

## The Function of Intellectual Property at the Present Time<sup>1</sup>

Neal H. Walfield

Intellectual property presupposes the individuality of the author by asserting that the author is unique and is able to transcend the realm of the mundane to discover a novel idea. Intellectual property denies T.S. Elliot's assertion in Tradition and the Individual Talent that the "poet's mind is in fact a receptacle for seizing and storing up numberless feelings, phrases, images, which remain there until all the particles which can unite to form a new compound are present together." Intellectual property is a logical impossibility for its fundamental tenant is that thoughts and ideas, once shared, can be owned and controlled by an individual.

Both ideas and material objects may be possessed. Unlike a material object such as a shovel, when an idea is shared it is not borrowed but freely possessed by all who have born witness to it; ideas can never be dispossessed nor returned to their original owner for they were neither taken away nor owned by individuals; ideas are owned by and a product of society. Can any one person claim to own words? Is language not freely possessed by all who use it? Is it not similarly absurd to maintain that a person can own happiness? Are not emotions freely possessed by all who feel them? And what of a song once sung? Does the experience not belong to the listeners?

Society is sharing. Yet somehow, the idea that mental processes can be owned has become an accepted part of social discourse. Intellectual property is a tool of tyrants: it is used by those who wish to share ideas nominally and remain in control of all the results an idea may inspire; copyright tyrants implicitly acknowledge that ideas—specifically their ideas—may inspire others while simultaneously playing God the Creator by claiming complete authority and originality over their own. Could a language owner stop anyone from using the language and being influenced by it? Could the happiness owner impose a happiness tax? Could a song writer demand prior consent before his or her song is hummed in the shower? Intellectual property is a tool used by the past to exploit, control and mold the future. There is only one way to retain control of an idea: not share it. St. Augustinus observed in De Doctrina Christiana: "Omnis enim res, quae dando non deficit, dum habetur et non datur, nondum habetur, quomodo habenda est;"<sup>2</sup> although there are tradeoffs when sharing a physical object, ideas are a different beast: they are indivisible goods only obtaining value through sharing.

Ideas are the product of innovation. The Oxford English Dictionary defines innovation as: "the introduction of novelties; the alteration of what is established by the introduction of new elements or forms." In other words, innovation upsurges the establishment. Could Chaucer have written the Canterbury Tales if he had had to secure permission to create a derivative work from all of the authors from whom he borrowed material? What of Shakespeare, Milton and Pope? What of Newton, Maxwell and Einstein? The greats have always built on the past; today's artists and scientists are no exception. Even the most adamant supporters of intellectual property build on

---

<sup>1</sup>Presented at the Literature, Communication, and Democracy Symposium held at University of Massachusetts, Lowell on April 2, 2003. Copyright © 2003, Neal H. Walfield. Verbatim copies of this document may be duplicated or distributed in print or electronic form for non-commercial purposes.

<sup>2</sup>For if a thing is not diminished by being shared with others, it is not rightly owned if it is only owned and not shared.

the commons: Disney Corporation freely adapts the Grimm Brothers' fairy tales and stole Mickey Mouse from Buster Keaton's Steamboat Bill long before it entered the public domain.

Copyright did not always constrict innovation: Disney Corporation and other media giants have perverted it. They have restricted through their attempts to eliminate unregulated use (reading and sharing books) and fair use (quoting works) of copyrighted works; they have turned copyright from a regulation on publishing to one on copying. They seize the power of copyright from the authors by convincing them that the process is "natural" and that "success" is impossible without them. They then alter and fine tune their creations to ready them for public consumption. Finally, they leverage the government sanctioned monopoly against the public convincing them to consume not the work of artisans but the products of a hype factory. They are the establishment and their only innovations are their new ways to further entrench themselves and control the public. Media has become the dominant ISA, ideological state apparatus; it is the opiate of the modern masses. Intellectual property destroys innovation and represses the public.

The framers of the United States Constitution, the original American freedom fighters, envisioned a copyright system radically different from the current implementation. Richard Stallman suggests in "Copyright vs Community in the Age of Computer Networks" that copyright was a concession; that it was a bargain between the authors and the public in which the public traded its freedom to make commercial copies—a freedom it could not easily exercise as only businesses could afford a printing press—so as to give authors the ability to restrict publishers. In Article I, Section 8 of the United States Constitution, their intent becomes clear:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The framer's intent was to help advance art and science. They do not suggest that authors should be rich. They do not claim that authors are more important than the public. They did not empower publishers. They tried to make an incentive for authors. Lawrence Lessig explains that "copyright law only covered 'printing.' Copyright law did not control derivative work. And copyright law granted this protection for the limited time of 14 years." This limited term permitted authors to make some money from their work while forcing them to continue to innovate: it provided a small reward, a reward which was not the end all be all, but a reward which allowed them to live and continue to innovate. The framers may have been doing the artists a favor by not giving them a life long cash cow: Alfie Kohn reports that contrary to popular belief "rewards can lower performance levels, especially when the performance involves creativity . . . the sense that something is worth doing for its own sake typically declines when someone is rewarded for doing it." To those who suggest that there are many rich and successful musicians today, they must be reminded that most do not write their own material.

With the advances of technology in the twentieth century, publishers have foreseen their minimization by cheaper and more efficace methods of distributions. They have seen this and reacted. Over the past forty years, the copyright term has been expanded eleven times. Currently, the copyright term is the author's life plus 75 years or 95 years for works for hire. Each time, it was expanded not only for new works but for existing works. And every time it coincided with the

end of Mickey Mouse's copyright term. As Stallman observes, this trend is perpetual copyright on the installment plan. Congress no longer concerns itself with what is most beneficial for its constituents but acts at the behest of the corporations who finance their campaigns. Eldred vs Ashcroft, which was recently argued before the United States Supreme Court, challenged the 1998 copyright extension by questioning "the authority the Constitution assigns to Congress to prescribe the duration of copyrights" (Ginsburg 1). Although the court ruled in favor of the status quo, they added that they "are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be" (17).

Those in power realize that technology cannot stop copying for long. Jon Johansen demonstrated this when he developed DeCSS, a program to read encrypted DVDs without "authorized" software from the MPAA, the Motion Picture Association of America. Dmitry Sklyarov proved this again when he helped develop software to read eBooks with unapproved software. Anticipating this, the media giants had used their power over the government to instate the DMCA, the Digital Millennium Copyright Act: legislation which functionally eliminates the unregulated use of copyrighted material making it illegal to circumvent copyright protection "non-technology." Using this and their sway over the United States government, they had both Johansen, a Norwegian, and Sklyarov, a Russian, prosecuted despite the legality of their alleged violations in their home countries.

Just as the church tried to legislate morality in the middle ages, the media is attempting to do the same today. For the past decade they have attempted to instill in the public the idea that copying published works is "wrong" and amoral through advertising and education. Michael Greene, the then president of the National Academy of Recording Arts and Sciences, said at the 2002 Grammy award ceremony that the "most insidious virus in our midst is the illegal downloading of music on the Net . . . [we must] embrace this life and death issue." These are fighting words: publishers have become obsolete and they are fully aware of it. They still control the media; they are the media. To preserve their power, they need to control society's liberator, the Internet. They are attempting to do just this by altering social discourse. They have tried to associate the word pirate, a person who rapes and pillages, with those who share with their neighbors. Yet, it is the publishers who rape and pillage the public. People do not believe that copying music and software is bad; the industry giants want us to think that: they are afraid we might find our freedom. They realize the power of the Internet and are actively working to prevent this new form of distribution—a form of distribution that offers a real free market of ideas—from being exploited.

Yet is copying wrong? As morality is a reflection of the social code, it will only be moral when and if society agrees. According to a survey conducted by Ipsos-Reid, only 9% of the American public believes that downloading music is wrong. But maybe the publishers are right and people are just misinformed about the damage they are actually doing to the artists and publishers or maybe, "[t]he scary truth for them [the record industry] is that there is a new distribution method that can take the artists directly to the consumer, a medium that disengages the record industry as middlemen" (Menta).

In their mythos, the publishers are doing authors a favor. Publishers "remind" the public how without them the artists would be poor and could never be successful. What they fail to say is that most artists suffer as much under the current system as the publishers claim they would under a

free culture. Stallman notes that record labels typically give artists a four percent royalty. On a \$15-\$20 compact disc, that works out to about eighty cents per disc. But they impose a further stipulation: artists do not receive any money until they have repaid their publicity loan—a loan which most are unable to ever repay. The result is that most bands only make money through touring and selling merchandise at concerts. Stallman continues his argument suggesting that if, in the current system, publicity is all artists receive from publishers, artists would be better off being nice to their fans and profiting from the highest quality advertising, word of mouth, as the Grateful Dead did and exploit the greatest distributor, the Internet. Maybe they will not be super-rich, but how many artists are?

The record labels are able to perpetuate the concept of the successful musician by choosing a few token actors who fit a certain image. The actor is tempted with a lot of money and molded into a form that the label can exploit. Really, the new star does not have any more talent than many other fairly successful performers but the star is promoted, the public buys into it and the Jacksonian American Dream is perpetuated. Their best seller is when they appear anti-establishment. Thank you Eminem.

Removing copyright completely is likely a futile battle and one not worth fighting: copyright has value, it is just a question of realizing the framers' intentions. Stallman suggests that fixing copyright requires that we first recognize that different situations require different types of copyright protection. He identifies three types of works today: functional works such as technical manuals, recipes and computer software; works of opinion such as memoirs and scientific reports of experiments; and aesthetics such as novels, music and art. Functional works, he argues, should be freely distributable and modifiable in both commercial and non-commercial environments; works of opinion should be freely redistributable, i.e. verbatim copying, however, it need not be modifiable as society gains nothing from changing someone's opinion, which is at best is a form of misrepresentation; and finally, aesthetic works should be freely redistributed non-commercially. He concludes that the copyright term should be reduced to ten, if not five, years.

Lessig agrees with most of Stallman's ideas and co-created the Collective Commons last year. This project is dedicated to providing free licenses for authors who wish to permit more liberal use of their works than is given by default under copyright law, i.e. no distribution and no modification. Authors may choose the type of restrictions they require for their work: attribution, commercial redistribution, derivative works and share alike, i.e. modified redistribution but only under the same terms. There are different licenses for each logical permutation, for instance, a musician may choose a license for an album which permits free redistribution and no commercial modification.

Working within the current copyright system, rather than through direct reformation, "The Eric Eldred Act" proposes a trivial tax on copyrighted works several years after publication. The argument is that since most works are remaindered within a few years of publication, most copyright owners would not pay the tax. After the proposed three consecutive years of non-payment, the work would revert to the public domain. He believes that if instated, 90% of the works copyrighted between 1923 and 1952 would enter the public domain.

The media giants want us to think we are morally wrong in copying music, books and other artistic creations. They need us to think that we are hurting the artists and authors; it is the only way they can continue to control a complacent public. They can only remain in power as long as

we give them the power to decide what we see. Once we destroy the hype factories and permit real innovation, they will no longer have the power to censor us. It is our civil duty to disobey their edicts. The question of intellectual property must be revisited. The public needs to remember that ideas do not belong to an individual but to society. Antonio Gramsci suggests that we are all intellectuals: each of us has a voice and a wallet; we must take responsibility for having helped create the establishment. We must realize that as we gave the bourgeois their power, we can take it back.

## Works Cited

- Clement, Douglas. "Creation Myths: Does innovation require intellectual property rights?" Mar. 2003. Reason Online. 12 Mar. 2003 <<http://www.reason.com/0303/fe.dc.creation.shtml>>.
- "The Eric Eldred Act FAQ." The Eric Eldred Act. v1.01. 12 Mar. 2003 <[http://www.eldred.cc/ea\\_faq.html](http://www.eldred.cc/ea_faq.html)>.
- "Free Mickey Mouse." Economist. 10 Oct. 2002. 12 Mar. 2003 <[http://economist.com/printedition/displayStory.cfm? Story\\_ID=1378700](http://economist.com/printedition/displayStory.cfm? Story_ID=1378700)>.
- Ginsburg, Justice Ruth. "Opinion of the Court: Eric Eldred, et al., Petitioners v. John D. Ashcroft, Attorney General." 15 Jan. 2003. Supreme Court of the United States. 12 Mar. 2003 <<http://cyberlaw.stanford.edu/lessig/blog/archives/01-618o.pdf>>.
- "innovation." Oxford English Dictionary. Ed. J. A. Simpson and E. S. C. Weiner. 2nd ed. Oxford: Clarendon Press, 1989. OED Online. Oxford University Press. 12 Mar. 2003 <<http://dictionary.oed.com/cgi/entry/00117401>>.
- "The Insidious Virus of Illegal Music Downloading: Michael Greene's address on the 44th Annual GRAMMY Awards." 27 Feb. 2002. GRAMMY Magazine. 12 Mar. 2003 <<http://www.grammy.com/features/speech.html>>.
- Kohn, Alfie. Studies Find Reward Often No Motivator. 19 Jan. 1987. Boston Globe. Mar 12. 2003 <<http://www.gnu.org/philosophy/motivation.html>>.
- Lessig, Lawrence. "Free Culture: Lawrence Lessig Keynote from OSCON 2002." 15 Aug. 2002. O'Reilly Network. 12 Mar. 2003 <<http://www.oreillynet.com/pub/a/policy/2002/08/15/lessig.html>>.
- "Legal Issues Don't Hinder American Downloaders." 14 Mar. 2003. Ipsos-Reid. 16 Mar. 2003 <[http://www.ipsos-reid.com/media/dsp\\_displaypr\\_us.cfm?id\\_to\\_view=1763](http://www.ipsos-reid.com/media/dsp_displaypr_us.cfm?id_to_view=1763)>.
- "Licenses Explained." Creative Commons. 12 Mar. 2003 <<http://creativecommons.org/learn/licenses/>>.

Menta, Richard. Ipsos-Reid Research: File Traders Feel Activities Are Not Wrong. 16 Mar. 2003. MP3newswire.net. 16 Mar. 2003  
<<http://www.mp3newswire.net/stories/2003/notwrong.html>>.

Stallman, Richard M. "Copyright vs Community in the Age of Computer Networks." 12 Feb. 2002. Queen Mary University of London, England. 12 Mar. 2003  
<<http://www.gnu.org/philosophy>>.