On the Self-Evidence of Copyright

Abstract:

Is there an innate or self-evident right to have control over the reproduction of work you have authored? Conversely, is the crime of unauthorized reproduction wrong in and of itself or wrong merely because it is currently illegal? At present, society as a whole does not share a common answer.

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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.

- Thomas Jefferson

The copyright of authors has been solemnly adjudged ... to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.

- James Madison

The concept of copyright is a veritable gordian knot of rights and restrictions. Copyright entails various prohibitions against such diverse acts as copying, distributing, performing, displaying, or creating derivative works. (Brinson & Radcliffe, 1994). Although the specific prohibitions against unauthorized reproduction and distribution are considered most germane to contemporary debates and as such are the focus of the subsequent arguments, it is worth noting that the arguments which will be made concerning unauthorized reproduction and distribution are in many cases applicable to copyright as a whole.

Is there an innate or self-evident right to have control over the reproduction of work you have authored? Isomorphically, is the crime of unauthorized reproduction wrong in and of itself or wrong merely because it is currently illegal? In short, does the unauthorized reproduction of a work infringe upon an author's natural rights, or merely contradict a convention which has been erected for the benefit of society.

Legal and ethical reasoning, particularly regarding technological innovation, often functions by way of analogy. But what is the correct metaphor for infringement of copyright? When a student downloads a digital recording of music, is he violating the author's innate rights in a manner akin to robbery? Or is he instead merely declining to participate in a course of action which is generally believed to be beneficial to society as a whole, analogous to someone who refuses to conserve electricity or recycle used paper? It is this question for which, it shall be shown, society as a whole does not share a common answer.

The lack of a societal consensus on the ethics of copyright issues has vast implications for the present as well as the future. An author possessing a natural right to copyright could reasonably demand
any price whatsoever for his work, and a government that denied an author his natural rights would be committing an unethical act. Under such circumstances, noncompliance with a copyright law would be an unethical infringement of author's right. However, if copyright is not a natural right of authors, but rather a monopoly granted to authors by the government, then it is incumbent upon authors to responsibly exercise their monopoly. In that case, an author possessing a government-granted monopoly has an ethical duty to act in the public best interest, and a government may set whatever copyright policy would most benefit its citizens, including obligatory licensing if not the abolition of copyright entirely. In the absence of an innate right of an author, unlicensed copying may be, in some circumstances, a justified act of civil disobedience.

Absence of a consensus in times past

 Debates regarding the merits and justifications of copyright are far from a modern invention. A lack of consensus regarding copyright law existed since the very founding of the United States. Any consideration of the opinions of the 'framers' of the United States is included only with some reluctance, as objections could be made both to the americentric nature of its inclusion as well as to the inherent problems with any argument from authority. However, in this instance, their opinions are offered not to lend validity to the conclusions they drew, but to establish that any supposed past social consensus on copyright is illusory.

 The notion of a natural right of copyright, indeed the very concept of natural rights, arose through the work of Locke, who also strongly argued for a right to property as a reward for labor. Subsequent authors applied Locke's natural right to property not only to physical products of labor but also to intellectual products as well. Citing Locke's arguments for a right of property, Blackstone directly argued for the natural right of an author to prevent unauthorized copies of his work: "When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, [...] is an invasion of his right of property."

 The framers of the United States government, although heavily inspired by Locke, seem less willing to accept his views on the natural right to property. Indeed, Locke listed the inalienable rights as "Life, Liberty, and Property", rather than the now-familiar "Life, Liberty, and Pursuit of Happiness". The
Framers later made a significant departure from Locke's views, feeling that property was perhaps, not a self-evident, inalienable right, but merely one possible expression of the more fundamental right to pursue happiness (Hamilton, 1999). This shift, though superficially minor, is indicative of a large philosophical difference between Locke and the American Framers--a difference which led to a copyright based not upon the intrinsic right of the author, but rather on a social contract by which the populace granted to authors a limited monopoly on the grounds that such a monopoly would be beneficial to society.

The modern foundation for copyright in the United States stems from the Constitution, which grants to Congress the 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 statement's phraseology and placement within the Constitution would seem to suggest that the authors of the Constitution denied the existence of a natural right of an author to copyright. There is no explicit listing of copyright in any of the many enumerations of natural rights in the Constitution or Declaration of Independence. Instead, copyright is included as one of many statements of congressional power, preceded by the power "to create post offices and post roads" and followed by the power "to constitute tribunals inferior to the Supreme Court." Contrary to Locke and Blackstone, the specific constitutional justification for copyright seems strictly rooted in utilitarianism, not natural rights.

However, the Constitution represents a compromise between various factions within the early United States, and as such, it would be an oversimplification to imply that all of the authors of the Constitution emphatically concurred with its philosophy of copyright. On the contrary, the ethical constructs underlying copyright were a source of much debate then, as now. As might be suggested by the Constitution's exclusion of copyright from its list of natural rights, some influential early American felt copyright was a limited monopoly granted solely for the societal good. Other members of the American revolution, however, harbored the believe that a natural right to copyright did indeed exist. James Madison, widely regarded as 'the father of the copyright clause' supported the natural right of authors in a oft-quoted Federalist article (Shirata, 2000). Benjamin Franklin seemed to concur, observing: "For [an inventor's] attempts to benefit mankind, if they do succeed expose him to envy, robbery, and abuse."
Absence of a consensus modernly

Modernly, debates as to the ethical foundations of copyright have only grown in intensity. Among online political groups, copyright is becoming an issue of ever-increasing importance. GNU Project founder Richard Stallman is a prominent, and vocal, opponent of the concept of the natural right of an author to restrict copying. In online communities, columnists lament the increasing reach and duration of copyright (Katz, 2000), while more radical user comments call for the complete abolition of copyright (Slashdot, 2000). Meanwhile, civil liberties advocacy groups like the Electronic Frontier Foundation fund defendants accused of violating the oft-criticized Digital Millenium Copyright Act of 1998.

While it is clear that among avid computer users and techno-libertarians, an author's natural right to copyright is debated if not dismissed, there exists strong evidence to suggest that the population at large also questions that extent to which copying a creative work is truly wrong. A September 2000 survey found 53% of internet uses felt downloading copyrighted music wasn't stealing. In the American population as a whole, 40% agreed (in contrast with the 35% who felt it was stealing) (CNN, 2001). As of February 2001, nearly 37 million Americans have engaged in downloading music. During his presidential campaign, then-Vice President Al Gore praised Napster and argued that "the American democratic system was an early political version of Napster." (Henig & Pontin, 2000), in addition to admitting, via a non-denial, having himself downloaded unlicensed music (Golson & Sheff, 2000). The huge number of people who have downloaded music online, in addition to the number of people who will publicly admit having done so, suggests that for a significant portion of the population, copyright violation (in the form of unlicensed copying and distribution online) is not seen as inherently wrong.

At the same time that the world population seems ever-increasingly skeptical of copyright, an equally vocal, albeit significantly more influential, group of copyright-supporters have argued for the existence of a natural right of an author. Music, motion picture, and publishing trade groups, representing the creators and distributors of information content, have aggressively lobbied for increasingly powerful copyright laws and emphatically argued for the natural right of an author to control the copying of a work. Press releases, public education campaigns, and websites from these sources take as self-evident that unauthorized copying is an inherently evil (malum in se) violation of the natural rights of the artist, not a
societal convention agreed upon for the public good (*malum prohibitum*). To proponents of this view, unauthorized copying is termed 'piracy' or just plain 'theft'.

Through lobbying and lawsuits, industry groups have aggressively fought against the perceived violation of an author's rights in the form of unauthorized copying. In the sphere of music, action is being taken to stop the recent explosion of authorized copying. The Recording Industry Association of America has pursued peer-to-peer facilitator Napster, while the National Music Publishers Association has successfully shut down online databases of lyrics and threaten action against tabulature archives. Simultaneously, the Motion Picture Association of America attempts to prevent an anticipated explosion of unauthorized copying of movies by engaging in litigation against the creators of software which might facilitate copying of DVDs. Similarly, publishing industry lobbyists, sharing the increased fervor characteristic of the music and film industries, hope to stop what they perceive as the wide-scale and long-standing violation of authors' natural rights at the hands of public libraries, publicly professing to "have some serious issues with librarians" (Weeks, 2001).

The United States government would seem to concur with industry advocates, having recently enacted an array of laws meant to increase the protections given to copyright owners. The 1998 Sonny Bono Copyright Extension Act increased the duration of copyright by 20 years to a total 95 years after first publication. The Digital Millenium Copyright Act, and it subsequent judicial interpretation, has made it illegal to circumvent encryption, even for the purposes of fair use. Time- and Space-shifting, long held to be fair use, has been eroded, as in the case of the successful suit against Mp3.com for its service which would enable users to listen to CD's that they already own from any internet-enabled computer.

Despite the intense debate on the ethics of copyright, as marked by intensely aggressive legal action, sweeping legislation, and wholesale civil disobedience by literally millions of Americans, mainstream media remains relatively silent on the ethical debate underlying the copyright crisis. The vastly popular Napster service has indeed received the attention of the national media, but such users of the service are only sporadically characterized as holding any shared trait or ideology besides youthfulness, apathy, or greed. However, the sheer magnitude of unlicensed copying, combined with the complete absence of guilt felt by the copiers, suggests a fundamental rejection, on a societal level, of the conclusion that unlicensed copying is inherently wrong. At the same time, aggressive litigation and sweeping
legislation demonstrates that other facets of society harbor an increasing devotion to a perceived natural right of an author. While phrases like 'the abortion debate', 'gay rights', or 'the environment' are familiar political issues of the past and present, the relatively unheard of 'copyright debate' promises to continue growing in intensity, with increasingly powerful laws passed and increasingly large populations committing wide-scale civil disobedience in the form of copyright infringement.

It would be presumptuousness of the highest order for a single document, composed by a single author and exhibiting relative brevity, to argue for the correct solution to the vast array of questions posed by the intersection of intellectual property and information technology. Similarly indefensible would be a claim of having answered the question whether there is an innate right of an author to restrict copying or not. Such questions are broad and complex indeed, and were this paper to boldly attempt to define for all readers the one true solution to the question of whether intellectual property rights exist, it would vacate its status as a limited, well-reasoned argument and assume the role not of essay but of manifesto.

Mathematicians, to the frustration of beginning students and the amusement of humorists, often argue not to find the solution to a question but merely to prove that a solution exists. This document's purpose is tailored even more narrowly, and as such does not attempt to demonstrate any solution to the question of whether intellectual property rights exist or are beneficial to society. What this document has endeavored to demonstrated, however, is that contrary to publishers who vilify computer users, wide-scale copyright infringement stems not from criminal instincts or uninhibited greed but from a very legitimate debate as to the merits of the ethical constructs underlying copyright law. Contrary to public relations campaigns which directly equate shoplifting and copyright infringement, the right of intellectual property is far from self-evident. In short: a question exists.
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