

Copyrights and Property Rights

On April 26, the Cato Institute hosted a conference on “Copyright Controversies: Freedom, Property, Content Creation, and the DMCA.” Speakers included Cato’s director of information policy studies Jim Harper; David K. Levine, coauthor of *Against Intellectual Monopoly*; and Consumer Electronics Association president Gary Shapiro. Excerpts from their remarks follow.

JIM HARPER: Property rights are very important, because ownership of property is as important as things like free speech for autonomous living and as bulwarks of resistance to authority. Property is at the very center and the very heart of what makes this a free country and a great society.

The original explanation for property rights is that inherent in the nature of tangible things is that two people can’t possess the same thing at the same time. If I have an apple and you want to eat it too, we can’t both eat it without bumping our faces together and making quite a mess. In economic parlance, an apple is a rivalrous physical good. No two people can possess it at the same time. John Locke gave us the best explanation for how we divvy up things in the physical world: by mixing our labor with something, we make it ours. If you imagine a Garden of Eden or an original place with plentiful common property, the way you make property your own is by mixing your labor with it, by tilling soil, by plucking an apple from a tree, and so on.

It’s a happy coincidence, of course, that ownership of property puts us in a position to trade goods with one another. So that if

I’m particularly good at collecting apples from trees and Drew is particularly good at collecting fish from streams, we can trade apples for fish and have wonderful meals of apple fish pie.

So property rights have a strong utilitarian basis. They do change on the basis of their utility and their efficiency, but essentially, property rights in tangible goods are there so that people play well together in the context of scarcity. When they can’t share physical items, property rights help people to work together.

Intellectual property is not similarly scarce. We can all take bites out of the same intellectual apple without bumping into one another or making a mess. We don’t even have to know about each other to feast on the same intellectual apple. So the starting point, the original explanation for intellectual property, is different.

The question then is: What is intellectual property? Where does it come from? What is the original explanation? I’m of the mind that the Lockean explanation is just as good for intellectual property as it is for tangible property. Ideas and expressions and inventions are all the product of mixing our

labor, in this case our mental labor, with the common property of pre-existing ideas and information. So when we set out to design a new kind of vehicle, just as when begin to eat a bowl of Wheaties in the morning, we’re creating new information. We’re creating new ideas. And we’re creating what could be called intellectual property.

We’re all constantly creating what I’ll call mundane facts simply by living our lives. Whenever a thought passes through your head, you’ve created a new fact, but most of these facts are not interesting to other people. But in the area of personal information, which is where I spend much of my time, mundane facts are sometimes a little bit more important. The fact, perhaps, that I want to buy a Porsche is mundane to most of you, but it becomes important to people who might want to sell me a Porsche. Likewise, the house I

live in; the things I purchase; my income level, family background, number of children, and educational level all start to matter to groups of people who want to know about me. These are important facts. They have slightly more value than the mundane facts that I create day to day.

Because those facts are important, industries have developed to aggregate them, to collect consumer data, credit reporting, and other useful facts. Those fact collections have quite high value to some people. And the data aggregation industry is one that’s certainly threatening to a lot of people, because it’s not well understood. But I think it provides a valuable economic service by putting more and more intelligence into our economy.

But what is the explanation for what has happened when mundane facts that I’ve created are important to others, and they collect them and start to amass them? Is it a wholesale theft of information from me? I don’t think so, but some orthodox privacy advocates do.

I think that if we somehow retained exclusive rights to the facts we create every day, that would turn society on its head. You

would be violating my rights if you spoke later today about something that I had said. That would be a fact, certainly a fact I've created, but it's one that you haven't stolen from me. Rather, I think the better explanation is consistent with property rights: the idea that almost from the moment many facts are created, they're abandoned.

While the default rule in physical property is exclusivity, the default rule in personal information is that what is observable by others is public.

We designate some of the facts we create intellectual property because we've decided that, for good, functional, utilitarian reasons, we should protect people's property rights in those facts even when they're available to others. Under copyright and patent laws, we have said that you can put out information and make it available to the public, but you don't lose exclusivity entirely. Intellectual property law is essentially a determination by society that we're better served by having rules that give incentives to create and distribute particular types of human-created information.

The question is, what is the scope of those rules and what term in these protections is most appropriate and gets the most out of creators? I don't know the answer to that. But I think the question is very important.

DAVID K. LEVINE: The Constitution speaks about promoting "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." This is pretty much the view that economists take of intellectual property. And I don't think I can easily be accused of being against free markets or being against property. I am a professional economist. Professional economists, I think more than any other group in the United States, understand very clearly the benefits of markets, the benefits of property.

What I want to raise in your mind is the question of what kind of property exactly is intellectual property. So, in particular, think for a moment, just as a conceptual experiment, what would happen if the government granted some particular company, in this case, me, the exclusive right to sell soap in the United States of America and allowed

me to license that right? Anyone who wanted to sell soap would have to buy a license from me, the owner of the soap right. The soap license would be a property right in the legal sense. It would confer upon me the exclusive right to my customers. I would own every potential consumer of soap. And when I licensed that right, I would be selling my customers.

That sort of arrangement used to be extremely common; governments would grant exclusive rights to sell a product. But economists do not view that grant as property in the same sense that we view property in land or property in physical capital, in plants and automobiles. They call it a monopoly. And it is a kind of property that



DAVID K. LEVINE

economists actually view as not a good thing at all, because monopolies tend to produce lousy products.

Copyright can also be viewed as a monopoly. No economist will argue that if I own a book, I shouldn't have the right to sell that book to the highest bidder, or that I shouldn't be able to profit from my ideas. But would an economist argue in favor of a monopoly over all copies of a book?

Economists agree that the right to control the distribution of a book is a monopoly. Economists, by and large, also argue that this is a desirable monopoly, that it's a good thing to give a monopoly over the distribution of a piece of intellectual property. The Constitution reflects the view that by giving a monopoly, we encourage the creation of things by providing a greater incentive. That's the heart of the argument in favor of intellectual monopoly. A musician

makes a living because he can prevent people from giving away copies of his CD or distributing it for free on the Internet.

If I produce a book and I have a monopoly over all copies of that book, no doubt I will earn more money from that book than if I don't have a monopoly. But that book will also be less useful if I have a monopoly over it. Because the way that I make a profit from a monopoly is by restricting distribution—by producing fewer copies and by making copies more expensive—but that also means that fewer people can read it.

Government-granted monopolies trigger rent seeking. I think probably one of the greatest examples of rent seeking is the retroactive extension of the copyright term. But maybe all this rent seeking and the restricted usefulness of all these products are good things if they get more music produced and more books written.

The other side of the coin is the fact that intellectual work builds on other intellectual work. I can earn more money from my book because of copyright. On the other hand, I may have to pay more money for the ingredients of my book because of copyright.

Does copyright lead to more creation? The evidence is unambiguous: it does not. F. M. Scherer, an industrial organization economist and a proponent of copyright and patents, studied the case of music in the 18th and the 19th centuries. One of the questions that he asked—because at that time copyright covered music for the first time—was whether copyright increased the production of classical music. Much to his surprise, he discovered no evidence that copyright increased the productivity of composers. In fact, the only really clear-cut case he found was that of Verdi, the great writer of operas. Verdi wrote both with copyright and without copyright. When he got copyright over all of his old works, he stopped writing new operas and he lived off the royalties from his old works. Not a great example of copyright inducing greater creation and innovation.

In a more modern example, *The 9/11 Commission Report* was a government document and therefore was produced without copyright. It was made freely available on the Internet. W. W. Norton & Co. publish-

ers was given a license to produce the first copies, and then any publisher could produce and sell copies. Another publisher, St. Martin's, did produce an alternate copy of the report. But solely because Norton was able to go first, as all content creators could with their own work, it earned a profit of \$600,000 from sales.

The music industry reports that unauthorized digital downloads may have caused a drop in sales of as much as 10 or 15 percent. But computers have had another rather significant effect on the production of music on the cost side. Producing music costs much, much less than it did 20 years ago when recording required giant, expensive sound studios. So do you think more music or less music is going to be produced? Do we need copyright to get music produced? Probably not.

The open-source software movement is a great example of creation without copyright. The creators of open-source software don't relinquish their copyright out of charity. They invented the Internet—not Al Gore—and they make money from it. The guru of open source, Linus Torvalds, drives a fancy car and lives in a nice house. He's worth millions of dollars, and he made that money by producing an intellectual product, a software product, and giving it away without copyright. He made money. He had incentive. You don't need copyright to produce incentive.

GARY SHAPIRO: We have to view the Digital Millennium Copyright Act in the context of history. There has been a trend over the last several decades toward defining intellectual property as if it were real, physical property, and that trend is bad. Just a generation ago, the law labeled copyright as part of a bundle of intellectual property rights. The phrase "intellectual property" didn't even exist a generation ago; it was just called copyright. The Constitution refers only to copyright and patent. We must be wary of those advocates who define copyright as property using analogies about stealing cars and shoplifting clothes and other products. They are trying to convey the concept that, just as real property, copyright must be protected. They then argue they must call copyright intellectual property.

Yet so-called intellectual property and real property are totally different. Real property is subject to ownership taxes. Real property can be owned forever. Intellectual property is a misleading term: it's only a license. Treating copyright as real property distorts the debate.

The content community has also corrupted the word "piracy." We know what pirates are. They steal from people. So now there are armies of lobbyists promoting this concept, and I'm unsure of our ability to reverse the idea that intellectual property law is a subset of the law of real property.

Copyright protection has also expanded immeasurably over the last three decades. Terms of protection are much longer. The



original term was set in 1790 at 14 years. Congress has acted 13 times to expand the length of the copyright terms; 11 of those expansions were passed during the last 40 years. Most recently, Congress added 20 years to the term of copyright in 1998, preventing millions of 20th-century works from coming into the public domain.

The content community wants all the benefits and protections of copyright, but they're unwilling to pay their constitutional dues—putting the work in the public domain so they may replenish our creative roots, as the process has worked ever since Shakespeare and all those fables upon which Disney has based its movies. This sudden increase in copyright terms means that copyright has shifted from a brief, exclusive monopoly to a long monopoly that forecloses public access.

The number of things that are copy-

rightable has also increased. Technology has obviously increased our ability to create copyrighted works. Every e-mail, text message, blog, website, digital photo, video, and audio recording is copyrightable. The World Intellectual Property Organization Treaty, ratified by the Senate, states that any time you fix something tangibly, it's copyrighted. So there are literally billions of works that are created every day that are copyrighted. Meanwhile, digital technology requires the making of numerous copies in the course of normal use of computers, bringing millions of consumer actions under the ambit of copyright law. If I lend you my copy of a paper book, I don't have to make a copy. If I lend you my E-Book, it has copyright implications.

The DMCA also gives copyright owners broader powers to control the use of their work. They can insist on the use of digital rights management technologies, and the DMCA makes circumventing those protections illegal. The Department of Justice wants even more criminal penalties. Kids could go to jail for noncommercial infringement in the process of exercising their fair use rights. There are foreign academics who are afraid to come to the United States because they don't want to be arrested for violation of the DMCA.

The DMCA creates new restrictions on technology, and those restrictions lead to lawsuits and a sharp decline in available venture capital. The Supreme Court says that if a manufacturer or a service provider is inducing a copyright violation, the copyright owner can sue. The DMCA includes technical protection measures, and there are new proposals to expand the DMCA's restriction on software that can bypass copyright protection. The Senate is considering a proposal to criminalize the manufacture of products that record from digital radio. Manufacturers are being told how to build products. The Tivo competitor Replay TV was sued out of business.

It's time we shifted the balance back, away from the copyright-protect only community, because our country relies on technology to fuel the economy. And to the extent that we are stifling innovation and threatening to throw people in jail, we are doing the wrong thing.