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Controversy: Would the Absence of Copyright Laws Significantly Affect the Quality and Quantity of Literary Output? A Response to Julio H. Cole

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"Without that sense of security which property gives, the land would still be uncultivated."[1]
Francois Quesnay

Introduction

Professor Cole argues that copyrights are essentially equivalent to patents in that they confer monopoly privileges that undermine social welfare. However, I find that his argument fails on a number of points. First, like Murray Rothbard, I argue that there is a clear difference between the copyright and the patent. Second, I take issue with Professor Cole's use of the term *monopoly* as applied to copyrights and the utilitarian morality he implicitly attaches to that inappropriate use. Finally, I reject the idea that we ought to abandon the copyright simply because technological advancements have made it more difficult to defend.

Are Copyrights and Patents All That Different?

Are copyrights and patents essentially the same? In *Man, Economy, and State*, Murray Rothbard argued persuasively that they are different forms of legal protection.[2] To be sure, Professor Cole is correct to assert that any law that creates scarcity does so artificially and thus is the source of monopoly. The question is, Can that argument be lodged equally against both the copyright and the patent? I would say, no. On the one hand, the patent may be attacked on such grounds because it extends the concept of ownership to natural laws and principles. It is true that the natural order is not a scarce good because it applies equally and perpetually to everyone. How could it be said, therefore, that someone owns a natural principle of the universe? Such principles are the

context within which all people live. Any effort to declare ownership to some specific principle would be superficial, as it would arbitrarily restrict the human action of others. Nature exists for everyone, and anyone is free to improve his understanding of it and to act upon that understanding. All persons are free to discover and employ natural principles that anyone else may have already discovered or already employed. No one can claim to own gravity, the fact that water runs downhill, or even the principles of aerodynamics. Thus, I agree with Professor Cole that patents essentially grant monopoly privilege because they confer ownership on things that individuals cannot properly own.

Is a copyright the same sort of claim to ownership as a patent? Are copyrighted items the type of things abundantly available in nature? My contention is that the copyright is of an entirely different nature from the patent. A copyright is meant to protect the owner of a product of scarce resources from theft. While no author can claim ownership of the fact that water runs downhill or any other natural principle of plumbing, for that matter, he may compose an educational handbook that elucidates those principles for a potential reader. In this effort, he employs numerous scarce resources including his time, effort, and personal capital. The result is a scarce product that ought to be protected by law. Though others are free to write their own guide to plumbing, they are not free to reproduce another author's book unless permission has been granted to do so. *The copyright exists to protect the product of one's labor.* This type of protection is the same as the protection of any property and cannot be separated from other moral obligations. It extends to the scarce labor of the person and the use of scarce resources, and hence ought to be protected. As Bastiat pointed out:

> In the full sense of the word, man *is born a proprietor*, because he is born with wants whose satisfaction is necessary to life, and with organs and faculties whose exercise is indispensable to the satisfaction of these wants. Faculties are only an extension of the person; and property is nothing but an extension of the faculties. To separate a man from his faculties is to cause him to die; to separate a man from the product of his faculties is likewise to cause him to die.[3]

In the case of a scientific discovery that can be used to create a new invention, the first person discovering the principle may or may not act upon the discovery or may attempt to sell some practical use of the idea. Regardless of whether anyone is interested, any person is free to discover the principle independently. However, no one is free to force the first person to divulge knowledge against his will because the discovery resulted from his own use of scarce resources. A person's knowledge is his property, which, in a certain sense, is

copyrighted material. No one may reproduce a person's product without his consent. In this case, the burden of proof is on the author or inventor to prove that such infringements have occurred when similar products appear on the market. In a world of imperfect information, any business is free to seek protection against the unlawful reproduction of trademarks and specific product designs, since these also represent the product of scarce resources. Businesses, however, are not logically free to prevent others from producing similar products, which have been independently designed, simply because they make use of the same natural laws. As such, patent protection is misguided, while copyright protection is not. As Rothbard argued:

> The patent is incompatible with the free market *precisely to the extent that it goes beyond the copyright*.... The crucial distinction between patents and copyrights, then, is not that one is mechanical and the other literary. The fact that they have been applied that way is an historical accident and does not reveal the critical difference between them. The crucial difference is that copyright is a logical attribute of property right on the free market, while patent is a monopoly invasion of that right.[4]

The Term *Monopoly* Can Mask an Implicit Moral Philosophy

The next problem I have with Professor Cole's argument concerns the term *monopoly* and his importation of an implicit moral philosophy into the definition.[5] When classical writers employed the concept of monopoly negatively, they pointed to a particular kind of government action: the extension of special privilege to engage in some enterprise to the exclusion of potential competitors. The problem with this kind of privilege is that it denied the human rights of some for the special benefit of others.

Initially, Professor Cole agrees with the classical usage of the term *monopoly* when he focuses on the government's creation of artificial scarcity as the test of its existence. However, as his article progresses, he shifts to embrace the modern structural view of monopoly that emerged out of welfare analysis. In making this shift, he seems more preoccupied with societal well-being than with the universal protection of human rights that makes the market possible. Welfare analysis began with the development of the static models of perfect competition and monopoly in the late-nineteenth century and became formalized in the early twentieth century. Nonetheless, as Dominick Armentano has argued, this emphasis on societal well-being has done more to blur the nature of the market process than to illuminate the way that competition actually functions.[6] Armentano thinks that structural analysis illegitimately compares the outcomes of the competitive model to monopoly. The practice of comparing

the fictional equilibrium outcome of the perfect competition model to the fictional outcome of the monopoly model tells us very little about the process by which markets actually function or even about how such markets promote societal well-being. As a result, the effort to eliminate economic profits from the market by way of government intervention can result in the expansion of monopoly in the classical sense, because such efforts to address the issue of monopoly using the new meaning of the term must attack property rights. The standard dictionary definition of the term *monopoly* is: "The sole power of vending any species of goods, obtained either by engrossing the articles in market by purchase, or by a license from the government confirming this privilege."[7] According to this definition, property is always held by monopoly right, but this fact is not necessarily problematic, for the market could scarcely exist otherwise. If people were not free to own and dispose of their property at will under the law, there would be no market. How can people trade what they do not possess as a monopoly? Would it be wise to abolish all property rights simply because they are monopolistic?

Karl Marx thought the abolition of property rights was a good idea, but history has shown otherwise. Unfortunately, Marxist ideas are making new inroads into economics through welfare analysis. The reason that the structural view spread throughout economics has more to do with its inherent utilitarianism than with its sound scientific character.[8] The moral philosophy of utilitarianism spread rapidly among economists largely because of J. S. Mill. Mill's father had been a devout follower of Jeremy Bentham and had reared his son in this new mode of ethical thought. From Mill, this philosophy was passed to his students who, in turn, passed it along to their associates, and so forth. In this way, then, the philosophy of utilitarianism became ingrained in the economic analysis of social phenomena. The welfare analysis of A. C. Pigou provides an excellent illustration of this point.

Utilitarianism is a hedonistic calculus that argues the government ought to undertake any action that would increase the total sum of societal happiness. The violation of property rights is often among the government actions proposed by utilitarian writers. As Frederick Copleston wrote, "Bentham did not invent the principle of utility: What he did was to expound and apply it explicitly and universally as the basic principle of both morals and legislation."[9] Bentham sought to develop a new moral philosophy that would undermine the old foundation of human rights in the natural-law tradition, but how is it possible to discern whether an action will increase happiness when happiness cannot be measured objectively? The answer is that it cannot be done. Nevertheless, proponents of utilitarianism, having denied a natural right to property,

are quite willing to violate property if they believe it would serve to advance the so-called public good. While Mill understood some of the problems with utilitarianism, he remained committed to it and attempted to engraft it into his economic analysis. Sadly, the influence of utilitarian analysis has misdirected the science of economics for a number of decades now.

The attempt to base government policy on utilitarian analysis reduces the political landscape to one best likened to children arguing over who would be happier to have various flavors of ice cream. The result is an assault on property as well-connected political interest groups use legislative means to acquire other people's property and to justify their actions by insisting that it promotes the general well-being of society. Such actions destroy property rights and, hence, undermine the market economy. "Utilitarianism, in short, has no logical stopping place short of collectivism."[10] The welfare component of Professor Cole's argument is similar to the socialist idea of eliminating private property for the presumed public good.

Should Copyrights Be Abolished Because They Are Hard to Enforce?

This brings us to the final problem I have with Professor Cole's argument: the abandonment of copyrights because of the increasing difficulty of protecting them in an environment where the costs of illicit reproduction are minimal. It is certainly true that new technological advancements allow people to reproduce copyrighted materials easily, resulting in a real problem for those deriving income from such products. But this fact alone is not enough, in my opinion, to justify abolishing copyright laws. On these grounds, it might equally be argued that laws against murder should be abolished, if it should ever become too easy to kill and too difficult to apprehend and convict the killers. Such utilitarian arguments hardly constitute reasonable justifications for abolishing laws respecting copyrights and murder.

In the lengthy quotation in Professor Cole's article, Pool traced the history of extending copyright protection in the twentieth century. He observed that the courts refused to extend copyright protection to certain kinds of works that developed as a result of new technologies, because they refused to apply the common law to such cases. Consequently, the developers of these products were forced to secure their property by pressing for the creation of new laws that would provide the protection they desired. For Pool, this fact provided ample evidence to denounce these laws as illegitimate since the courts had been unwilling to provide the protection by extending the common law. However, this argument is not particularly persuasive, especially when one considers that the common law has been under attack in the courts for most of the

twentieth century. Any study of the evolution of the legal system during this time will reveal a steady abandonment of natural-law reasoning. It is the natural law that gives rise to the common law and, as utilitarianism has spread, applications of the common law have waned. For this reason, the failure of the courts to recognize and extend copyright protection by appealing to the common law may be interpreted as the failure of a legal system that became increasingly utilitarian. The real problem lay in the legal system's abandonment of the natural law and the fundamental human rights recognized therein. As this trend continues, property rights are under increasing assault.

To illustrate this point, consider the case of the environmental movement. Prior to the enactment of environmental laws, people had legal recourse to seek restitution from someone who had harmed them due to an environmental abuse. Indeed, those who suffered environmental damage by someone else's action could seek restitution by appealing to the common law. In fact, many lawsuits were brought against polluters on this basis. As Roger Meiners pointed out, these efforts resulted in steady environmental improvement throughout the 1960s, which was well before the onslaught of environmental legislation in the 1970s. In these cases, the responsibility was placed back on those who believed they had been damaged, to instigate legal action. Consequently, a property owner would usually only enter into litigation that had a good chance of winning. While this legal structure did not rectify every instance of environmental abuse, in some of the worse cases it held the offenders liable for their actions. As Meiners argued:

> The common law has never been perfect. However, it plays a key role in promoting responsible behavior and allows citizens to decide for themselves if they want to enforce their rights. The common law of torts, contracts, and property provides the key legal framework for the free-market system. Individuals decide what actions they will take. Other persons injured by their actions have the recourse to private litigation when their protected rights have been violated.[11]

As long as the common law protection of people was recognized, improvements in the protection of property evolved over time. However, environmental activists of the 1970s became unwilling to rely on the legal system to work through the common law and pressed for new legislation. Their efforts were successful and led to the creation of the Environmental Protection Agency (EPA). As the EPA expanded its regulatory control, people have discovered that this institution has usurped their property rights. Cases abound where private individuals are denied the right to develop their own property because of the damage it would supposedly do to the environment, regardless of whether the

evidence of harm is minimal or nonexistent. Timothy Lynch of the Cato Institute makes this case in a recent study.[12] In short, property is protected less under the direction of utilitarian laws than it would be under the extension of the common law.

In the case of the copyright, new technologies have made it more difficult to protect copyrighted material. Now, more than ever, the revival of the common law tradition is needed. Such a revival would provide authors and other creative producers with a means of protection against the worst abuses of their property and, furthermore, would provide a means by which average people might gauge what the responsible use of their property would entail. This approach acknowledges the developer's responsibility to protect his property to the best of his ability, while providing an avenue for restitution in cases where a person's property has been grossly abused. This approach is likely to extend the creative efforts of people as they seek to better themselves by producing goods that might serve the interests and needs of others. However, if this course of action is pushed aside, then what has happened in the environmental movement in relation to property will likely be repeated in the area of copyrights.

Notes

1. Francois Quesnay, *Webster's Dictionary of Quotations* (New York: Smithmark Publishers, 1992), 328.

2. Murray Rothbard, *Man, Economy, and State: A Treatise on Economic Principles* (Princeton, N.J.: D. Van Nostrand Company, Inc., 1962), 652–60.

3. Frederic Bastiat, *Selected Essays on Political Economy* (Irvington, N.Y.: Foundation for Economic Education, 1995), 99.

4. Ibid., 655.

5. See Paul A. Cleveland, "Modern Misconceptions About Monopoly," *Religion & Liberty* 9, 6 (November/December 1999): 5–7.

6. Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (New York: John Wiley & Sons, 1982).

7. American Dictionary of the English Language, 7th ed. (San Francisco: Foundation for American Christian Education, 1993).

8. See my longer article on the subject, "Economic Behavior: An Inherent Problem with Utilitarianism," *The Journal of Private Enterprise* (Fall 2000): 81–97.

9. Frederick Copleston, *A History of Philosophy*, vol. 8 (London: Burns and Oates, Ltd., 1966), 4.

10. Edmund A. Opitz, *Religion and Capitalism: Allies, Not Enemies*, 2nd ed. (Irvington, N.Y.: Foundation for Economic Education, 1992), 132.

11. Roger E. Meiners, "The Role of Rights," *Ideas on Liberty* 45, 3 (March 1995): 161.

12. Timothy Lynch, "Polluting Our Principles: Environmental Prosecutions and the Bill of Rights," *Policy Analysis*, no. 223 (April 1995).