COPYRIGHT, AND THE DECLINING AUTHORITY OF PRIVATE PROPERTY

As of June 2006 the Recording Industry Association of America had sued 17,587 people, including a 12-year-old girl and a dead grandmother for infringing the laws on copyright. The RIAA further sent around 2500 pre-litigation letters to 23 universities across the US threatening action over students' alleged illegal downloading of music files. In Europe the Federation of the Phonographic Industry reported suing more than ten thousand people in eighteen countries by the end of 2006. (Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy, Bloomsbury, 2008, p 39)

Just as the recording industry has been fighting to defend its property rights, so too have authorities in Britain. The Coalition government says that

Within competitive markets, a sound intellectual property framework is essential to protect incentives for entrepreneurship and innovation, underpinning the dynamism the Government wants to see in the UK economy. (The path to strong, sustainable and balanced growth, H.M. Treasury, November 2010, p 13)

The government has asked journalism professor Ian Hargreaves to head a study to look at whether the current legal framework is a barrier to innovation (http://www.ipo.gov.uk/ipreview), but overall the attitude of government has been to defend and extend copyright. Britain's 'The Duration of Copyright and Rights in Performances Regulations 1995' extends the period of copyright in original works to the author's life plus seventy years, in line with the European Directive (2001/29/EC) and the 1998 Sonny Bono Act in America.

The defence of intellectual property rights on the part of authorities in the developed economies of the United States and Europe is a marked response not just to illegal downloading, but also to the competitive challenge of East Asian markets. In January, Benoît Battistelli president of the European Patent Office was telling delegates to a conference on the coordination of copyright law in Hanoi that 'In South-East Asia, we would like to harness the exceptionally mature and trustful relations we have established with our partners by raising the quality and scope of our co-operation to a higher level.'
(http://documents.epo.org/projects/babylon/eponet.nsf/0/492CB4F782E6B42BC1257817003A6B74/$File/20100113_battistelli_keynote_speech_en.pdf)
In 2001, the Agreement on Trade Related Intellectual Property was imposed at the Doha round of the World Trade Organisation, after widespread controversy over western monopolies over drug copyright.

The moves not just to defend but also to extend the duration and integration of copyright law have provoked considerable opposition. In 2006 police raids on the free downloading site Pirate Bay provoked large demonstrations. Since then the 'Pirate Party', that campaigns for a sharp reduction in copyright and patent restrictions, has become one of the fastest growing, and youngest, winning 7.3 per cent of the vote for the European Election in 2009, and winning two seats there. Sister 'Pirate Parties' have been set up across Europe, with elected representatives in local government in Germany and Czechoslovakia.

As remarkable as the growth in organised opposition to copyright law is, the greater challenge to its defenders is the exponential growth in illegal downloading. Pointedly, attempts to restrict downloading through digital rights management have failed as downloaders proved more adept at breaking into files than publishers were at making them secure.

In December 1973 Brian Burton, known as 'DJ Dangermouse' released an album that combined tunes from the Beatles White Album and Jay Z's Black Album. His 'mash up', titled The Grey Album, drew cease and desist letters from EMI – but after The Grey Album was adopted as a cause by the Downhill Battle website it was downloaded more than 100 000 times on a dedicated day of civil disobedience, 24 Feb 2004 – making it the 'best-selling' album that week. After that EMI abandoned digital rights management, and chose instead to try to follow the trend by selling songs through licensed downloading sites such as iTunes and Amazon.

EMI's decision was commercial, of course. By the first half of 2002 world sales of recorded music had fallen by 9.2 per cent – the third year of decline. With the launch of iTunes in 2003 more than one billion songs were downloaded legally within three years, rising to 2.5 billion in four. (Lessig, p 40) In 2007 digital music sales rose by 40 per cent to $2.9 billion. The strategy of adapting to the trend of downloading seemed to have had some success – though the industry spokesmen would have to acknowledge that illegal downloading had forced a marked price reduction in reproduced music upon them. As David Byrne, Talking Heads singer and head of independent label Luka Bop, says 'major labels weren't doing well because they put out terrible records for years and kept raising the price of these terrible records and finally people were, like "Screw You"' (David Byrne's Survival Strategies for Emerging Artists — and Megastars, *Wired*, 18 December 2007, http://www.wired.com/entertainment/music/magazine/16-01/ff_byrne?currentPage=all).

More than that, according to the International Federation of the Phonographic Industry 'the increase in legitimate sales did not come close to offsetting the billions of dollars being lost to musical piracy with illegal downloads outnumbering the number of tracks sold by a factor of 20-to-one' (Raphael G Satter, Digital Music Sales up 40 per cent', Associated Press, 24 Jan 2008). And by 2010, digital sales growth had slowed to a much more modest six per cent, while Frances Moore of the IFPI claimed that something like 95 per cent of downloads were illegal (Raphael G. Satter, Associated Press 10 Jan 2010, http://news.yahoo.com/s/ap/20110120/ap_en_mu/eu_digital_music)

As a note of caution on the numbers, though, industry spokesmen are widely assumed to be exaggerating the scale of downloading and of financial losses. William Patry, senior copyright counsel to Google shows that many of the numbers bandied about in scares about piracy are just speculation: 'not real data – quite the opposite, the data is fake – the point is to create a sense of siege, or urgency, of a clear and present danger that must be eliminated either by Congress or the Courts' (William Patry, Moral Panics and the Copyright Wars, Oxford University Press, p 35).

COPYRIGHT

The laws on intellectual property are different for inventions (which are covered by patent – a license) and for artistic expression which is covered by copyright. The laws on copyright have some ancient antecedents, but for the most part date back to the constitutions that establish commercial societies (The Statute of Queen Anne, 1710, in England; Article 1, paragraph 8, clause 8 in the US Constitution; a law in the French National Assembly of 13 January 1791).

The laws on intellectual property try to marry goals that are far apart. On the one hand the US Constitution sets out 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'. On the other hand the First Amendment to the same constitution ('Congress shall make no law … abridging the freedom of speech') protects free expression, which would seem to pull against exclusive rights.

In 1785, Lord Mansfield, trying Sayre vs Moore set out the same struggle:

> We must take care to guard against two extremes equally prejudicial; the one that men of ability who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labour; and the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. (Quoted in Ronald Rosen, Music and Copyright, Oxford University Press, 2008, p 13)

Right up to today, the same idea of a balance to be struck holds, as when Intellectual Property Minister David Lammy promised the House of Commons in March of 2010 'an intellectual property system which … balances the needs of rights holders and the public' (Hansard, 29 Mar 2010: Column 73WS).

The tug of war in copyright law is found not just in the claimants, but also in the goods themselves. Courts must work out whether the copying is of an 'idea' whose freedom is guaranteed, or the expression of an idea, which is protected under copyright law ('The idea/expression dichotomy', Rosen, p 14-15).

Of course the proposition that things are not just things themselves, but the manifestation of an idea can be found in Plato's doctrine of the forms, that all things are but the phenomenal form of an ideal type, that accounts for their universality ('I have seen Plato's cup, but not his cupness', joked Diogenes). Plato thought he was describing a theory of nature, but from his examples, mostly taken from geometry, we can see that he is led by the experience of man-made goods. In the nineteenth century, Karl Marx saw that all goods have a two-fold character, as useful things in themselves, but 'in addition, the material depositories of exchange-value' (Capital, Chapter 1, Section 1). In that it goes to the difference between the need to reward the manufacturers and the needs of consumers, there is a relation between the copyright concept and Marx's theory of the dual character of the commodity.

More broadly, Marx thought that Capitalist societies had both universalising tendencies and limiting ones:

> Those economists who, like Ricardo …having in view only the development of the forces of production and the growth of the industrial population … have

> therefore grasped the positive essence of capital more correctly and more deeply than those, who, like Sisimondi, emphasized the barriers of consumption … although the latter has better grasped the limited nature of production based on capital, its negative one sidedness. The former more its universal tendency, the latter its particular restrictedness. (Grundrisse, Harmondsworth, Penguin, 1973, p 410)

In the debate over copyright, both the universalising and the limiting sides of capital can be seen.

Technological innovation

One reason that the copyright debate seems to have hotted up is the way that new technologies have loosened the ties between private property rights and the goods they fix to. Even before digitalisation, lawyers knew that new technologies could tilt the balance. Harvard Lawyer Benjamin Kaplan wrote in 1967 that 'the fortunes of the law of copyright have always been closely connected with … technological improvements in means of dissemination'and 'successive ages have drawn different balances' (An Unhurried View of Copyright Law, vi-vii). More recently the spread of home computing and drag-and-drop file copying has once again overturned property norms. In Lawrence Lessig's view, 'the "natural" constraints of the analog world were abolished by the birth of digital technology' (Lessig, Remix, Bloomsbury, 2008, p 38).

The impact of the new technologies shows us again that the grounding of private property is conflict. In a hymn to the conveyor belt, Trotsky welcomed the way that new technologies of rail transport and electric cables brought in to increase profits tended to break down private property, saying 'the power "conveyor" clashes most sharply with the partitions erected by private property' (In the collection, Problems of Everyday Life, Monad Press, New York 1973, p 243).

It always was the case that the legal framework of private property was a poor fit for the actual character of social reproduction. Marx writes

> A commodity is therefore a mysterious thing, simply because in it the *social character* of men's labour appears to them as an objective character stamped upon the product of that labour; because the relation of the producers to the *sum total* of their own labour is presented to them as a social relation, existing not between themselves, but between the products of their labour. (Capital I, Chapter One, Section Four, my emphases)

Social reproduction is a process, in which all are connected making the inputs for other people's outputs, but it looks like something else. It looks like lots of separate activities, ending up in goods, that are bought and sold in individual and episodic acts. An exclusive right in a property makes it look as if the world is made up of exclusive things, when truthfully it is made of interconnected processes of which these 'properties' are only nodal points. Enjoyment of an exclusive right in a good seems to make sense where that good is a definite thing, with clear limits, like a piece of land,

or a manufactured object. As Trotsky suggests it begins to make less sense when the property is an industrial process that is tied in with others.

As a definite good, possession is straightforward: if I have the thing, you do not. But with the mechanical reproduction of goods where the usefulness lies less in the material substrate of the article and more in the intellectual component, there is a divergence between the good and its management as private property.

Furthermore, there is a divergence, too, between the cash value of the good and saleability. Marx asked 'why does the capitalist, whose sole concern is the production of exchange-value, continually strive to depress the exchange-value of commodities?' As he showed 'the value of commodities diminishes … in direct proportion to the development of the productiveness of labour', and innovations in production continued to push down the value of goods, in what business analysts dread as the 'race to the bottom'. (Capital, Vol 1, Ch XII)

Amongst lovers of the arts there has been a powerful reaction against mechanical reproduction, as for example in the F.R. Leavis' conservative screed *Mass Civilisation and Minority Culture* (1930) where the mysteries of craft production are lauded over the dismal 'yellow press'. Even as astute a commentators as Theodor Adorno and Walter Benjamin was driven to despair of the impact of Mass Culture, while Walter Benjamin thought that 'which withers in the age of mechanical reproduction is the aura of the work of art' (The Work of Art in the Age of Mechanical Reproduction, Penguin, 2008, and here http://www.marxists.org/reference/subject/philosophy/works/ge/benjamin.htm). Bertolt Brecht had the proper answer to that pessimist who thought that cinema was in the gutter: namely that it would stay in the gutter for as long as he left it there, and 'he was thus proclaiming his willingness to have nothing but dirt produced for him' (*Brecht on Theatre,* London, 1978, Methuen, p 47).

With digitalisation, the costs of mechanical reproduction are close to zero. That strains the imposition of the private property form upon social production. Everyone who has worked in internet publishing will recognise the problem: how do you charge for something that can be copied at no cost? Lawrence Lessig writes of 'creative work' that 'anyone can consume it without reducing the amount that anyone else has' (Remix, 2008, p 290). Where the consumer can take the goods away without depriving the original owner of their use, the 'exclusive right' to property is difficult to sustain. With the despised 'lumpy goods' of mass production it is relatively easy to withhold ownership until payment is made. But with digital files that is more difficult. And when you sell ordinary commodities to customers, you do not in the process hand them the means to reproduce those goods.

The difficulty for the defenders of copyright is that they rest more and more heavily on the legal enforcement of the title to property to realise the returns on their investments, whereas in the past it was enough to physically withhold the goods in question. That is one of the reasons why governments have become more and more interested in protecting intellectual property rights, and a sign that their legal claim to returns is at odds with the actual character of social production, as a collective process.

The Declining Authority of Property Right

Technological innovation, however, is not the only, or even the main reason that copyright has become as contentious an issue as it has. Digital reproduction gives the means for illegal downloading, but not the motive. Without investing the downloading phenomenon with the fantasy character of a social revolution, we can see that it has grown as the authority of rights in property has declined.

Jack Valenti, talking to an audience at Stanford University, broke his speech to ask the audience how many illegally downloaded – a sea of hand went up. Singling out one young man Valenti asked what justification he thought there was for stealing the song: 'everyone does', was the less than confident reply. Valenti turned to his hosts and put the question 'what kind of moral platform will sustain this young man in his later life?' Valenti's question was to the point. Stanford University was failing to inculcate the values of respect for private property – even among the well-heeled students that go there.

Respect for all kinds of authority has declined over the last twenty years (see Heartfield, Capitalism and Anti-Capitalism, interventions, Vol. 5 (2), 2003, and here www.heartfield.org/interventions.pdf). The mood of distrust to corporations parallels that with governments and other figures of authority. That private property fails to command the respect it once did is in keeping with that change, and bears upon the loss of respect for copyright law.

Those who want to downplay property rights in ideas see that artists *want* their work to be read, seen or heard. Commercial promotion of works constantly puts the work before as wide a public as possible. Consumers find it hard to understand why they should be tempted over and over again by products, and yet be denied them. Illegal downloaders hear the appeal from artists to pay attention to their works, but do not listen to the other part of the proposition that the artists should be rewarded for their work. Furthermore, they are not convinced that the appeal to protect the rights of artists is much more than a defence of the rights of the record industry. In the 1980s Saul Zaentz used the courts to enforce his rights to John Fogerty's songs, which he had bought, against John Fogerty, alleging that Fogerty had plagiarised himself.

In the minds of those who want free access to works there is a breakdown in the distinction between producers and consumers. They claim that the act of consumption is creative, too. They are not just taking the works; they are re-working them in a creative way. Candice Breitz's installation/performance 'Working Class Hero' at the White Cube in August 2007 had Lennon fans singing 'Imagine': 'the idea is to shift the focus away from those people who are usually perceived as creators, so as to give some room, some space, to those people who absorb cultural products'. The 'reception' of the work 'involves interpretation or translation' she says, and that act 'is creative'. Unfortunately for her, Sony saw things differently and asked for $45,000 for the rights, even though Yoko Ono had given her permission. Breitz – following the reception theorists in media studies – implies a democratisation of art, where the consumer stands on the same level as the producer, or consumption is itself an act of production. All told, this is a self-flattering view of audiences that gives too little credit to artists.

Parallel to the breakdown in the distinction between producer and consumer is a breakdown in the distinction between original expression and free ideas on which the enforcement of copyright rests. For younger people the boundary between original expression and the universe of given ideas seems to be set differently. If you are seventeen, the Beatles' song Help! seems to be as much part of the given realm of established ideas as does the Gettysburg Address or Hamlet. They grew up in a world in which the Beatles' works *are* the classics that tradition passed down from previous generations. The origin of those works in the creative lives of artists seems as distant as Lincoln's speeches or Shakespeare's plays. Of course the law of copyright itself recognises that over time original expression passes into the canon of ideas that belong to us all – this is why copyright is for a limited period.

Copyright lawyer Ronald Rosen writes about modern day consumers 'who contend that they are entitled to copy … that they are only tapping into and using "information" and ideas rightfully available to the public'. It is an attitude he says that can easily be understood: 'For those who are younger, that code of conduct is all that they have known' (Rosen, p 576). Practice shapes belief. Widespread copying leads consumers to conclude that the distinction between free ideas and protected expression is artificially constructed, and that the copyright laws have been rewritten to move the goal posts. Already they have succeeded in forcing legal downloads on the industry, and broken DRM.

But it is not a revolution

Declining respect for copyright law is a long way off being a revolution. Private property might not command the respect that it once did, but there is nothing in that that suggests that the social system based upon private property is about to be overthrown. Of course the critique of private property has a venerable past. Long before Joseph Prudhon declared that 'property is theft', Francis of Assissi said that to own property is to steal from God. Indeed, capitalist societies have again and again had to limit the particular rights of private property the better to defend the whole system. So in 1879 Moral Philosophy lecturer T. H. Green argued that 'rights have been allowed to landlords, incompatible with the true principle on which rights of property rest, and tending to interfere with the development of the proprietorial capacity in others' (Lectures on the Principles of Political Obligation, Cambridge University Press, 1986, p 176).

Industry proponents of the reform of copyright law are attempting to uphold the future revenue in the face of declining respect for intellectual property rights. Increasingly the music industry is adapting pragmatically to the fact of copying, and seeking to make revenues in advertising – as commercial radio did – or other business models of marketing premium content.

It is tempting no doubt to invest copying with a positive aspect – as with the first flush of the Wired philosophy that 'information wants to be free' (See Richard Barbrook and Andy Cameron, The Californian Ideology, Mute August 1995). But the utopia of free information itself rests on the other pillar of capital's universalising tendency, while ignoring its limitations. In that model 'information' ceases to be the product of

human agency and instead is invested with the fetishistic power of agency itself. Piecemeal rejection of special instances of private property is very far from being an overcoming of the system of private property, but is instead the means to sustain it. As Marshall Mathers says, if you can afford a computer, you can afford to pay for your music.

EFFECTS OF DECLINING COST OF MUSIC ON SUB-CULTURAL IDENTIFICATION

The declining value of music also means that it is of declining value to the consumer, so that they will tend to fail as goods that enhance the self-esteem of their purchasers.

When Long Playing records were expensive, buying represented a greater commitment to a genre. Teenagers who saved up to buy an LP would have to choose between various music styles, which were associated with sub-cultures (see Dick Hebdige: Subculture: The Meaning of Style, London, Methuen, 1979). If the backlog of prog-rock was too expensive, punk-rockers could easily assemble the canon of punk rock. They valued their music, not just because it was associated with an exclusive sub-cultural identification, but also because it represented a cash investment of other pleasures foregone.

But with declining costs, music buying is less expressive of group loyalty. A more eclectic buying mixed styles. The idea of 'guilty pleasures' legitimated listening to the kind of music that your parents enjoyed, with irony of course. More eclectic and mixed buying has added to the break-down in music-based cultural identification, so that the exclusive tribes have dissipated. Music, representing less of an investment, no longer gives the exclusive cultural identity that it once did. It fails as an esteem good.

Correspondingly, live performances have become more important, because they still represent an investment that grants esteem to the concert-goer. Saving up for a concert ticket, making the effort to arrange that special day all work because they still create a sense of commitment and identification that listening to recorded music does less. In the studies of the creative economy, this is called the 'experience economy' that puts greater value on unique experiences than reproducible commodities (see Pine and Gilmore *The Experience Economy*, Harvard Business School Press, Boston, 1999). It is the unique character of the experience - its non-reproducibility - that makes it valuable to the consumer– a return perhaps of Benjamin's idea of 'aura' and the authentic.

The loss of respect for property rights lies behind the conflict over copyright and intellectual property. Not just new technologies, but developments in society proper call into question just how good a fit the rules of property are to mankind's daily grind. Still, without a clear alternative to the organisation of society along commercial lines, that conflict just drifts, without coming to a head.