Journal of Markets & Morality 4, no. 1 (Spring 2001), 127-131

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

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I did not really expect to get away from an exchange of this sort (and certainly not from a controversy sponsored by this Journal!) without having to address the normative aspects of intellectual property issues, but I preferred to wait for my distinguished opponent to fire the first shot. He has now done so, and I must follow suit.

Do We Have a Natural Right *Not* to Be Copied?[1]

I was glad to learn that Professor Cleveland, while he does not share my views on copyrights, agrees with me regarding the negative consequences of patents. This is not a common viewpoint—opinions on intellectual property tend to be "all or nothing"—although it is a respectable position, and has a distinguished intellectual ancestry.[2] It is even a position for which I have some sympathy—partly because I happen to think that copyrights are not as economically harmful as patents—though it is a sympathy based more on personal "feeling" than on intellectual conviction. As far as the strictly intellectual case for copyright is concerned, I believe it is as weak as that for patents.

Our most basic disagreement seems to hinge on the question of whether copyrights are either (a) a form of property, or (b) a special privilege. Some people (myself included and many defenders of copyrights) think that copyright laws are simply a special sort of governmental intervention, designed to produce a desired social outcome. If so, then the discussion should center on whether they are *effective* means of achieving that objective, and whether they are the *only* means of achieving it. This is the utilitarian position, which Professor Cleveland attacks so fiercely, but which many people regard as quite reasonable.

However, other defenders of copyrights view them as much more than mere instruments of social policy. Rather, they view them as a means for protecting pre-existing "natural rights," essentially as a way to prevent theft. This is Professor Cleveland's position, which he states in so many words: "A copyright is meant to protect the owner of a product of scarce resources from theft." This view also seems reasonable at first glance, but it has its own problems. Consider, for example, what is implied when we say that unauthorized copying should not be allowed because it amounts to a form of *stealing*. If we argue that it *is* stealing, then should we not be able to describe what exactly has been stolen? If I reproduce someone else's book (or painting, or musical score, or computer program) the original "owner" of the product has not thereby been dispossessed. He still has it, and the fact that others are using it too does not mean that he can no longer use it as well.[3] In what sense, then, can we say that "copying is theft" and that the original creator has been "robbed"?

Copying by others will certainly affect a person's ability to sell his own product, and in that sense we might say that unauthorized copying hurts him. But the important question is, Has the creator lost anything to which he was *entitled*? If copying by others results in his obtaining smaller revenues than he would have otherwise, then he *has* been dispossessed of a profit, which is true enough, but was he really *entitled* to it? Ultimately, the question is whether we believe the original creator should always be entitled to all of the benefits deriving from his creation. Many people feel that unauthorized copying somehow "offends the moral sense," in that some people (the copiers) benefit from the work of others (the creators) without compensation.[4] But this brings us back to the basic question: Who has the right? Does the fact that others benefit from my work give me the right to prevent them from doing so?

Some people think that the act of creation itself is what justifies ownership. To them, this probably seems to be a sufficient argument, but to me, it either begs the question, or it proves too much. If it really were the case that intellectual creation in and of itself automatically grants to the creator the right to prevent others from using his work without permission, then it seems to me that to be consistent we would have to apply this to *any* kind of intellectual creation. More generally—if I am allowed to introduce a bit of economic jargon—under this view the creation of *any* kind of positive externality would automatically provide an entitlement to claim all of the benefits deriving from it. Most people, I believe, would not go that far. The fact is that there are many areas of highly creative activity where the act of creation does not bring with it an automatic presumption of ownership over new ideas. Think of cooking recipes, math theorems, fashion designs, jokes and magic tricks, to cite a few

examples. (Observe that under this view, it is the act of creation that is the source of the right, not the importance of the idea itself.) In what sense are books, songs, and computer programs fundamentally different from these other kinds of intellectual creation?[5]

Of course, rejecting a rights-based theory does not necessarily mean that intellectual property is illegitimate. Even if we believe that "the presumption is in favor of the copier" we could still argue that it might be *convenient* to limit the right to copy to achieve some other overriding social objective (such as providing incentives for intellectual creation). I suspect that, in practice, even rights-based theorists regard this as the ultimate justification for intellectual property—if pressed, they usually fall back on the idea that it should be protected, because creators will not otherwise have sufficient incentives to create. This, of course, shifts the debate to a completely different plane, and the discussion becomes much less "normative," if you will, and much more "utilitarian" (with apologies to Professor Cleveland). At this level, the language is not so much that of right or wrong as of cost and benefit.

Should Copyrights Be Abolished *Because* They Are Hard to Enforce?

Regarding the final point of Professor Cleveland's critique, I should clarify some confusion in his reading of my point regarding the implications of recent technological developments. After citing a long passage from Ithiel de Sola Pool's book,[6] what I stated was that this quotation raised "the intriguing possibility that, in arguing whether authors *should* have a copyright over their creations, we may be posing what will increasingly become a moot question. Technological developments in certain areas—photocopiers, video and sound recording, computer scanning, and so forth—are making it harder to enforce claims to intellectual property. At some point, we might just have to give up trying to enforce such claims."[7]

Professor Cleveland thinks that I appeal to this fact as an argument for the abolishment of copyright laws. He says that this is akin to letting people get away with murder, so to speak, if it should become technically feasible to kill with impunity. "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."

First of all, while I do happen to think it would be a good idea to repeal patent and copyright laws, I was not arguing here that they should be abolished *because* they are becoming harder to enforce. I was merely stating a fact: As a

result of technological developments, copyright issues will increasingly become "moot" issues.[8] In other words, what I am arguing is that, if and when, it becomes technically feasible to copy with little effort and with impunity, it will not matter much who happens to "own" the copyright. Why, then, would I want to "abolish" copyright in these circumstances? What practical need would there be to repeal a law that becomes irrelevant?

Second, I do not think the comparison with murder is very helpful, since it is too far-fetched. A better illustration would be the following: Suppose a substance is developed that allows a woman to terminate an early pregnancy with no harm to herself and in complete secrecy. Let us assume, moreover, that this substance can be easily prepared in any household kitchen with inexpensive materials that can be purchased at any grocery store. In such a situation, would it not be true that discussions concerning the *legality* (not the morality) of abortion would then become essentially "moot" questions (i.e., questions concerning which "a judgment … cannot have any practical legal effect upon a then existing controversy")? I am not implying that under these circumstances abortion would thereby cease to be *morally* wrong. But *I am* saying that the debate concerning early abortion would have to shift from the legal sphere—since, for all practical purposes, it would no longer matter if it is legal or not—to the moral sphere.[9]

I suppose what I was trying to say is that essentially, in the complicated interaction between technology and law, often "technology giveth, and technology taketh away." This is the case with copyright, just as it might conceivably become so with abortion.

Notes

1. I owe this phrasing of the question to a conversation with Mr. Henri Lepage.

2. Professor Cleveland cites Murray Rothbard in this regard, although it should be pointed out that this position actually derives from Henry George: "The two things [patents and copyrights] are not alike, but essentially different. The copyright is not a right to the exclusive use of a fact, an idea, or a combination, which, by the natural law of property, all are free to use, but only to the labor expended in the thing itself. It does not prevent any one from using for himself the facts, the knowledge, the laws or combinations for a similar production but only from using the identical form of the particular book or other production—the actual labor that has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of anyone else to do likewise. The patent, on the other hand, prohibits anyone from doing a similar thing and involves, usually for a specified time, an interference with the equal liberty on which the right of ownership rests. The copyright is therefore in accordance with the moral law—it gives to the man who has expended the intangible labor required to write a particular book or paint a picture security against the copying of that identical thing. The patent is in defiance of this natural right. It prohibits others from doing

what has already been attempted. Everyone has a moral right to think what I think, or to perceive what I perceive, or to do what I do—no matter whether he gets the hint from me or independently of me. Discovery can give no right of ownership, for whatever is discovered must have been already there to be discovered. If a man makes a wheelbarrow, or a book, or a picture, he has a moral right to that particular wheelbarrow, or book, or picture, but no right to ask that others be prevented from making similar things. Such a prohibition, though given for the purpose of stimulating discovery and invention, really in the long run operates as a check upon them." *Progress and Poverty* (New York: Robert Schalkenbach Foundation, 1990 [1879]), 411 (footnote). Once a distinction has been established between copyrights and patents, four scenarios are theoretically possible: One might favor both (the conventional view), one might oppose both (a minority view), one might favor copyrights but oppose patents (the George-Rothbard-Cleveland view), or one might oppose copyright but favor patents (a conceptual possibility, although it appears to be an empty set).

3. This is what I meant when I stated (following Arnold Plant) that the objects protected by patents and copyrights are not "scarce" in the same way that tangible goods are. Professor Cleveland rightly points out that the production of these goods consumes "numerous scarce resources," but is mistaken when he concludes "*the result is a scarce product* that ought to be protected by law" (my italics). The resulting object is indeed "a product of scarce resources," although once produced it is not *itself* a scarce product.

4. At this point, I think it is important to stress that I am not talking about *plagiarism*. That is, I am not referring to "copying" in the sense of claiming credit for other people's work or discoveries. That is wrong (at the very least it is *morally* wrong), but not so much because it involves *stealing* as because it involves *lying*. When I plagiarize someone else's work, I am saying, in effect, "I did this," when, in fact, I did not. However, when I photocopy someone else's book or article (or when I record a television program on videotape, or download a musical recording from the Internet, or copy a computer program on my harddrive), I am not claiming authorship. I am not lying at all. The only question is whether I am *stealing* from the original author or composer when I do so.

5. Taking the ownership-by-virtue-of-creation argument to its logical consequences, we would even have to recognize "property" rights in new dance steps. Should we then copyright dancing the Macarena?

6. Ithiel de Sola Pool, *Technologies Without Boundaries: On Telecommunications in a Global Age* (Cambridge, Mass.: Harvard University Press, 1990), 254–59.

7. I then added an endnote: "We may have already reached this point in the case of musical recordings." For a balanced, informative, and well-written analysis of the implications of the MP3 revolution, see Charles C. Mann, "The Heavenly Jukebox," *Atlantic Monthly* 286 (September 2000): 39–59.

8. "MOOT, *adj*., … *A moot point is one not settled by judicial decisions*. A moot case is one that seeks to determine an abstract question that does not arise upon existing facts or rights." *Adams v. Union R. Co.*, 21 R.I. 143, A. 515, 44 L.R.A. 273. A moot case is one that "seeks to get a judgment on a pretended controversy, or a decision in advance about a right before it has been actually asserted and contested, *or a judgment on some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy*." *Smith v. Smith*, 209 Wis. 605, 245 N.W. 644, 645. *Black's Law Dictionary*, 4th ed., rev. (St. Paul, Minn.: West Publishing Co., 1968), 1159. Italics mine.

9. It is not my intention to minimize the gravity of the abortion debate by comparing it to the question of copyright. There can be no comparison between the life-and-death issues involved in abortion and the much more pedestrian issue of copyright. Apart from the stakes involved, however, there is an important sense in which copyright is a much simpler issue than abortion. In my hypothetical scenario, even if the abortion issue should become legally moot, a strong case can be made that it would still be morally wrong. Under current law, unauthorized copying may be *legally* wrong, but very few people think it is *morally* wrong as well.