
CyberRight: intellectual property rights in the electronic information market

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Are intellectual property rights in an electronic environment socially, politically, or economically different than in a print environment? Many analysts have proposed that the fluidity of electronic data transfer has changed materially the concept of information as a commodity and, therefore, has changed the concept of intellectual property. Our research suggests that the transfer to electronic form has transformed the context of intellectual property with significant changes, but that the same underlying voices still endeavour to exert power.

This paper documents a discourse in intellectual property that represents mainstream social, political, and economic interests. Such discourse has been operative since the Statute of Queen Anne established copyright in common law, linked it to control of the press, and commodified information. It is still operative in protecting corporate interests, and it claims to protect creators. It is, however, based on the concept of individual creation of intellectual and artistic work. It does not recognize that all such work is constructed in a social and historical context rather than in isolation.

As our research progresses into the electronic realm we ask:

- Does electronic publishing change whose interests are represented?
- What discourses are identifiable in the literature on electronic publishing and intellectual property (published in both print and electronic forms)?
- Do such discourses represent the same themes that have been prevalent since the eighteenth century?
- What are the changes and their possible implications?
- Are there opportunities for changing the power structures involved in intellectual property?

In the print environment, copyright has been described thus:

Simply put, the Act prohibits others from copying your work without your permission. Its purpose, like that of other pieces of intellectual property legislation, is to protect owners while promoting creativity and the orderly exchange of ideas. (Canadian Intellectual Property Office 1994, 4)

copyright the practice of securing marketable rights in texts that are treated as commodities (Rose 1993, 3)

These two definitions of copyright illustrate two discourses in relation to intellectual property law. The first proclaims that copyright promotes creativity by protecting ownership of intellectual property. It implies protecting the value of intellectual property for the benefit of the creator and for society as a whole by enabling the exchange of ideas. The scenario is of creators funded through sale of their work, thus having the wherewithal to go on creating new ideas. It is grounded in a liberal individuality, an Enlightenment concept of individual rights, and an economics of individual creativity benefiting society as a whole and therefore to be protected and encouraged by the central government that represents that society.

The second definition changes several factors in this scenario. Creators have slipped out of the definition, and copyright governs the exchange of texts, not ideas. These changes produce a very different picture in which texts are commodities that are exchanged, as are other commodities, for economic gain. Their value is determined by market variables. This discourse sees copyright as protecting the investments of corporate interests in the commodity of information.

We argue that both discourses are espoused in turn by the same interests for different purposes. The creativity discourse is employed to illustrate the justice of the present concept of copyright. It focuses on the author/creator. The corporate discourse is voiced mainly by critics who identify it as the real impetus behind copyright. It focuses on information as a commodity. Neither discourse fulfils the utopian vision of the exchange of ideas enunciated by Thomas Jefferson:

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. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. (In Barlow 1994)

In this section of our paper we will explore the problems of the concepts of author/creator and information as a commodity, particularly in the traditional medium of print.

Individual authorship is a modern concept beginning only in the late Middle Ages. With the idea of individual authorship developed the picture of an author thinking and writing and eventually producing something wholly original (Rose 1993, 3). The individual author creates texts out of whole cloth, not as part of a tradition or community. Therefore, the individual author is responsible for the intellectual and creative content of the work (to paraphrase our cataloguing rules). Mark Rose notes that early advocates of copyright for protection of the author's work used the image of paternity.

[Daniel] Defoe, employing the ancient metaphor embedded in the word "plagiarism" (derived from the Latin for kidnapping), speaks of literary theft as a form of child stealing:

A Book is the Author's Property, 'tis 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...

We can note here the continuation of the patriarchal discourse of traditional society: the author is the master and owner of his wife and children as well as of the children of his inventions. (Rose 1993, 38)

This metaphor belies the credibility of the individual author. Creation of a text in isolation from the rest of humanity is as plausible as creation of children in isolation from the rest of humanity. A text is the product of fruitful unions over generations. Its nature is shaped by its environment. The author is also the construct of both genealogy and community. In fact, many texts are written by individuals for their organizations and not considered the work of those individuals at all. Further, the text, once written, is not limited by the meanings of the author. Poststructural critics have questioned the authority of the individual author in relation to a text arguing that the text is constructed by its readings as well as by the genealogies and communities in which the author

wrote it. In this interpretation, the text is not complete when it is put to paper. It changes as it is read. Therefore, it is not a singular text.

The question these considerations raise in relation to copyright is: If the picture of an individual author writing away in a garret to produce an original text is an illusion, who is being protected by copyright?

The answer comes in the second metaphor Rose identifies in relation to copyright: that of information as real property. Ownership as a natural right also comes from a liberal Enlightenment tradition. The author is producer rather than creator, but the focus is on the property produced by the author's labours. Copyright is, then, an issue of "liberty and property: the freedom of the individual to employ his efforts to create property and the freedom to dispose of that property as he saw fit" (Rose 1993, 85). Instead of concentrating on the originality of the author's ideas, the real property metaphor centres on what is produced, the text. This notion of the text as a saleable commodity comes from the predecessors of copyright law. Originally, in English common law, the crown gave printers the right to print a given text. In this manner, the crown controlled the availability of texts to the public. If the crown gave no printer permission to print, then the text was *de facto* suppressed. This pre-copyright practice shows the linkage between copyright and censorship as forms of controlling information. In the case of permission from the crown, the control was politically motivated. Now, control through copyright is mainly for economic interests, because information is now treated as a commodity.

Is information a commodity? The corporate discourse depends upon the commodification of information. Buckland has suggested that information can be economically valuable because of the cost of becoming informed and sometimes because of the gain in keeping information from others (1991, 200). Branscomb suggests that the value of information is in the power of controlling it (1994, 1). The value of information as a commodity is assessed according to its utility, such as in decision making (Lamberton 1984; McCain 1988; Mowshowitz 1992). However, there are problems with treating information as a commodity. As pointed out by Jefferson, one can sell information and still have it. Information does not get used up (though it may be perishable). Trying to pin down information as an identifiable and marketable commodity illustrates how fuzzy a concept it is. What can be sold is the container, what Buckland calls information-as-thing. However, the container is not the text, but a physical manifestation bearing the text such as a book or journal. In commodifying information we are a long way from exchange of ideas. The commodity is the container bearing the text, and the text is the stylistic manifestation of the idea. So what is being protected by copyright is neither the commodity nor the idea, but the text created by the author in a genealogical and community context.

What has happened, then, between the creativity and corporate discourses is that the former has become the cover story for the latter. The two metaphors discussed by Rose both support the economic rights guaranteed under copyright legislation. They allow the text to be sold or given away. Neither really values the creator in the sense of the moral rights guaranteed under copyright: neither addresses the author's right to maintain the integrity of the text. The lack of a discourse representing the author's moral rights suggests that the author's creative originality is not the issue. Economic rights are primary. Both the creativity and the corporate discourses are economic: the difference is a matter of who benefits. Again, the question arises: Who is being protected by copyright?

This question can be addressed by asking who actually holds copyright and who loses by its infringement. To get published, the creator must make a decision negotiated with the publisher, who ultimately controls the process. The decision normally concerns assigning economic rights to the publisher in exchange for royalties, a flat sum, employment, or simply the opportunity to be published.

Who loses by copyright infringement? First, copyright infringement usually refers to infringement of economic rights rather than moral rights. Therefore, it is the publisher to whom the economic rights have been assigned who loses by infringement. In Canada, CANCOPY is the collective that negotiates the right to copy copyrighted texts. One poster distributed by CANCOPY suggests, in large print, before photocopying: "Consider what's involved in writing a textbook... And then consider not getting paid for it." The small print elaborates on the number of hours of work the author puts into a textbook. It asks the potential photocopier to remember what is due to the author in a clear example of the creativity discourse. It does not take into consideration the underlying corporate discourse. First, CANCOPY members are publishers to whom economic rights have been assigned, not authors. Second, most photocopying is not of books but of articles. Yet this poster is hung over library photocopiers to produce compliance through guilt.

Copyright itself can be a cover story for suppression of texts. An interesting case is *Para Leer al Pato Donald* (translated into English as *How to Read Donald Duck: Imperialist Ideology in the Disney Comic*), written by Ariel Dorfman and Armand Mattelart in Allende's Chile. When its English translation, printed in the United Kingdom, was shipped to the United States, Walt Disney Productions challenged it under copyright legislation because of Disney comic book frames included as examples in the text. As a result, only 1,500 copies were allowed into the United States; the impact of the critique was minimized on the basis of the notion that corporate Disney would be deprived of income that rightly belonged to it (Lawrence 1989).

A similar instance occurred in Australia when George Munster and Richard Walsh produced a book of government documents including embarrassing revelations about Australia's involvement in the Vietnam War and the Indonesian invasion of East Timor. The book was challenged by the Australian government under both criminal and copyright law. The former challenge was denied, but the latter was successful in suppressing the book on the basis of copyright infringement (Martin 1995).

Obviously some authors benefit from the economic rights of copyright in that otherwise their work could be copied by publishers without their permission. However, as few authors can make a living by selling their works, and not all want to, copyright is not the universal answer for authors. Posters like the CANCOPY one quoted above may actually inhibit the use of texts by authors such as academics who want to see their work as widely distributed as possible.

The role of copyright for print media is, then, at least as likely to stymie as to facilitate "the orderly exchange of ideas." What it does do is protect texts owned by authors or corporate bodies. It protects individuals and economic interests at the expense of society as a whole.

Questions for an electronic environment

As we continue our research we are discovering that the same discourses seek to operate in an electronic environment. The economic and political interests of publishers and governments that have largely maintained control over information in a print environment are trying to do the same thing as information become digitized. Since our electronic environment is much more fluid, control cannot be had to the same degree as for print. Therefore, there are opportunities for significantly changing the way we look at copyright and at the creation and ownership of information. We will continue to work in this direction to help find the spaces where change will be fruitful.

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