

# "Do the Justifications for Intellectual Property Survive in the Networked Environment?"

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An outline for University of Hokkaido talk

## I. DISCUSSION OF THE TRADITIONAL JUSTIFICATIONS FOR INTELLECTUAL PROPERTY PROTECTION, PARTICULARLY COPYRIGHT PROTECTION (BUT SOME OF THE EFFECTS OF THE “NETWORK” EXTEND TO PATENTED INVENTIONS AS WELL)

- A. **LOCKEAN LABOR THEORY FOR IP** (Discussed extensively in *The Philosophy of Intellectual Property*)
- B. **ECONOMIC INCENTIVE MODEL FOR IP** (This is closely related to the “Lockean” theory. In fact, 18<sup>th</sup> and 19<sup>th</sup> century English and American commentators would not have distinguished them.)
- + Implicit in both models is a belief in:
  - + A social class of *consumers* that is capable of paying for works and performances (that is, the rise of a middle class)
  - + A social class of *creators* that is capable of creating art, science, and learning, but is NOT independently wealthy. We do not need copyright to have Lady Murasaki writing *Genji monogatari* [源氏物語] because she was part of a wealthy Heian class with leisure time.)
  - + The need for a class of persons to connect consumers and creators, i.e. middlemen who package and distribute works and performances.

- + The need for capital investment, not just to support the class of creators, but to make large-scale investments in intellectual works, whether new pharmaceuticals or feature films like *The Dark Knight* or *Godzilla X Mothra X Mechagodzilla: Tōkyō SOS*

[ゴジラ×モスラ×メカゴジラ 東京]

- C. **PERSONALITY THEORY FOR IP, PARTICULARLY COPYRIGHT** (Discussed extensively in *The Philosophy of Intellectual Property*)



- D. **JUSTIFICATION OF IP BASED ON OPPORTUNITY AND REDISTRIBUTIVE EFFECTS.** Although we do not discuss it often, intellectual property regimes throughout the world show remarkable concern about the distribution of wealth and rights – trying to protect individual, creative people.
  - + termination of transfer in US copyright law
  - + inventors rights in Japan and the UK
  - + droit de suite in the EU and California
  - + moral rights in most jurisdictions

## II. EXPANDING REALM OF COPYRIGHT – BOTH SUBJECT MATTER AND RIGHTS. OVER TIME, THESE JUSTIFICATIONS – NOT JUST TECHNOLOGICAL DEVELOPMENTS – LED TO COPYRIGHT ON MORE KINDS OF CREATIVE WORKS (AND MORE RIGHTS).

- A. Over time – books; etchings and fine arts; printed music; photography; mechanically recorded music; “moving” pictures (film); software.

- B. The expansion of rights also has been logical sometimes. The public performance right was – and remains -- an economically sound way to price discriminate across different users of copies.

**III. SINCE THE ADVENT OF THE INTERNET, COPYRIGHT HAS BEEN SUBJECT TO A NUMBER OF CRITICISMS – ALL OF WHICH ARGUE THAT THE SYSTEM OF COPYRIGHT IS LESS NECESSARY, LESS RELEVANT, AND LESS PRACTICAL IN THE DIGITAL, NETWORKED ENVIRONMENT. THESE ARGUMENT INCLUDE THE FOLLOWING:**

- A The internet allows more people to participate in creative processes but to do this, they need to use pre-existing works, and that copyright laws unduly hamper their ability to prepare “transformative works” or “derivative works”
- B. That the economic incentive of copyright is not needed for the kind of collaborative work that the Internet makes possible. The open source software movement is an example of this.
- C. That the creative class that is NOT independently wealthy can support themselves through other mechanisms than copyright, so copyright is unneeded.
- + Musicians can support themselves with live concerts, so copyright in sound recordings is unneeded or should not be enforced
  - + Open source software companies support themselves with tech support and services related to the software that they give away.
  - + Bloggers provide enormous amounts of reporting and commentary without the traditional newspaper model.
- D. While copyright is no longer needed, enforcement of copyright frustrates technological development.

- E. While copyright is no longer needed, enforcement of copyright frustrates democratic discourse.
- F. Copyright disproportionately benefits large corporations, who hold all the copyrights.

We must take each of these arguments very seriously and explore copyright's positive and negative effects.

**IV. THE PROBLEM WITH THE ARGUMENT THAT COPYRIGHT FRUSTRATES DEMOCRACY, CULTURAL DEVELOPMENT, OR TECHNOLOGICAL ADVANCES IS SIMPLE: THERE IS LITTLE OR NO EVIDENCE OF THIS. THERE IS SUBSTANTIAL EVIDENCE THAT COPYRIGHT – AND INTELLECTUAL PROPERTY – MAY HAVE MINIMAL IMPACT.**

A. Some examples where slightly stronger or slightly weaker copyright seems to make little or NO difference in terms of democracy and cultural development:

- + The UK has a public lending right for books – an extension of copyright that gets more money to authors – the US does not. No visible impact.
- + The EU – including the UK now – have an artist's resale right, an OBVIOUS constraint on the free flow of expressive art; so does California. The rest of the US and Canada do not. No visible impact on culture – indeed, the London art market is flourishing as much as before extension of the right to the UK.
- + The French have much stronger © protection in the world of fashion than the Americans do, yet French fashion continues to dominate.

- + On the other hand, the Americans have much weaker ©-like protection of databases than the EU – and the Americans continue to dominate the database markets.



- + Japan seems to have relatively loose enforcement of derivative work rights in *manga* – if WIRED magazine – is correct, but manga flourish. Meanwhile traditional publishers flourish in lots of countries with serious enforcement against derivative works.

*In other words, there doesn't seem to be much negative impact from small, incremental increases in © and ©-like protection – nor from small decreases.*

- B. There is also no empirical evidence that copyright and its enforcement frustrates technological developments. For example, concerning the P2P cases (*Naopster, Aimster, Grokster, Rogue File, Winny*, etc):
  - + There is no decrease in venture capital to technology companies in the US that can be traced to the court decisions against P2P;
  - + There is a leveling off of patents related to P2P, but many computer scientists attribute this to P2P being more “mature” as a technology and less “trendy”;
  - + There was no decrease in the value of technology company stocks that can be traced to the court decisions against P2P;
  - + BUT there probably **was** a movement of venture capital, **away** from development of P2P business models based on infringement;

Copyright enforcement does shift technological focus and it promotes some technologies, like content identification, filtering, and dark nets (to take the extreme examples of technological responses to © enforcement on the Internet.

**V. IN JUDGING WHETHER WE THE TRADITIONAL JUSTIFICATIONS FOR COPYRIGHT ARE STILL VALID, WE SHOULD LOOK AT BOTH CHANGING TECHNOLOGICAL CIRCUMSTANCES AND CHANGING ECONOMIC CIRCUMSTANCES.**

**VI. THE LOCKEAN JUSTIFICATION FOR INTELLECTUAL PROPERTY – THAT PEOPLE DESERVE THEIR RESULTS OF THEIR MENTAL AND INTELLECTUAL LABORS – REMAINS LARGELY UNCHANGED.**

**VII. THE *PURE* ECONOMIC INCENTIVE JUSTIFICATION FOR INTELLECTUAL PROPERTY, PARTICULARLY COPYRIGHT, IS THE PLACE WHERE WE HAVE THE MOST ARGUMENT ABOUT WHETHER THE INTERNET HAS CHANGED EVERYTHING.**

**A. SOME GENERAL OBSERVATIONS ON TECHNOLOGICAL CHANGE.**

Some commentators talk about advertisement-based business models as an alternative to copyright, but they are just one of copyright's own standard business models (traditional newspapers and network television). Control of advertising revenues depends on having exclusive control of content.

**B. THE MUSIC INDUSTRY.**

- + Digital technologies have substantially reduced the costs of producing “professional quality” recordings and have, therefore, eliminated one of the reasons we needed large capital investments.
- + Network technologies have substantially reduced the costs of marketing *and radically changed the dynamics of marketing.*

- + Successful, professional sound recordings can be created by very small groups of people working informally, so the digital, networked environment *has* lessened the need for copyright with sound recordings.

### C. THE AUDIOVISUAL INDUSTRY.

- + Digital technologies have made many parts of filmmaking less expensive and more accessible (computer-generated effects, in particular).
- + Digital technologies and the network have produced a new genre of (low budget) user-generated content that serves an important cultural, political, and entertainment function. But there is no evidence that this will ever occupy more than a modest % of people's entertainment time.
- + The bulk of people's entertainment time will remain with professional audiovisual works. But these audiovisual works remains a large-scale, capital-intensive activity involving large groups of people in highly-coordinated functions that cannot be done "working informally." There is no prospect that this will change. There is no "live" public performance alternative to earning back the investment through ©-controlled exhibition and sales of copies.  
Even if we decided we wanted only "less expensive" films such as modern, romantic comedies (no *Godzilla*, no *War & Peace*, no *Star Trek*, no *Seven Samurai* [七人の侍 *Shichinin no samurai*]), the less expensive films still cost \$US 1-50 million to make.

+ Besides for a segment of entertainment now coming from user-generated content, internet distribution of films does not change the dynamics of the audiovisual industry any more than television did. Both have two effects on the pre-existing the situation: [a] each new technology created a new platform (or window) for the delivery of existing content, [b] each new technology created a forum for a new, particularized art form. So, just as television started with radio programs, then showed existing feature films, and *developed its own art forms – situation comedy series, talk shows, etc*, so too the Internet started with existing television shows and feature films, but can be expected to develop increasingly its own professional content.

**D. THE SOFTWARE INDUSTRY. PROBABLY LARGELY THE SAME ANALYSIS APPLIES.**

**E. SOME GENERAL OBSERVATIONS ON ECONOMIC CHANGE.** The declining need for copyright that many commentators attribute to changing *technology* is *more* a function of *changing economics*. As societies became richer, more and more people have had time to pursue their hobbies, including the arts. Much of what we see in the “arts scene” today are people who can pursue artistic careers because there has been an accumulation of wealth (by them or, more likely, their parents and grandparents) that allows these people to write, paint, sculpt, act, perform, etc. This analysis can include government grants for the arts: the richer the society becomes, *ceteris paribus*, the more money the government has to support the arts *in a non-market function*. This is a credible argument that copyright is **less** important economically than it was in, perhaps, the 1950s or 1960s.

## **VIII. HAS THE NETWORKED, DIGITAL ENVIRONMENT WEAKENED THE “PERSONALITY THEORY” JUSTIFICATION FOR INTELLECTUAL PROPERTY?**

There are so very interesting and difficult questions here.

- A. One thing we have learned from the Creative Commons project is that people value “attribution” very, very much – more than was initially expected
- B. The Internet definitely creates the prospect of more collaborative work being done by more people – and we need to understand what effects that will have on creators’ identification with their works – and their moral rights interests. But so far:
  - + We have not seen any collaborative creativity models emerge from the Internet that are substantially different than large artistic collaborations in the past, whether movements in early 20<sup>th</sup> century painting (Cubism, the Brücke movement in Dresden) or large-scale film production.
  - + So far, individualistic or very small group creative production on the Internet (user-generated content on video sites, blogs, video blogs, indie bands) has swamped any new collaborative creativity.
- C. Truly large-scale collaborative creativity – like Wikipedia – there may be no “personality justification” and, indeed, the social norms of Wikipedia are for anonymity as much as articles in the *Economist*. (Well, almost as much. One can find out the IP addresses of who wrote what on Wikipedia!)

## **IX. HAS THE NETWORKED, DIGITAL ENVIRONMENT WEAKENED THE REDISTRIBUTION FUNCTION OF INTELLECTUAL PROPERTY, PARTICULARLY COPYRIGHT?**

A. We are simply not very honest in talking about this, particularly in the United States.

B. © and related rights have been – and probably still are – the main ‘property’ mechanism by which African-Americans have become wealthy in the United States. Before the 2008 crash, the five richest African-Americans:

1. Robert Johnson (Founder, Black Entertainment)

\$1.45 billion

2. Oprah Winfrey (Talk-show host)

\$940 million

3. John Johnson (Magazine Publisher)

\$520 million

4. The family of Reginald Lewis (Late CEO of TLC Beatrice)

\$190 million □

5. Catherine Hughes (Founder of Radio One)

\$163 Million

This is no as true for Latinos, but © and related rights are still very important for their wealth accumulation.

C. This is a totally unexplored topic in copyright – and intellectual property, in general.

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This outline is only for participants in the University of Hokkaido lectures during the week of 9 March 2009. Please do not quote or distribute further without the permission of the author. Contact: [Justin@justinhughes.net](mailto:Justin@justinhughes.net).