IT'S TIME TO RE-EVALUATE COPYRIGHT

Darren Abramson

I dedicate this article to the memory of Donna Balkan, who was always telling me to "write something about copyright."

Suppose you write a short story. Do you "own" that story? Yes and no, under copyright law, and each of the "yes" and the "no" answer has good reasons behind it. After briefly explaining what I mean, I'll introduce a puzzle for copyright and offer some thoughts on how you can help solve it.

Let's start with the claim that you don't own the short story. If you own a car, and someone drives that car away, then they have deprived you of your possession. Unlike a car, if someone makes a *copy* of your short story, then you might still have your short story. All of the things that are protected by copyright law are "intangible" in this sense. It is for this reason that we need copyright law for you to have special rights over the short story you wrote—property law won't cut it.

Early industry association advertising campaigns took on the task of blurring the distinction between theft of a tangible good and violation of a copyright. The term "piracy" intentionally confuses criminal theft with unauthorized copying, which makes satire of those early ads all the more satisfying,

In what sense *do* you "own" your short story? Strictly speaking, you don't. But in Canada and most other countries you have copyright over it: a temporary monopoly over the right to make copies of the short story. Copyright is a legal mechanism to make it *as though* you own the short story. Ownership of intangible goods doesn't actually make sense, since there is no safe that can hold an intangible good. But creating a right to sue someone who makes unauthorized copies of your short story means that you can monopolize all the financial benefits of that short story.

For about 400 years, Western democracies have held that copyright is a good idea for society. The downside of copyright is that it limits our freedoms. I can't make copies of other works, or substantially borrow from them when making my own works, as long as they are under copyright. The upside is that, given the knowledge of the financial monopoly that they'd accrue from the publication of a popular original work, creators of intangible goods are highly incentivized to create. So, via copyright law, societies end up with lots of very high quality intangible goods, created by authors seeking not only fame but also fortune.

Richard Stallman, recipient of a MacArthur genius grant, and father of the idea of "free and open source software", understands these opposing tendencies in copyright between limiting freedom and incentivizing the creation of new works (see section "Finding the right bargain" in this article). The following puzzle is due to him.

Suppose we agree that copyright law is an expression of what our society thinks is the right balance of these opposing tendencies. Then, in order to get clear on what that balance should

look like, we must ask: how much freedom should be curtailed? What incentives should be offered for the creation of intangible goods like books, movies, music and software?

To see the complexity of this question, consider the cost involved to create and distribute music. Vinyl records are expensive and time-consuming to transport, but the digital transmission of music is cheap and nearly instantaneous. Assuming that people who create intangible goods are at least somewhat rational, if the risk associated with investing time, energy and money goes up, so too must the incentives go up, if they are to fulfil their incentivizing role. Conversely, as the costs go down, people will need fewer incentives to invest in the creation of intangible goods.

This shows that the "right balance" for society between liberty ceded and incentives gained in copyright is a moving target that must be determined by investigating practical consequences. In other words, solving Stallman's puzzle can't be done from the armchair.

For the last 100 years, copyright has expanded in one direction, granting ever-longer copyright terms. In Canada, the former Federal government recently told its citizens that due to the economic necessity of new global trade treaties, copyright terms must be extended as a part of the budgeting process. From what I can tell, there is no shortage of new content being created. Instead, what we find is that business models that couldn't have existed when trucks transported reels of film to movie theatres are thriving. Consider: ad-free broadcasting that offers on-demand content for a monthly fee, a fee that is an order of magnitude lower than the price of cable television, is doing quite well (yes, Netflix).

Should you feel less free, or more free, to use new technology to make copies of intangible goods? Or, just as public libraries now have limited licenses to allow for simultaneous viewing of digital books (5 at a time for some at the Halifax Public Library, 2 at a time for others) that can be copied at no cost, should we use technology to make it harder to make copies?

Let me emphasize: the creation of culture isn't just about money. It also isn't just about labours of love. In Canada, it is also about "honor and reputation." The puzzle above isn't about finding the right point in two dimensions, or even three. If you've ever been in Toronto's Eaton Centre, named after an early casualty in the war between the Internet and Retail, you might have noticed the sculpted geese. Canadian copyright gives the right to the artist who sculpted the geese to deny the owner of the sculpture the ability to put festive hats on them. The geese are tangible, but the owner's inability to alter them is prevented by the law governing what copies we make of the tangible good.

Should there be greater protections for the intangible property of artists? Lesser? This is a hard question. But, let's return to money, or rather to the deliberate lack of money, for a second.

An interesting feature of Canadian copyright law, but only since 2012, is that if you make creative use of other folks' copyrighted output, but don't charge any money for it, you are scot-free. Almost no one seems to have noticed this (with notable exceptions, such as Murray and Trosow).

Here's what section 29.21 says, in plain language (compare the legal language here). If you create a new work that contains copies of another work, you have not infringed on the copyright of the work you copied so long as you

1. are not trying to make money from your own work;
2. provided attribution for the work you copied;
3. didn't violate copyright to get a hold of the copy you used of the other person's work; and,
4. your work wouldn't spoil the market for the other work.

The fourth condition is stated in terms of a "substantial adverse effect, financial or otherwise" on the market for the work you borrowed from, and might mean that you can't put festive hats on the other person's work. This hasn't been tested in the courts. It is very common for young artists to learn their craft by "remixing" other people's works, and this practice has caused significant controversy in the United States. I hope people discover that if they build a Soundcloud-equivalent on Canadian soil, and find a not-for-profit way to support it, then musicians can have a place to practice remix culture without fear of takedown notices and copyright attacks. I also hope that this clause on "user-generated content" survives the upcoming review of Canadian copyright.

We live in an age of record economic inequality in which powerful actors have a strong vested interest in keeping copyright the same. Traditional publishers that succeeded under older conditions for making and transporting intangible goods are strongly incentivized to keep things the same, or even to extend copyright terms and conditions. Don't get me started on digital locks, which some have argued could take away the exceptions that the Copyright Act provides, including user-generated content. Those of us who accept my argument here that the social utility that copyright promotes could thrive with a law that permits greater liberty might heed the words of Robert Heinlein, who got his start when he discovered he could get paid per page writing pulp sci-fi in the 1950s.

> There has grown up in the minds of certain groups in this country the notion that because a man or corporation has made a profit out of the public for a number of years, the government and the courts are charged with the duty of guaranteeing such profit in the future, even in the face of changing circumstances and contrary public interest. This strange doctrine is not supported by statute nor common law. Neither individuals nor corporations have any right to come into court and ask that the clock of history be stopped, or turned back, for their private benefit. That is all. (From Heinlein's first published story, *Life-Line*, 1939, in *Astounding Science Fiction*.)

So, the time is ripe for a re-evaluation of copyright. Thank goodness that Canadian copyright law has, built into it, a mechanism for periodic review. Apparently this will be happening this fall. I've given an argument here for what I think should happen, but I encourage you, reader, if you're a Canadian citizen, to tell your Member of Parliament what you think about copyright.

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