

Intellectual Property Extremism by Christian Seberino

MAIN POINTS

- New always **BUILDS UPON** the old and old always **RESISTS** the new.
- IP should be treated **DIFFERENTLY** because IP **IS** different.
 - No scarcity problems with IP like with material property.
 - Third world piracy helps Microsoft more than Linux when the country cannot afford Windows.
- System should **BALANCE** the interests of creators and the **PUBLIC**.
 - “[The] doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to count-less trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.”
--Justice Douglas (United States v. Causby (1946))
- Our IP system is the most **UNBALANCED**, **OPPRESSIVE** and **DESTRUCTIVE** in history.

“As I write these final words, the news is filled with stories about the RIAA lawsuits against almost three hundred individuals. Eminem has just been sued for “sampling” someone else’s music. The story about Bob Dylan “stealing” from a Japanese author has just finished making the rounds. An insider from Hollywood—who insists he must remain anonymous—reports “an amazing conversation with these studio guys. They’ve got extraordinary [old] content that they’d love to use but can’t because they can’t begin to clear the rights. They’ve got scores of kids who could do amazing things with the content, but it would take scores of lawyers to clean it first.” Congressmen are talking about deputizing computer viruses to bring down computers thought to violate the law. Universities are threatening expulsion for kids who use a computer to share content.”
--Free Culture, L. Lessig

“No matter the lengthy arguments made, no matter the charges and the counter-charges, no matter the tumult and the shouting, reasonable men and women will keep returning to the fundamental issue, the central theme which animates this entire debate: *Creative property owners must be accorded the same rights and protection resident in all other property owners in the nation.* That is the issue. That is the question. And that is the rostrum on which this entire hearing and the debates to follow must rest.”
--Congressional testimony 1982, J. Valenti

“Thought Thieves is about people stealing the ideas in your head. It sounds like science fiction but it really happens, and it happens all the time. So how would you feel if you saw your hard work being passed off as the property of someone else? What would you do?”
--Microsoft

EXAMPLES OF 'HISTORICAL NAPSTERS' AND 'LEGAL PIRACY'

"Legal Napster" - something that legally distributes someone else's IP without their permission
"Legal Piracy" - legal encroachment on someone else's IP without their permission

Book Publishing: (Legal Napster #1)

Statute of Anne (1710)

- Copyright for **new** works for **14** years renewable **once** for another 14 years if **author** alive
- **21** more years for **existing** works
- Sentiment was that monopoly rights should be limited.
- Goal was to increase public good.
- Enlightenment favored universal access to great works.

Miller v. Taylor (1769)

- London publishers successfully overturned Statute of Anne.
- Argument was that common law supported perpetual copyright.
- It was unclear if Statute of Anne should supersede that.

Donaldson v. Beckett (1774)

- House of Lords interpreted Statute of Anne as superseding common law for perpetual copyright.
- Cleared up ambiguity wrt Statute of Anne and was the birth of the public domain.
- "Great rejoicing in Edinburgh upon victory over literary property: bonfires and illuminations."
--Edinburgh Advertiser (Scotland)
- "The Booksellers of London and Westminster, many of whom sold estates and houses to purchase Copy-right, are in a manner ruined"
--Morning Chronicle (London)

Scots and others were allowed to 'pirate' IP legally after a limited period of time.

This 'piracy' immensely benefited society.

US Constitution Article 1, Section 8, Clause 8:

"Congress has 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"

Notice helped society and encouraged inventors/creators. These have been twin goals of copyright for about 300 years. Should be the case now.

Photography: (Legal Napster #2)

Corliss v. Walker (1893)

- Wife of the deceased inventor George Corliss filed a claim against a publisher.
- She argued that a biography of her husband would be an invasion of privacy.
- "It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead,"
--Justice Colt

Eastman's Kodak business benefiting from "piracy" just like Napster!

Legalization of photographic 'pirating' immensely beneficial to public wrt amateur photography, family albums, journalism, science, etc.

Film (Legal Napster #3):

Edison held patents wrt film making. Unlicensed film making hardware was confiscated. Equipment was vandalized. People were harassed and intimidated.

The "independents" moved out west to California. This was the beginnings of Hollywood. By the time the federal arm reached out to film makers in California, the patents had expired since only for about a generation!

Therefore, Hollywood industry originally a "pirate industry". There was immense public good done wrt patents expiring. Would it have been better if Edison could lock up patents forever? Could same thing happen today?

Recorded Music/Player Pianos: (Legal Napster #4)

Law said one must pay money to buy/sell sheet music and/or perform music publically. How handle recording hardware?

What if music recorded in private studio? What if done from memory instead of sheet music? What if don't sell/distribute sheet music but rather just sell/distribute a musical recording?

(Player pianos are a form of recording hardware since they "store" music in a manner also.)

Congress created new compromise laws. One must also pay to record music into recording hardware and distribute recordings. BUT, a "compulsory license" was created s.t. composer **must** allow recordings and distribution for price **set by Congress**. ('cover songs'.)

Recording industry started wrt "piracy" of musicians property.

Immense public good created from this "piracy". Many more songs were covered and distributed than otherwise.

Radio: (Legal Napster #5)

Recording wrt property of both the singer and composer.

Radio stations by law only have to compensate the composer. They are "pirating" the property of singers!

Singers are losing control for public good. This "piracy" has made it cheaper for radio stations to broadcast music which has fueled growth of radio and wider enjoyment of all kinds of music.

Paper Copier: (Legal Napster #6)

Many uses protected by "fair use provision" of 1976 copyright law.

Immense public good caused by this "piracy". Science and other fields of study have benefited. Wider and faster dissemination of information.

Video Recording: (Legal Napster #7)

Sony v. Universal Studios (1984)

- Sony's Betamax VCR allowed to time shift, store and distribute video.
- Supreme Court said VCR had "substantial noninfringing uses".

Video recording did not kill off Hollywood as Valenti had predicted.

This 'piracy' has been a benefit to Hollywood and the public. Wider dissemination of movies and more revenue for Hollywood were the result.

Cable TV: (Legal Napster #8)

They are distributing traditional broadcaster's content for money.

Congress eventually decided they must pay for content distribution. But, at a price set by Congress.

Congress did not want content owners to have veto power over new technologies.

Immense public good caused by this "piracy". Wider access to television broadcasts was one result.

PROBLEMS WITH CURRENT IP SYSTEM

Copyright duration too long.

<u>Year</u>	<u>Copyright maximum duration</u>
1790	28 (14 + 14)
1831	42 (28 + 14)
1909	56 (28 + 28)
1962	59
1965	61
1967	63
1968	64
1969	65
1970	66
1971	67
1972	68
1974	70
1976	75
1998	95

There is no evidence this pattern will not continue and violate intention of Constitution. And, what is the benefit to society of extending copyrights for previously created works?

Copyright scope too far reaching.

1790 - registered books, maps, charts
1831 - registered books, maps, charts, music
1870 - registered books, maps, charts, music, painting, statues, derivative works (e.g. translations, plays)
1909 - registered books, maps, charts, music, painting, statues, derivative works, **all** copying
1976 - **all** books, maps, charts, music, painting, statues, derivative works, **all** copying
(previously had to register and then reregister)

Notice now many works unintentionally locked up from public domain for 95 years.
(It would be risky to create your own "America's Funniest Home Videos" video and sell it.)

Notice not until 1870 was there **any** control over derivative works.

Notice after 1909 copyright tied to new technologies **automatically**.

Copyright law too ambiguous, unforgiving and open to abuse.

Jesse Jordan created an *intranet* search engine while a student at Rensselaer Polytechnic Institute in New York and gave it away for free. RIAA demanded he pay them \$1.5M in damages since 25% of the traffic wrt his site was illegal music files. He could fight and likely win a costly battle or pay his savings of \$12K which he did. (If you steal a CD from store you get ~\$1000 fine but if you download a single song you get a \$150K fine. A 10 song CD would imply a \$1.5M fine.)

Joe Else, a file maker has fair use privileges to use a few seconds of a Simpsons episode on a TV in a background shot. He does not have the money to defend his fair use rights and risk losing. Therefore, Fox effectively eliminated fair use regarding their content!

Grokster case could put a chill in innovations like iPods, Tivo, BitTorrent technologies (Linspire distribution mechanisms, apt-get distribution mechanisms), open wireless access points, etc.

Public Enemy does not sample anymore since legal costs are so high.

Copyright scope increased by technology.

Copyright protection technology cannot be circumvented due to DMCA even if wrt a fair use or some new balanced copyright system!

Princeton University professor Felton broke Secure Digital Music Initiative (SDMI) proposed copy protection algorithm in competition SDMI set up for itself. Felton wanted to publish results to enrich crypto community. DMCA used to stifle this free speech even though Felton wasn't infringing on a copyright.

Sony created a robotic dog named Aibo. See aibopet.com for fan page. A fan circumvented copy protection to make dog dance jazz! They got a threatening letter wrt DMCA violation even though they were not infringing on any copyright!

Broadcast flag (VCR time shifting is fair use!)

DRM (Open source is not illegal!)

DeCSS illegal (created by Jon Lech Johansen)

Analog world

read a book
lend a book
selling a book
going to the bathroom

Digital world

Restricted since wrt copy of an eBook.
Restricted since wrt copy of an eBook.
Restricted since wrt copy of an eBook.
Restricted???

Problem is that in 1910 copyright law was extended, perhaps accidentally, to apply to all copying. Authors has no idea copying technology would pervade society the way it does. It was never their intention for copyright law to have such control over our culture as it does today.

Video Pipeline distributes Disney's and other companies' movie promos on tape to VCR stores where store has legal right to play purchased promos for customers as many times as desired free from copyright restrictions. They wanted to cut costs by streaming movie promos over the Internet. This now involves more copies. They got involved in a big expensive court battle with Disney and lost.

Fan clubs create related home grown stories and do role playing wrt copyrighted content like Star Wars and Star Trek. If they migrate to a CMS then this involves copies and so they are now breaking the law.

Due to ability of bots to crawl through Internet 24/7, extreme laws can now be enforced better than ever before as well!

It is easy for RIAA and MPAA to force ISPs to reveal content customers have.

DEREGULATION LEADING TO IP OLIGARCHY

- 5 companies control about 85% of US media sources.
- 5 recording labels control about 85% of US music market.
- 4 companies control about 90% of US radio advertising revenues.
- 10 companies control about 50% of US newspaper circulation.
- 10 film studios get about 99% of US film revenue.
- 10 cable companies get about 85% of US cable revenue.

Not only are less companies controlling more of each industry than before but also multiple industries.

Viacom, AOL/TW, Disney, News Corp., Clear Channel are 5 huge conglomerates controlling immense sections of information landscape.

Less voices means less diversity, less risky programming and less independent creativity.

Supreme Court has ruled media has a right chose what they air or run therefore weakened opportunity for dissent since media likely hesitant to by very critical of government or do anything controversial?

Fewer people have more control over our culture than ever before.

In an effort to control piracy we may be damaging our culture, killing off innovations and opportunities.

Starwave was innovative company founded by Paul Allen, cofounder of Microsoft. They wanted to make an innovative Clint Eastwood retrospective CD with old film clips, old interview clips, etc. Rather than rely on fair use which is dangerous, their lawyers spent one year tracking down anyone who might have a property claim and paid them off. This included anyone who appears in a clip used, anyone who has claim to music playing in the background, etc. Would not more work like this get done if laws were not so oppressive? Isn't it clear law is stifling creativity? If anything, these innovative creations would attract more commerce to old work. These laws are like impractical extreme controls over airplanes and photography which were rejected. Should only rich be allowed to do this? Should rest of public be excluded?

Dreamworks and Mike Myers are working together to gain rights to insert Mike Myers into old films (Forrest Gump style). This is similar to music sampling rappers do with music. Do we want Myers and powerful Dreamworks to be the only ones who can innovate this way? Must we lock out poor rappers and poor film makers because they cannot afford to overcome the red tape to secure all necessary rights? Should only the rich be allowed to do this? Should rest of public be excluded?

P2P

- P2P trying to escape overly controlling industry like early Hollywood.
- P2P trying to leverage new technology of distribution like radio.
- P2P not even selling content unlike cable TV.
- P2P needs balanced new laws like recording industry, radio and cable TV got.

Whether the net effect of P2P is very bad or even bad at all is controversial like wrt VCR, book publishing, film in past.

RIAA says in 2002 CD sales dropped by 8.9% (882M down to 803M) and revenues fell by 6.7%. RIAA estimates in 2002 2.1B CDs were downloaded for free. If every downloaded CD really is equivalent to a stolen CD then music industry should have had ZERO revenues in 2002!

In about 10 years file services will compete with file sharing and illegal file sharing will not be as attractive. Notice technology will take care of problem automatically. (In Japan you can already pay for music to be streamed over cell phones even though cheaper to 'pirate' the music because more convenient.)

Good uses for P2P:

1. More convenient, cost effective distribution system than pushing plastic into stores.
2. share (sample) then buy
3. share stuff not sold or hard to get
4. share public domain or open copyright stuff
5. Safeguard for freedom of speech (Gnunet, Freenet, etc.)

OTHER HARMS

Much creativity and cut and pasting will be killed or driven underground by broadcast flag, DRM, etc. Also encourages a black market in DMCA circumventing technology.
(see illegal-art.org)

Arms race between both sides. (Berman bill, Freenet, Gnunet, etc.) Choice is to either enforce laws more severely or change laws.

Not only is creativity stifled but small business and entrepreneurship too:

- Not only was MP3.com sued but it's lawyers were also to send a message to the legal community.
- Not only was Napster sued but it's VC firm was also send a message to the VC community.
- Car manufacturers do not add MP3 players to cars.
- Internet radio burdened by more requirements than old radio. (They must pay composers.)

Oppressive, ridiculous unnecessary laws encourage people to break rule and numb millions of people to breaking the law s.t. more prone to ignore important laws we cannot ignore like draft, safety laws,

- File sharing technology turns 40-60M Americans into felons.
- 55 mph speed limit turns millions of people into daily law breakers
- Overly complex and burdensome tax code turns many into tax evaders.
- Prohibition lead to organized crime.

It is easier abuse the rights of these 'felons' than it would be otherwise.

- right to privacy (RIAA can easily force ISPs to turn over private info.)
- protection from PC seizure
- right to broadband
- protection against fines

(RIAA sued 12 year old girl in public housing and settled for her \$2000 life savings.)

Question to ask is, "Is there a better way to compensate authors with some innovative system than creating 40-60M felons?"

Eric Eldred was first to challenge Congress's perpetual copyright extensions and lost. He was interested in creating electronic versions of many public domain works. Other side was giving huge amounts of money (Disney, RIAA, MPAA) to supporters of extensions.

Very tiny percentage of work that is commercially valuable is causing so much work that is not commercially valuable to be locked up.

- Even if you wanted to honor copyright holders it would be hard because there is no list of copyright holders and/or contact info.
- Authors could also have passed copyright to an estate.
- For film situation is even more impractical since so many people can have piece of the ownership.
- If you try to just ignore copyright until if and when copyright holder contacts you, you are committing a felon.
- Since they cannot be digitized, much stuff not commercially valuable will rot on shelves and be lost forever.

Here copyright not furthering progress in science and culture but hindering a new virtual Library of Alexandria.

Even simple remedies like registration requirements are fought by MPAA because their goal is to eliminate a public domain that competes with them!

There does not exist a cure for AIDS but there exists expensive drugs (\$10K-25K/year) that can drastically minimize symptoms.

- 35M cases of AIDS in world with 25M in Africa
- Drugs are cheap to make but expensive only due to patents.
- Companies need to recoup costs before patent runs out.
- US and EU fought to prevent South Africa from making and selling patented medicines themselves for cheaper prices.
- This would not have harmed patent value since they could not afford medicines anyways. Therefore, millions will die to protect the sanctity of property.
- We should fine a balance here for patent system just like we should for copyright system.
- Is some abstract idea about property more important than millions of lives?
- Can we at least discuss this and be open minded about property ideas?

SUGGESTED LAW CHANGES

- registration and renewal requirements
 - We can make private companies compete to provide easiest cheapest service like wrt domain name registration
 - So can know who owns copyright and their contact info.
 - Government will just supply database and rules of fair play.
- marking requirement
 - Let industry decide how to mark various content types
 - If don't, consequence is not that you lose copyright but just that you cannot nail someone for present violations, only future ones.
- shorter terms
 - 14 years?
 - 75 years but need to renew every 5 years?
- remove ambiguity
 - fair use too vague
 - make more clear
- no retrograde extensions
 - How promotes public good?
- weaken scope of control wrt derivative works
 - Make derivative protection perhaps run for less time than original copyright on base work?
 - Specify more clearly what types of derivative works are and are not covered.
 - Either /no/ protection for /new/ derivative works or perhaps a compulsory license.

WHAT YOU CAN DO

- Get people to talk about these issues and understand them. Then, Congress will take notice.
- Build up large group of creators and users of Creative Commons content to affect public opinion and education.
- Support EFF financially.