

# Excess Copyright: How restrictive copyright legislation impedes technological innovation

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**Abstract**— This paper explains how copyright laws being promoted by the USA are being used to prevent the development of open educational resources. This includes a brief history explaining the origins of copyright law leading up to the modern day conception of artistic creations as “intellectual property.” The concept of “stealing” is explored in relation to the sharing of copyrighted materials and the concepts of pirating and bootlegging. The role of the large copyright controlling companies is placed in context and the war on the public domain is highlighted along with an explanation of the rights of the users and how these rights are integral to the copyright concept. Finally arguments supporting the call for stricter protections for copyright controllers are exposed.

**Keywords**— copyright, intellectual property, pirating, public domain

## I. INTRODUCTION

Any discussion of copyright in an intellectual context must begin with the USA. The USA receives more than 50% of the world’s royalties for “intellectual property” [1]. Because of this, they are the principal supporters of stricter, more protective copyright laws that are being imposed on other countries as part of the “coalition of the willing”.

Yet, many will be surprised to know that copyright was never intended to be primarily a vehicle for protecting the rights of the copyright holders. On the contrary, copyright was initiated specifically to promote learning: The Statute of Queen Anne, *An Act for the Encouragement of Learning* [2]. Passed by the British House of Commons in 1709 forms the basis for US copyright law, which is enshrined in the *Copyright Act 1790: An Act for the Encouragement of Learning*, which was signed by George Washington [3][4].

The US Constitution also echoes the original British copyright law affirming that copyright was enacted “to promote the progress of science and useful arts” [3]. This was no co-incidence as the US law was derived from those states that had created their own versions of the British statute [4].

Copyright holders possess a simple “copy” right that gives them an exclusive right to exclude others and otherwise control the expression of their ideas for a limited time. Whoever turned “copy right” into one word had to be a lawyer. One does not say “freespeechright” or “gunright” or “assemblyright” or “religionright.” [5]

## II. COPYRIGHT PROTECTION

Copyright owners have “co-opted the rhetoric of property” (p. 8) [6]. The term “intellectual property” was seldom used prior to its popularization following the establishment of the World Intellectual Property Organization (WIPO) by the United Nations in 1968 [7]. Since then, owners of copyright on creative works have conducted a constant campaign, with some significant success, to transform copyright into a property right. They are extending the property label for intangible things like texts, songs, movies, plays, software and yes, learning objects.

US founding father, Thomas Jefferson, expressly opposed linking copy rights to property rights, noting “Inventions then cannot, in nature, be a subject of property.” He reluctantly agreed to the granting of a copyright monopoly on a limited basis only insofar as it encouraged learning [8]. In the same vein, President James Madison wrote that “incentive **not property** or natural law is the foundational justification for American copyright” (p. 43) [9]. So, there is no common law support for creative works as property. It is a privileged monopoly not a right.

## III. COPYRIGHT “STEALING”

No one “owns” an intellectual work. The so-called owners possess only the **copy** right for the creation. Stealing and theft as confirmed by both the Oxford and Merriam Webster dictionaries involve taking something “away” as well as the taking of “property” belonging to another [10][11]. Since, nothing is taken away (the owner still has it) and there is no property, it cannot be stealing. As confirmed by the U.S. Supreme Court, the correct word to describe the act of illegal copying is “infringement” not “stealing” [12]

There is reason to doubt the reported losses due to pirating that companies quote [13]. He provides an economic analysis showing that the figures they use on the billions of dollars lost are manufactured and highly suspicious. He questions their methodologies, which in any case they seldom provide. He also wonders if Microsoft would really prefer a million installed copies of Linux rather than a million installed pirate copies of Windows. There is also a strong argument that pirating has bolstered the profits of many companies. For example MS DOS became an accepted standard because it was copied by everyone with a PC. This helped to establish Microsoft as the leading software company [14].

On the other hand, how much extra money have copyright controllers made from consumers paying full price for music

and movies in a new format when they had already paid full price only a few years before? For example, many people have bought the phonograph record, the tape, the 8track, the CD and now the DVD of the same song. One reverend minister wrote "Strip away all the pretension, and what you really have is this: Rapacious companies that have become bloated on windfall profits and ruthless exploitation of other people's talents are now terrified that the gravy train will go away"[15].

When you share your materials with others, you still have it. President Thomas Jefferson put it this way: "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" [8].

#### IV. PIRATING AND BOOTLEGGING

Ironically, the present day copyright controllers owe their very existence to "piracy". The Hollywood film industry only exists on the west coast because the copyright and patent controls enforced by Edison and others were unduly restrictive forcing independents to flee in order to make movies. The recording industry began by recording songs without permission as did radio and as did the cable industry for television programming [16].

Content companies crying about the loss of their profits to digital pirates should examine their own history. They tried to stop radio from playing their songs, not realizing that it would be the biggest promoter for record sales. Movie companies attempted to limit the showing of movies on television and TV. Yet, it became a huge aftermarket for their used products extending their life. Although B movies and newsreels suffered, the aftermarket for the top hits became very lucrative [15]. The VCR terrified studios and TV executives. At the time of its introduction, the MPAA's Valenti, once commented "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone" [17]. Yet, the VCR has proved immensely profitable, once the content controllers came to terms with rentals and reduced their pricing to sustainable levels. Now with DVDs, the aftermarket is often more profitable than the original cinema showing. The only movie theatres to (almost) disappear because of the new technologies are the pornography theatres. They never learn. To protect their copyright, the Recording Industry Association of America (RIAA) is now pushing for onerous restrictions to limit the capabilities of digital radio [18].

#### V. ROLE OF THE COPYRIGHT CONTROLLERS

The big content companies' protestations that they are protecting the rights of their artists are sham. They have been manipulating copyright laws for years, stealing everything they could from the authors and artists who created the content. Movie studios use "creative accounting" to minimize their profits, thus avoiding taxes and depriving the creators of their proper percentage. These companies can be characterized as profiteers and bloodsuckers [15]. It is estimated that nearly 90% of musicians with major label contracts cannot pay up the money advanced to them [20]. They want to be heard so much that they are willing to sell their souls to the big record

companies. Albini gives an informative account of how record companies rip off rock band artists [21]. The major recording companies were caught stealing \$100m a year from their artists and were severely chastised for doing so by a US federal court judge [22].

In another action, authors had to file suit with the US Supreme Court to assert their rights to proceeds from the subsequent sales of their works to database services. Record companies, who normally paid artists from 6 to 8 cents per song, refused to pay artists anything more for their "double session" CDs that release the songs in multiple formats [23].

A rather contemptible example of the usurpation of an artists right by the big companies is that of Disney and other recording companies, who took over the rights to the hit song "The Lion Sleeps Tonight" otherwise known as "Whinawei" or originally "Mbuba". The original South African song writer, Solomon Linda died a pauper, although the estimated value of his song is US\$15 million [24] [25].

U.S. record companies even attempted to furtively insert a clause preventing copyright from reverting to the authors, into the Satellite Home Viewer Improvement Act of 1999, which was unrelated legislation and so unknown to the artists. They attempted to add four words -- "as a sound recording" -- deep within it. This would have made all recording artists' creations "works-for-hire" and thus the property of the record companies even after the 35year expiration date when copyright normally reverts to the artist. Fortunately, Congress decided to remove this clause after intense negotiations with artists' representatives [26].

#### VI. CONSUMER RIGHTS

In fact, the original copyright act created the public domain. Prior to the Statute of Queen Anne, there was no public domain. Copyright law was enacted to encourage learning. The public domain is an integral part of copyright law. "Fair dealing" and "fair use" in the British common law countries integral to copyright law. The rights of copyright owners to control their materials are the exception.

In Civil or Napoleonic code countries (most of the non Anglo-Saxon nations), copyright is "droit d'auteur" and more concerned with protecting author's rights, both moral and economic. This approach seems to allow more latitude for non-commercial uses of copyrighted materials.

The big content companies are also at war with consumers. The Recording Industry Association of America (RIAA) has prosecuted thousands of file sharers, from an 11 year old girl to a grandmother. DirecTV sued thousands of people who may or may not have been downloading its movies. Whereas, the RIAA is "fishing" for infringers by casting a wide net, DirecTV has been focusing on prosecuting Smart card users in the largest legal action in US history with more than 150 000 defendants. A spokesman for DirecTV stated, " We're

looking to put a chill on the market” by prosecuting many people who do not even own satellite systems. Although there are many legal uses of Smart Cards, DirecTV is continuing to prosecute because the cards CAN be used for pirating, not necessarily because people DO use them to pirate ([27].

In addition to their prosecutions, the owners have also developed the concept of “contributory infringement” as a way of downloading the responsibility of enforcing copyright to Internet Service Providers (ISPs), telcos, and others. This is known as the compulsory deputizing of network providers as content police [28]. If the entertainment industry has a problem with their copyright, they should handle it themselves and not transfer the responsibility and costs of enforcement onto public institutions and the taxpayers.

Librarians have their own problems with digital locks as being pushed by the US, claiming that copy protection could break the chain necessary to preserve creative works. They argue that because of digital locks, creating a ‘Rosetta Stone’ of today’s new formats is becoming illegal. Copy-protected content and applications are less likely to survive for posterity [29].

Many of the advanced features of ebooks have been removed in order to prevent copying. These regressive measures include technical features that limit the downloading of content to the proprietor’s site, suppress the copy and paste feature, as well as charging excessive prices making e-book purchases less attractive than paper copies. Other controls include publishers withdrawing legitimately purchased subscriptions without notifying the subscribers.

## VII. CONCLUSION

The copyright controllers have declared war on technology, using lawsuits, legislatures and clever public relations to restrict the ability to sell and use new technologies. Even homeland security is trumped by copyright protections and the \$40 billion entertainment industry is imposing its views on the \$500 billion technology industry[30].

Copyright controllers are trying to entrench their monopoly. They want to control “in infinite detail all use and duplication of material, monitor that use, and possibly charge for it on a transactional basis if they don't block it out of hand” [31]. The copyright controllers have waged a continuous war aiming to extend their rights at the expense of education and the general public. Barlow (p. 15) warned “The greatest constraint on your future liberties may come not from government but from corporate legal departments laboring to protect by force what can no longer be protected by practical efficiency or general social consent” [32].

### **Final words**

“It’s fascinating that we live in a society where openness and sharing can actually be considered crimes.” - Stephen Downes.

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