital computers and the instructions that computers read to do what they do (known as software), were the progeny of World War II.[16] The invention of the transistor in the 1950's greatly accelerated the digital world, and the question of whether software was copyrightable was ripe. In 1964, a Columbia University

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[11] The Statute of Anne, 8 Anne, c. 19 (1710)

[12] *Copyright Law and Practice*, William F. Paltry, Bureau of National Affairs, Inc. 2000

[13] *Donaldson v Beckett*, 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257 (1774); 17 Cobbett's Parl. Hist. 953 (1813)

[14] (Art. 1, Sec. 8)

[15] *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908)

[16] See, *e.g.*, *First Draft of a Report on the EDVAC*, by John von Neumann, (University of Pennsylvania, (June, 1945)

law student sought to register a printout of a computer program in the U.S. Copyright Office. To the surprise of nearly everyone, the Copyright Office registered it without controversy. The Copyright Office concluded that a computer program was like an instruction book and protectable by copyright just like a book, if, among other things, the elements of assembling, selecting, arranging, editing, and literary expression that went into the compilation of the program (*i.e.*, its *creation*) were sufficient to constitute original authorship under the statutory language of the 1909 Copyright Act.[17]

Congress passed the 1976 Copyright Act in an attempt to keep pace with technology, enlisting an appointed group to provide special guidance, the National Commission on New Technological Uses of Copyrighted Works (referred to as CONTU).[18] In 1978 CONTU reported to the Congress its recommendations, including a definition of "computer program" and a right for a user to make an archival copy of a lawfully obtained computer program, changes Congress implemented in 1980.[19] But almost no one anticipated the rapid pace of change about to come in the late 20th century and early 21st century through today. The 1976 Copyright Act was out of date within a few years of its enactment. We have seen an explosion of information transmission over the internet, including the near instantaneous streaming of audio, video, music, graphics, and written content to cell phones that have more processing power than the Apollo moon mission computers just prior to the 1976 Act.[20]

The third observation is that while technology continued to outpace copyright law, *creators*, *distributors* and eventually *users* have banded together from time to time in groups to facilitate, enforce, and sort out their respective rights, both in commercial practice and in the copyright law itself. Consequently, much of our modern copyright law is really a negotiated statute, achieved by practical compromises among the various constituencies of *creators*, *distributors* and *users*. For example, in reaction to the Supreme Court's *White-Smith Music Publishing* piano roll decision, the *creators* and *distributors* persuaded Congress to change the copyright law to implicitly include machine readable works.[21] However, the *distributors* and *users* also persuaded Congress to balance this new extension with a compulsory license to permit recording a work if the *creator* had ever permitted a recording.[22]

On the commercial front, some *creators* and *distributors* formed an association called American Society of Composers, Artists and Publishers (ASCAP) to assure that member *creators* and *distributors* are compensated by *users* in public performance of their works.[23] In a Supreme Court case in which ASCAP prevailed against a restaurant *user*, Justice Holmes affirmed the incentive underpinning of copyrights: "If music did not pay, it would be given

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[17] http://digital-law-online.info/lpdi1.0/treatise17.html
[18] Public Law 93-573
[19] http://www.cni.org/docs/infopols/CONTU.html
[20] http://www.nasa.gov/audience/foreducators/diypodcast/rocket-evolution-index-diy.html
[21] 17 U.S.C. §102(a)
[22] 1-2 Nimmer on Copyright § 2.03
[23] http://www.ascap.com/about/

up. Whether it pays or not, the purpose of employing it is profit and that is enough."[24] Thus entered the concept of compensation to the copyright holder regardless of whether the owner charged a specific fee or not. But with the rapid expansion of radio toward the middle of the 20th century, commercial conflict among factions in ASCAP led to the formation of another group of *creators* and *distributors* in Broadcast Music, Inc. (BMI) to collect royalties. Together ASCAP and BMI now divide more or less equally about $1.8 BB in revenue.[25] Performing rights alone sustain a commercial juggernaut.

Aside from the performing rights groups, other *creators* and *distributors* banded together for mutual benefit. In the 1920's, in reaction to public pressure to censor the perceived licentiousness of Hollywood, some *creators* and *distributors* (the major studios) banded together to form the Motion Picture Producers and Distributors of America (MPAA) to self regulate the Hays code.[26] In the postwar 1950s when sound recordings became commodities in an increasingly consumer-oriented culture, some *creators* and *distributors* of sound recordings formed the Recording Industry Association of America (RIAA).[27]

Later, *users* started banding together to clarify their rights, most notably under the newly codified fair use provisions of the 1976 Act. And the proliferation of the plain paper copiers and audio tape recorders stretched the resources of the *creators* and *distributors* to enforce the copyright laws. Libraries and educators (*users*) lobbied for guidance on use of copiers in libraries and in the classroom, and restrictions on enforcement actions. Congress inserted some exceptions into the Copyright Act and published guidelines.[28] On the other hand, Universal Studios and Disney (*creators* and *distributors*) felt threatened by the introduction of a home videotape recorder (VCR) that enabled *users* to copy TV content. So they sued Sony (who made the Betamax VCR) as a contributory copyright infringer because it made and sold a device that permitted copyright infringement by *users*. *Users*, however, benefited when the Supreme Court ruled that the technology had significant non-infringing uses, *i.e.*, private, noncommercial time-shifting of TV content by the use of VCR's in the home is a fair use.[29]

Since the Sony case, the internet has enabled unauthorized copying and distribution of content in unheard of ways. The rapidly diminishing costs of personal computers, the faster and cheaper memory, the advent of cellular telephones with cameras and touch screens, wireless digital communications, handheld music and video players, compression technology, and ever wider bandwidth to make it all faster have made our current digital world a place unimagined even 25 years ago. One person can copy and distribute virtually any content to millions of people worldwide with a single click of a mouse or a single tap on a keyboard.

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[24] *Herbert v. Shanley Co.*, 242 US 591 (1917)

[25] http://www.ascap.com/press/2009/0309_financials.aspx ($933MM for ASCAP in 2008), and http://www.bmi.com/publications/entry/539930 ($905 MM for BMI in 2009).

[26] http://www.mpaa.org/AboutUs.asp

[27] http://www.riaa.com/aboutus.php

[28] 17 U.S.C. §108, and Circular 21, U.S. Copyright Office

[29] *Sony v. Universal Studios*, 464 U.S. 417 (1984).

All of this change in the digital world leads to the fourth observation. The established reasons underpinning much of the copyright law have changed significantly, if they were ever really valid in the first place. The Constitution provides that the purpose of the Congressional power to secure for limited times to authors the exclusive right to their writings is to promote the progress of science and the useful arts. The Supreme Court elaborated, stating in *Fox Film v. Doyal* that "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."[30] Implicit in this reason is the assumption that without copyright protection, authors would have no incentive to labor for the general benefit of the public. But is this assumption still valid in the digital world? Perhaps not.

The various groups of *creators* and *distributors* who had banded together, for the most part, responded to the rapidly changing digital world with traditional copyright approaches, presumably to preserve their economic positions. For example, in 2004, the RIAA (*distributors*) sued to stop *users* of Napster, who at one point downloaded and exchanged so many songs over the internet that universities' networks were at risk of overload.[31] RIAA successfully obtained an injunction against Napster.[32] But before the suit was over, numerous other peer-to-peer networks were established to facilitate music sharing, such as Grokster, Gnutella, and Kazaa. RIAA (and others) sued Grokster, successfully obtaining another injunction in 2005.[33] Finally, almost in desperation notwithstanding its court successes, and in the face of very negative publicity, it initiated an unsuccessful campaign to stop downloads by suing the end *users*, its own potential customers.[34] Meanwhile, Apple (*distributor*) introduced a new business model called iTunes where *users* could download single songs or albums, unlike the prevailing market in which one could purchase only plastic discs of compilations of music (CD's). By February 2010, over 10 billion songs had been downloaded on iTunes in a rapid accelerating market,[35] while CD sales continue to fall.[36] Clearly, new business models have trumped the incentives underlying traditional copyright laws.

Indeed, creation of new works of authorship has not diminished where copyright law is either unenforced or ignored completely. Consider the internet alone. It can fairly be assumed that there is some copyrightable content on most web pages. After all, someone (*creator*) had to create something that would be displayed when a *user* enters a uniform resource locator (URL) into a web browser and starts browsing through the pages associated with the URL. So, how many web pages are there? Google, Inc. is a good source for an answer because Google searches the entire web to establish the databases it needs to respond to search

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[30] *Fox Film Corp. v. Doyal*, 286 US 123 (1932)

31 Webnoize reported that as of March 2001 (less than 2 years after Napster first appeared, 85% of students had downloaded music--nearly 58% of them using Napster. The actual number of users had been estimated at between 20 million and 66 million in 2000.

[32] *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001)

[33] *MGM Studios, Inc. v. Grokster, Ltd*, 545 U.S. 913 (2005)

[34] http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html

[35] http://gigaom.com/2010/02/25/the-path-to-10-billion-itunes-downloads/

[36] http://www.billboard.biz/bbbiz/content_display/industry/e3i23793066fb1d6b4f0e46ec935fdcacb3

requests. According to the Google Blog as of July 2008, no one really knows the number of web pages, but upon hitting 1 trillion unique URLs, Google's engineers estimate that the number of individual web pages out there is growing by several billion pages *per day*! [37] Something other than copyright law must be driving this enormous creation of content.

In reality, the incentive to create works of authorship has never really depended on copyright law. Consider historical works of authorship created without benefit of copyright by such *creators* as Shakespeare, Handel, Milton, Cervantes, Virgil, Dante, Mozart, Vivaldi, Beethoven, Da Vinci, and Newton. Some *creators* have actively avoided reliance on their copyrights to gain economic benefit using other models.

Thus, the digital world is rapidly outpacing the ability of copyright law to handle it. The pace of change in the digital world continues regardless of the attempts by groups of *creators*, *distributors* and *users* to apply outdated copyright law to maintain the status quo. The very foundations of copyright law are being shaken by the changes of the digital world. Any answer to the question of whether copyrights help or hurt in the digital world requires context. Certainly, copyright can effectively deter if not altogether bar an individual from unauthorized copying of a digital work of authorship. Do copyrights help in a given individual situation? Probably yes. But the scope of the copying and the number of copiers on the internet is enough to swallow any individual effort. Do copyrights help in the bigger picture of maintaining the status quo of a given market? As we have seen in the music industry, probably not. In fact, seeking to enforce copyright against potential customers of the works one seeks to sell can have negative consequences as the RIAA has discovered. In that context, copyrights hurt in a digital world.

Regardless of the context, however, it is apparent that the pace of change in the digital world is so fast and the changing business models so far-reaching that copyright in one sense is becoming somewhat irrelevant. Consider, for example, print media and, more specifically, how these observations and conclusions impact newspapers. Can copyright law effectively preserve the existing business model for newspaper creation and distribution?

In the digital world, most newspapers and periodicals now have a web presence. One can generally find an online version containing the content found in the paper versions of most newspapers and periodicals. But the ease with which others can copy online content has diminished the value of the content. For example, aggregators take published content within minutes and redistribute it to subscribers, often without any economic benefit to the *creator* (the newspaper). Meanwhile, advertising revenue is down and can no longer support the fixed overhead costs associated with gathering information for publication and for maintaining print production. Some newspapers have dallied in charging for online content, with mixed results. Some have advocated for changing the copyright law to codify an unjust enrichment cause of action. What must newspapers do to survive? Can the *creator* newspaper rely on copyright law to bar the *user* aggregator from copying the content, and thereby preserve its economic interest?

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[37] http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html

A few problems arise with this traditional copyright approach. First, the content may not be protected by copyright. During World War I, the Associated Press (AP) sued International News Service (INS) for essentially the same problem. INS was copying or rewriting AP stories and transmitting them by telegraph and telephone to papers in other parts of the U.S. The U.S. Supreme Court affimed that there is no copyright in facts. [38] Second, the value of the content is often considered in terms of the labor that went into its creation. But U.S. copyright law no longer recognizes the "sweat of the brow" that went into the creation of the work in determining copyrightablility.[39] Regardless of the investment in creating the content, if it fails to meet the standard for originality, its value will not be found in copyright. Third, aggregators are as nimble and diverse as the music distributors that traditional copyright law struggled to stop. It takes valuable time and resources to pursue pirates, often offshore and with limited success.

History and our critical observations of it teach us that traditional copyright enforcement is costly, time-consuming, and often ineffectual in a world of rapidly changing technology like that in our present digital world. Indeed, the survival of newspapers will depend on something other than copyright law. And that is a whole other world.

[38] *International News Service v. Associated Press*, 248 U.S. 215 (1918). Rather, in a controversial decision, the court distinguished between interference with business practices (unfair competition) versus interference with intellectual property rights (copyright), and recognized a quasi-proprietary right in "hot"news.

[39] *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)