Too Much to Carry? Copyright Laws in the Electronic Environment

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Abstract

Digitization of information, the rise of the World Wide Web, and the development of new means for information creation, production and dissemination place new strains on the legal infrastructure of copyright laws in the United States. Review of the historical trends in copyright protection, focusing on changing socio-technical relations in the information production environment, uncovers five core problems: The difficulty of separating ideas from expression in determining infringement; diminution of the public domain; expansion of the definition of authorship; trivialization of the definition of artifact tangibility and fixation; and expansion of the timeframe for protection past the point where only original producers and their immediate heirs are rewarded. These problems, responses to earlier stakeholder concerns, tend to complicate efforts to develop an effective legal framework for copyright in an electronic environment.

Introduction

Over the past decade, the United States Congress has attempted to realign the nation’s intellectual property regime through successive modifications of copyright law [1][2]. The motivations behind these actions were varied, and included attempts to extend the protection of the nation’s intellectual assets during a major shift in the technology used to create, store, and disseminate information; pressures to conform with existing and developing international intellectual property regimes; and a continual process of tug-of-war among various stakeholder groups over control of intellectual property in the United States.

Today, core copyright industries make up 4.94% of the nation’s Gross Domestic Product, a 360% increase in value since 1977 [3]. Copyright court cases have trended upward, while the percentage of cases won by plaintiffs has decreased from approximately 88% in 1987 to 79% in 1997. Pricewaterhouse Coopers recently reported a 16.3% increase in legal costs between 1997 and 1998 for companies aggressively seeking to protect their intellectual property assets [4]. Active corporate and creator promotion of copyright and other intellectual property rights has deeply impacted legislative debate and decision-making. This is clear when copyright is viewed in an historical context. An historical analysis also indicates that the presence of competing interpretations of the goals of copyright protection contribute to increasingly complex implementations of copyright law, which in turn lead to increased costs related to production and dissemination of information goods. This trend is magnified when copyright regimes are challenged by new patterns of information production and dissemination occasioned by changes in information technology.

This paper will look at some of the trends in copyright protection, focusing on changing socio-technical relations in the information production environment and the attempt to determine the nature of copyright infringement through judicial review. An analysis of these aspects of copyright law will lead to some insights about the challenges for legislatures and societies with respect to copyright and other intellectual property laws in an electronic environment.

Socio-Technical Context

Prior to passage of the US Constitution, the meaning and function of copyright evolved through three centuries of English legal attempts to regulate the production and dissemination of books. Originally designed as a means for craft protection for the fledgling English publishing industry and as a reward to printers loyal to the Crown through the grant of limited printing monopolies, copyright soon became a mechanism for defining relations between authors and printers; import control; regulation of the number and professional standing of printers; and prohibition of treasonous and seditious works [5]. Eventually,
decades of shifting control over press power and privileges amid tumultuous changes in the political and social structure of England coalesced in 1709 in the Statute of Anne [6].

The Statute of Anne established a new statutory monopoly for authors, allowing them to enter into contracts with publishers for the rights to print and vend their works for an initial period of 21 years, if their works had not been previously printed. After that time, all rights returned to the author, who would be free to establish new contracts for printing and sale of their works for a further 14 years. The law, which was implemented “for the encouragement of learned men to compose and write useful books,” also provided for copies to be sent to 9 universities, allowed importation of classical books, and included a mechanism for redress against high book prices by publishers.

The Statute of Anne represented several changes to the traditional production and regulation of the book industry in Great Britain. First, it clearly enunciated the right of authors to control printing of their works, a concept which during the decades prior to 1709 was not universally supported, and would still be the subject of legal and parliamentary maneuvering during following decades as publishers attempted to undermine the new law and regain monopoly control over intellectual assets [5] [7]. Secondly, it freed book production from governmental censorship, by changing the process that linked book production to ideological oversight. Lastly, it established two key legal precedents. The first delineated a statutory domain for copyright control, as opposed to a common law scheme based on perpetual “natural” property rights. Secondly, the law codified the notion that intellectual property, once placed in society through the mechanism of printing, would eventually be placed in the “information commons” for uninhibited social use after copyrights expired.

First period—The National model

While the language of the Statute of Anne provided the structure for early state copyright laws and Constitutional language providing for limited copyright and patent monopoly protection, the goals of copyright protection did not translate unambiguously from early 18th Century England to America at the end of the 18th century. First, by the end of the 18th Century, the romantic notion of authorship had taken firm hold in social understanding, though as noted in a letter on Jan. 10, 1783 from Joel Barlow to Elias Boudinot, President of the Continental Congress, there were “few Gentlemen of fortune sufficient to enable them to spend a whole life in study, or endure others to do it by their patronage.” [8] The new vision of authorship tended, in subsequent years, to blur the distinctions established by England regarding the statutory, limited nature of copyright, and substituted a notion of common law right that extended to all the steps of intellectual creation, production and dissemination. Secondly, the nature of the printing industry, with many small and under-capitalized printers scattered through the newly formed states (rather than a limited number of powerful publishers concentrated in a handful of cities as in England) meant that promotion of new industries rather than controls over information production monopoly was the salient concern of American statesmen [9].

Even more important to the framers and early national leaders was promotion of the public good through the development of a national literature and republican intellectual tradition. This is evident in the language of the Constitutional clause (Art. 1, Section 8) that underscored the importance of promotion of science and useful arts, President Washington’s first address to Congress, in which he urged passage of copyright legislation to promote informed citizenship, and the Senate response, which noted “Literature and science are essential to the preservation of a free constitution; the measures of government should, therefore, be calculated to strengthen the confidence that is due to that important truth.” [10]

Second Period—The Author Model

The goal of intellectual capital as critical to republican traditions remained an important trend in the debates over copyright and intellectual capital into the third decade of the 19th Century, as evidenced in the writings and speeches of intellectual leaders such as Rev. Channing, the Unitarian divine.[11] However, a second voice, that of the author, also gained strength during the period leading up to the passage of the first copyright revision in 1831. Although the United States had begun to develop a national literature in the persons of Cooper and Irving, Noah Webster, the leader in the fight to extend copyrights from fourteen to twenty eight years with renewal rights for the author and/or his heirs, had a more pragmatic concern, to ensure a comfortable living and a “decent independence” for his wife after Webster’s death. [12] In addition, the legislation specifically accorded authors rights to their manuscripts prior to publication, by making it unlawful to publish works without the author’s permission.

It is important to note that publishers did not figure into the debates over the 1831 bill, except as a point of refutation against the legislation. In the House debates, Rep. Hoffman argued that extension of copyrights would break the contract between author...
and society, and harm publishers to the extent that they would not be able to publish, royalty-free, at the expiration of the then extant 14 year copyright term. [13] In fact, analysis of author/publisher relationships during the period indicates that copyright was not usually a source of negotiation, since publishing rights were generally secured for a short term and for limited printings, leaving only enough power in the hands of publishers to insure control until the printing was sold out, at which point all rights reverted to the author. In fact, much publishing during the period consisted of reprints of English authors, for whom only nominal payments to secure early proofs were paid in order that publishers could be first into the market with new British novels. [14]

Emphasis on delineation of author’s rights also figured heavily into the two most important Supreme Court copyright cases of the period, Wheaton v. Peters and Folsom v. Marsh [15][16]. In Wheaton, the court, rehashing English legal battles of the 18th Century, reluctantly found that an author’s rights regarding publication and vending were not based on common law, but on the statutory legislation that flowed from the Constitution. Writing to Chancellor Kent of New York, Justice Story noted, “The strict construction of the statute of Congress we adopted with vast reluctance...I wish Congress would make some additional provision on the subject of authors.” [5]

By 1841 Justice Story, in an early example of judicial activism, would get a chance to expand authors’ rights by strictly limiting the right to abridge previous works (a then common form of authorship) and by expanding the range of private property control over works to include communications that were developed in the course of public service. [16]

The Third Period—Producers Ascendant

The 1830s would prove to be a high-water mark for authors in the construction of copyright in the United States. During this period, other factors intervened that would begin to push the concerns of American authors into the background. The rise and capitalization of some large publishing firms, particularly Harper Brothers; improvements in transportation and distribution of published works; the continued absence of a copyright law protecting foreign works in the United States; and changes in productive capacity due to technological advances, changed the balance between authors and publishers. [17][14]

Even accounting for periodic economic collapses such as the Panics of 1833, 1837 and 1857, which weeded out many smaller, under-capitalized firms, the publishing industry during this period was marked by steady increases in production and sales. In 1830, approximately 100 titles per year were published in the United States, valued at approximately $3.5 million. By 1856, the annual number of titles had increased to 1,095 and the amount of sales ballooned to approximately $15.6 million, increases of 995% and 346% respectively. [9]

The value of published books would increase steadily during the century to reach more than $93 million per year by 1889. The publishing industry became more concentrated geographically, with New York achieving ascendency due to transportation and financial advantages. Fixed production costs were decreased through the use and storage of stereotype and electrotype plates, allowing for multiple reprints of popular volumes without the necessity of re-setting type. The practice of larger press runs to meet increased demand enabled publishers to allocate fixed costs over more copies, further increasing efficiencies. Additionally, press run capacity increased dramatically, from approximately 800 sheets per hour with the first power driven presses in the 1810s, to approximately 15,000 sheets per hour by the end of the Civil War.

These changes had several effects. By the end of the 1830s, production capacity had caught up with market demand, triggering periodic price wars over printed works, particularly over British novels for which no royalties were required. Cyclical market gluts also strained the practice of publisher “trade courtesy,” a system whereby publishers gained informal American publishing rights from popular British authors through agreements with British writers and publishers for early copies with which to set and print American editions [14]. For American authors, the combination of periodic market gluts—with their attendant price reductions—and lack of an international copyright agreement, meant that publishers of American writers who required royalties could not compete in the marketplace, causing demand for American works to diminish. In addition, the early republican argument for promotion of literature and science as essential to effective government had been transformed into an argument based on the need for inexpensive literature to promote general education. This was used as a rationale for continued refusal to protect foreign writers throughout the remaining decades of the 19th Century.

Another important change in the relations between authors and publishers occurred during the period. Where previously authors were afforded a wider variety of contractual arrangements with publishers due to under-capitalization of many firms, as the period progressed contracts between established authors and publishers coalesced around the royalty
system, whereby publishers underwrote the fixed costs necessary to launch a book, and paid the author a set percent per book for sales after costs were recovered, sometimes agreeing, in the case of better-known authors, to an advance on sales. This practice, still common, changed the relationship between author and publisher from partnership to a more formal contractual model, giving rise to mutual recriminations about issues such as the costs to be considered in the fixed base, the number of books to be allowed as free promotional copies, and the accounting practices of publishers in keeping track of sales [18]. Best selling authors like Mark Twain would attempt to bypass this relationship through direct marketing, while many neophyte authors were forced to underwrite all fixed costs, as well as agreeing to the royalty system, in order to access the publishers’ distribution system [19]. A by-product of this contractual system, which emphasized the publication of books that would sell briskly enough to quickly underwrite publishers fixed costs and provide enough sales to profit both publisher and author, was that many scholarly works—with expectations of a long life coupled with slow and steady sales—were consigned to sale by non-profit, subsidized university presses, which began in 1869.

Attempts to control the production and distribution process through law during the period between 1840 and the end of the century focused most heavily on expansion of copyrights to include other media forms, including photographs, dramatic and musical compositions, engravings, cuts, prints, paintings, drawings, statues and designs; establishment of intellectual property protection for trademarks; and regulation of assignment of copyrights from authors to publishers.

In addition, publishers and unions engaged in the printing industry actively supported import tariffs to exclude British and Canadian imprints and modification of postal regulations to choke off distribution of cheap book reprints printed in newspaper format, which benefited from advantageous mail rates. In particular, beginning in 1853, unions and publishers with large in-house production capacity advanced language in copyright proposals that protected native industries through restrictive “manufacturing clauses,” requiring that any foreign book given American copyright protection be set up and produced in the United States [20][21].

These efforts culminated in the Copyright Act of 1891, which for the first time provided some measure of protection for foreign authors. Passage of the bill represented the first major philosophical change in copyright law in 60 years. It was the result of an uneasy alliance among authors, publishers, and unions, motivated to a great degree by ruinous overproduction of cheap foreign works during the 1880’s and the threat of cheap reprints of American works from Canada [22]. The competitive advantage of publishing copyright-free foreign literature had been tapped; requiring a remedy that no longer relied on productive competitiveness, speed to market, or informal “trade courtesy,” but rather on legal protection for publishers of new works.

In particular, the “manufacturing clause” required that all typesetting and printing of foreign authors writing in English be done in the United States, a move that assured the unions, book-related manufacturers and large publishers. In addition, the legislation tightened time requirements for registration, from 10 days following publication to the date of publication, providing an advantage to US publishers who wished to maintain control over national markets.

The advantages to publishers and manufacturers of such a scheme was not lost to the Senators and Congressmen who debated the bill. Senator Gray, a Senate representative of the Conference Committee who reported out the final bill, voted against the measure, citing the “greed of the publishing interests.” [22]

In general, authors supported the bill. They had proved, in fact, to be the group most consistently in support of international copyright, both in solidarity with their fellow authors, and in anticipation of improved protection they could receive in the expanding British market, which, during the past decades had fed itself, like the Americans, on the free helpings of intellectual labor developed abroad. However, insertion of the manufacturing clause meant that authors could not expect to improve their bargaining power relative to publishers, since the pool of publishers in direct competition with each other would likely not significantly expand. Nor could they expect any part of savings that would have accrued by the spreading of fixed costs for typesetting, stereotyping, illustration development, and administrative overhead via a move to trans-national production. Instead, the benefits of the scheme accrued mainly to American publishers and printing-related manufacturers [23].

The final important aspect of the third period of copyright protection in the United States was the virtual elimination of the national perspective from the copyright scheme. While information commons concerns were embodied during the author period in the idea of “cheap literature,” by 1891 this argument had disappeared. It was no longer important, in the view of creators and producers of intellectual property, to promote cheap literature; it was instead critical to stem its flow before the production system collapsed.
As a result, protection of the public domain was manifested by 1891 not as an articulated position in copyright legislation, but as an contentious afterthought embodied in an amendment to the legislation by Senator Sherman of Ohio. The amendment allowed for duty-free importation of a limited number of copies of books published abroad by non-profit and educational institutions and for personal use. This position would raise the continued ire of publishers, who viewed libraries as a mechanism to undercut the national market in new works through wholesale importation and sharing of free information.

The Fourth Period—Patrons and Performers

The 1891 copyright legislation failed to satisfy the unions, manufacturers, or publishers. The period until the next major copyright legislation in 1909 was contentious and included a series of conferences headed by the Librarian of Congress and the Register of Copyrights. In the interim, manufacturers and unions argued that publishers evaded the manufacturing requirement by falsely claiming copyrighted articles printed or prepared abroad as domestically produced articles, and in 1897 succeeded in having a penalty for false claim of copyright inserted in the law [20]. Publishers and authors accused librarians and other non-profit institutions of undermining the market by importing many foreign books and lending copies to patrons, actions that cut into the profits of domestic publishers [24]. This complaint was not new. In 1885, Mark Twain, in a letter to the Concord, Massachusetts Free Trade Club, had noted, “A committee of the public library of your town have condemned and excommunicated my last book, and doubled its sale…It will deter other libraries from buying the book, and you are doubtless aware that one book in a public library prevents the sale of a sure ten and a possible hundred of its mates…”[19]

The interim period before 1909 uncovered the limitations of 1891 copyright scheme in three fundamental ways: The differentiation between people who made copies of copyrighted works for profit and those who made and disseminated works for purposes of information diffusion and the public good; the rights of authors regarding performance of their works; and the rights of people or organizations to whom copyrights were assigned.

As noted above, libraries became a lightning rod for publishers’ discontent about the first problem, but it represented a critical issue that had heretofore been obscured during a period of dramatic market growth for information products. What was the public right to information after the first sale by the producer? The publishers, hoping to emulate their British counterparts, wanted extensive control of their products, to the extent of determining the retail price to customers, as illustrated in a pair of 1908 cases pitting the publishers Bobbs-Merrill and Scribners against the Macy’s department store, who wished to sell books below suggested retail prices. [25][26]

Additionally, was there a distinction to be drawn between dissemination of copies for profit and community-based diffusion of information for the common good? Traditionally, protection against infringement was granted only in cases where items were offered for sale, but copyright legislation in 1897 regarding unauthorized performance of a dramatic or musical composition for the first time made reproduction of the work for non-profit purposes also an infringement, differentiating between profit and non-profit motives only to the extent that intentional for-profit performance constituted a misdemeanor criminal act, punishable by imprisonment.

The regulation of performances added another dimension to the copyright sphere, adding performers to the list of copyright stakeholders. This role became increasingly more salient by the invention and spread of phonographs, and posed a major new challenge to intellectual property protection. While the act of 1856 was the first to prohibit the unauthorized performance of a dramatic work for profit, performances of non-dramatic works such as music, lectures, sermons, and speeches fell outside the scope of copyright protection, as did mixed performances modes such as vaudeville.

The final area of contention lay at the core of the author/publisher relationship, the degree and length of control over copyrights after assignment by the author to the publisher. Since the Act of 1834, Congress had required the recording of assignments, but the law remained unsettled about control over renewal of copyrights at the end of their original term. The Act of 1831 first established the procedure for copyright renewal for an additional period of time, but made the right available only to the author if alive, or his widow and children if dead. The stipulation of family control over extension remained unchanged for seven decades, and though publishers argued that they should be allowed to establish contracts at the beginning of the term for unconditional assignment of copyrights to include both original and renewal terms, the general opinion was that authors could not assign extended copyrights prior to their affirmative act of renewal. The rationale behind this stipulation was to give authors a second chance to re-negotiate the terms of their contracts with publishers, should their works prove successful and long lived [27].

The Copyright Act of 1909 sought to set a new balance in the increasingly complex, contentious, and profitable field of intellectual production. For authors,
the copyright renewal term was expanded from fourteen to twenty-eight years, and their exclusive right of renewal was retained. Authors and publishers had sought to expand the copyright to life plus fifty years, in compliance with the Berne Convention, but were repulsed [24]. A novel compulsory licensing and royalty system was established to compensate authors or their assigns for musical recordings of their work made by others [28]. In addition, authors were given further rights regarding control over for-profit lectures, sermons, addresses and their transcription or recording, as well as for-profit performances of musical compositions.

Manufacturers of information-related products and unions in the information field were protected by continuation of the manufacturing clause and requirement of a sworn affidavit by publishers and other producers that the publication met the clause’s tightened requirements. In addition, though producers continued to complain of its inadequacy, reduction of the number of allowable imports of duty-free books strengthened the importation clause.

Authors and producers were supported by strengthened penalties for infringement, to include the recovery of damages not only for items in the infringer’s possession at the time of injunction, but for those previously made and sold.

Although publishers complained that the new law did not allow absolute assignment of copyright, and restricted their rights with regard to works whose protection was about to be extended by another fourteen years during the renewal term, another clause provided them with a potentially greater level of control. Enactment of the “work for hire” clause established in law a corporate copyright for posthumous works, periodicals, encyclopedias, and composite works requiring multiple creators. This clause legitimized the changes in conditions of literary production, which had moved away from a romantic notion of authorship, where individual geniuses acted in splendid isolation, to a model in which a large proportion of intellectual works, be they newspaper articles, serial novels, movies, or recordings of musical composition, were undertaken under the direction of a corporate body that controlled wages as they controlled other fixed and variable costs of production [29].

The Act’s benefits to the information consuming public were more complicated. Although the 1909 legislation specifically removed the possibility of price controls from publishers (unless they acted both as producer and sole distributor) and legislated the “first sale doctrine” to keep producers from controlling any transactions after the physical object was first sold, other public rights were further constrained. While a distinction was made between non-profit and for-profit infringement with respect to criminal prosecution and the scope of payment for damages, the zone of profit-free public information exchange was narrowed to include only performances of religious or secular musical works by charitable and educational institution for non-profit purposes, and musical performances on coin-operated machines where an admission fee was not paid.

The Fifth Period—Fencing the Frontiers

The period between 1909 and the next major copyright revision in 1976 represented a time of continued growth for the nation’s information industries, the rise of important information technologies for production and dissemination, and advances in distribution networks for all information goods. Copyright legislation during the period focused for the most part on relaxation of the terms under which foreign works could enter the United States marketplace, a response both to distribution dislocations caused by war and the increased engagement of American information industries in international markets [30].

However, fundamental problems plagued the 1909 copyright scheme. First, the issue of authors’ statutory vs. natural rights remained unresolved. Though the natural rights view predominated as a common understanding of authors’ rights, the requirements that states provide pre-publication common law protection and the federal government regulate statutory copyrights led to a legal tangle that could not be efficiently maintained [31].

Secondly, although the importance of the public domain was still acknowledged as a core theoretical concept in copyright, its boundaries had become extremely blurred. Earlier legislation had extended copyright protection with regard to the range of information artifacts covered, the types of production and transformation activities that occurred on those artifacts, and the conditions under which infringement would be deemed to have occurred. In addition, the establishment of the “work for hire” doctrine had introduced a new kind of “author,” the corporation. Under these circumstances, the public domain could be envisioned not as a large region surrounding a smaller area in which limited statutory monopoly rights applied, but a series of “reservations” around which the commerce of information industries predominated.

In addition, though courts were often called into play in infringement cases to maintain a “rule of reason” concerning fair use by of copyrighted works for the purpose of learning and advancement of
knowledge, they experienced difficulty differentiating between ideas that belonged to the public domain, and the individual expression of those ideas that could be protected under copyright statutes. Judges, in effect, became semioticians, whose job was to first extract the unique qualities of competing works from the arena of the information commons, and then determine if one work directly stole from another.

Even in the case of direct copying, questions often arose about how much copying was necessary to comment or borrow from a work for critical or abridgement purposes, and how much was unlawful “taking” that diminished the value and stole the essence of the original expression [16]. The task became infinitely more difficult when judges were confronted with deeper issues of meaning and modes of expression tied to the constraints of a particular technology.

Figure 1 illustrates the dilemma facing any judge who attempted to try an infringement case [32]. The first task in copyright infringement cases was to differentiate between unprotected ideas and protected expression. However, while the forces arrayed outside the box in Figure 1 did not represent ideas, they were common constraints imposed on any individual expression by physical, technological and social conditions, and hence, could be deemed to lie outside individual expression. Although the individual author might change some of the constraints, particularly with respect to conventions of expression, socially accepted norms, and modes of expression, too much change in any factor would tend to limit the understandability and economic value of the work. Therefore, the most commercially successful works tended to be those that borrowed most heavily from accepted ideas and means of expression, further complicating the task of determining originality and infringement.

In fact, the history of infringement cases beginning in the 19th and accelerating during the 20th Century was characterized by an attempt on the part of copyright owners to limit the scope and number of works that could be deemed critiques of expression (extensions of previous works eligible for distinct protection), as well as expanding their proprietary control over the constraining forces to any expression. From an market standpoint, limitation of competing expression protected the market for the producer’s work, while capture of any portion of constraining factors might mean that market control could be exercised over broader areas of the information commons and the for-profit market in information goods. A good contemporary example of this principle is the ongoing battle over control of computer operating systems, databases, and application interfaces.

Figure 1: Copyright’s Semiotic Space

Finally, changes in information technology, particularly with respect to broadcast distribution of information products via radio and television, the development of cheap photocopying and the rise of computers increased the stress on the copyright system. Broadcast media represented two challenges. The first challenge lay in the ability to control distribution of performances [33]. Where the 1909 Act provided some controls over performances in fixed locations and via fixed media such as piano rolls, copyright owners could not expect to collect payments from every listener to a radio or television program, since it would require identification of all receiving locations as well as the listening and viewing habits of all people receiving broadcasts. Secondly, broadcasts of live events could not be protected under the 1909 Act, since they did not represent publication in the traditional form, in that radio and television transmissions were not fixed objects in a tangible medium.

The development of photocopying uncovered other unresolved issues. Previously, access and possession of a work required purchase or borrowing of a legitimately or illegitimately produced object, developed with expensive machinery. The lowered cost of production and availability of photocopying machines extended the distribution chain past traditional bookstores, newspaper retailers, and libraries into thousands of schools, offices and homes. The first sale doctrine, whereby the rights of producers ended at the point at which the public purchased the
object, could not contend with the notion that a tangible object could multiply once it passed that boundary.

Like the 1891 and 1909 Acts, passage of the Copyright Act of 1976 (17 U.S.C. sec. 101 et. Seq.) required a long period of negotiations. Unlike the 1891 Act, whose denouement played out via six decades of bitter journal articles, newspaper opinions, attempts to bribe members of congress, and ultimately coast-to-coast newspaper and personal lobbying [21], the 1976 Act followed the model of the 1909 revision in the manner in which competing visions were reconciled, by convening interested parties for a series of hearings, studies, and negotiations [31]. This time, however, the gestation period increased seven-fold, from three to twenty one years, indicative of the increased numbers of stakeholders, the growing number of protected media and methods of distribution, and the perceived economic and social value of information in US society.

The resulting legislation attempted to preserve the essential balance between social and proprietary interests in a number of novel ways. First, it expanded the notion of copyrightable works from items that had passed from manuscript to formal publication (as traditionally formulated) to all original, creative works as soon as they were fixed in a tangible form [34]. This eliminated the need for states to protect manuscripts in their pre-publication form. Secondly, it relaxed the notion of fixity to allow for transient fixation as evidence of protectability. Where previously fixation meant the permanent impression of intellectual production on a fixed medium, the new definition of fixation allowed for a presumption of permanence in the work’s first fixation, protecting intellectual property even after it was removed from the original medium. This redefinition separated the work from the medium, allowing for protection for broadcasts, and later for computer based works that could be easily transported from storage, to impermanent memory, to telecommunications lines, and on to other computers, storage devices, or print copies. Unfortunately, his change also opened the door for trivialization of what could be considered a work entitled to federal copyright, since any production in any stage of development or finality could now be protected, as long as it was fixed, however temporarily, on some form of information medium.

Authors were afforded further protection by an extension of the term of copyright, to bring the United States in line with Berne Convention signatories, which specified protection for the life of the author plus 50 years. This action and the removal of importation and manufacturing clauses, which militated against reciprocality with other countries’ copyright schemes, also indicated the growing importance of foreign market to the US information industry. The term of renewal was extended to a time period of five years beginning in the 35th year. The rights of corporate copyright owners were extended from 56 to 75 years.

The second major adjustment in the 1976 Act was an effort to better delineate the boundaries between the proprietary and public domains and between ideas and expression. First, the act specified what could be considered original, and specifically exempted facts from protection, although the author’s original expression of facts could be protected. It established tests for fair use, which while still requiring adjudication, provided four factors for judges to weigh when considering a fair use defense against infringement: 1) Purpose and character of the use (including whether the use was for commercial or non-profit use); 2) the nature of the work; 3) the amount and substance of the items used as a proportion of the entire work; and 4) the effect on the potential market for the original work. In addition, the Act specifically protected parodies and efforts at reverse engineering to access unprotectable parts of computer programs [35].

The issue of copying posed a more serious challenge, in that the chances for effective enforcement were problematic. Nevertheless, the 1976 Act gave owners of the copyrighted work the exclusive right to make copies, while providing a measure of protection for the public domain by allowing the free reproduction of a limited number of copies for libraries, archives, and educational purposes. The legislation also limited the right to protect sound recordings to exact copies of the work made from the original recording, thereby permitting imitations, no matter how similar to the original. This was an attempt to protect the rights of performers. Exceptions to the owner’s right to control performances included private performances and public performances at school and benefit concerts, as long as no profits were made and no one was paid specifically for the concert. Instructional and religious broadcasts were also exempted from performance controls. The law also attempted to limit the range of subsequent copying by designating re-broadcasts for profit as unlawful copying, while allowing broadcasters the option to use compulsory licensing arrangements for payment.

Too Much to Carry?

The period following the 1976 Copyright Act has seen a dramatic expansion of US engagement in international efforts to promote cross-national
intellectual property protection, rapid changes in information technology, and multiple attempts to adjust the copyright regime to meet those challenges. In particular, the digitization of information and the development of cheap computer-based information production devices capable of nearly-instantaneous low cost Web distribution and flexible transformation of works, have strained both the traditional socio-technical system of information creation, production, and distribution, and the intellectual property laws developed to regulate information properties.

A number of new copyright bills were introduced soon after the passage of the 1976 Act, indicative of the incomplete nature of the legislation and the rapid pace of information technology changes. In subsequent years, new legislative initiatives have tended to decrease temporarily after passage of significant new legislation such as the Home Audio Recording Act of 1992, which allowed non-commercial copying of music [36]; the Sonny Bono Copyright Term Extension Act, which extended duration of protection for works [2]; and the Digital Millennium Copyright Act (DMCA)[1], which provided “safe harbor” protection against infringement suits for Internet Service Providers acting as distribution mechanisms for information works, and prohibited the distribution of measures that defeated piracy protections on digital works. However, the number of new bills never dropped to pre-1976 levels, indicating the stop-gap nature of copyright legislation in the period after the 1976 legislation [37].

Given these conditions, what challenges can policy makers expect in the next years? Recent court cases and public debates in the copyright arena provide indications of the looming challenges, including:

- The Napster controversy, which exposed difficulties in policing digital copying and exchange, the public’s general indifference to current copyright law, and the question whether copyright law can be used to protect a particular method of distribution;
- The Wind Done Gone case, concerning a parody of Gone With the Wind from a slave’s perspective, which raised issues of the rights of parody and first amendment speech, and the ongoing semiotic issue of what constitutes originality [38];
- Payments to Gershwin heirs, who received $2 million in extra royalties from copyright term extensions in the 1976 Act, and expected $2 million more from a further 20 year extension under Bono. These funds rewarded non-productive individuals rather than the original producers [39];
- Repeal of a Copyright Act amendment passed at the behest of industry lobbyists, which allowed record companies to marginalize performing artists’ rights by placing recordings within the corporate copyright framework. This incident raised the question whether the constitutional intent of copyright to support artists and inventors, had been subverted by the rise of industrial “creators”, embodied in the “work-for-hire” doctrine [40].
- A Survivor v. Boot Camp suit that CBS brought against Fox for copyright infringement. Although CBS was unsuccessful in their quest for an injunction, senior CBS executives stated “the network needed to send a message that it would fight to protect its show from what could turn into a flood of look-alike reality shows.” [41]

In general, we have seen the gradual extension of private property rights in intellectual goods. At some point, we must ask ourselves whether the current construction is over-burdened, inefficient, and unconstitutional. A good place to start in this enquiry is to ask the following questions:

1. Is the idea-expression distinction an adequate framework for determining infringement and protecting public domain information, ideas and media-specific constraints?
2. Do we need to re-define the notion of authorship, to strictly differentiate products of individual work from those of corporations, and devise separate schemes, similar to the difference between individual and corporate free speech?
3. Does the new definition of tangibility and fixation embodied in the 1976 Act and the DCMA protect the creations that need protection, or do they trivialize the act, and in a practical sense, provide a blanket protection for works in all stages of development and transmission?
4. Have we extended the time for protection beyond the time necessary to promote new works and invention, by rewarding non-productive heirs at the expense of the public good?

The Constitution’s copyright monopoly was established in response to market scarcity and the necessity to promote national intellectual assets. In contemplating new schemes, we must be aware of market and technological changes that either exacerbate or mitigate the original problem, and act accordingly. Today, we are experiencing market plenty rather than market scarcity, diminishing the relative value and longevity of most information products. This is coupled with the consolidation of the information industry and increased marginalization of individual authors. Technology has dramatically lowered costs for production and distribution, increased the speed to market among information products, and allows us to easily modify information for new uses and works. It also challenges us, given the number of cheap copy and production devices, and the ability to subvert technological means for
information asset protection, to visualize alternative methods for promoting the production of information products in a manner both consistent with Constitutional mandates and profound changes in the means of creation, production, and distribution.

References: