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Abstract

Examining the arguments for and against intellectual property rights, the author of this paper argues that the current copyright structure of the music industry is designed to protect the profits of recording labels (and other holders of copyright), but it may not maximize the cultural wealth of society with regard to music. In this paper, another creative industry, the fashion industry, which survives in the absence of copyright law, is examined. Using an analysis of the survival and success of the fashion industry, along with existing literature arguing against intellectual property rights, the authors explore how the music industry would survive, and flourish, without copyright.

Introduction

Property rights are important for a functioning market system. In his theory of entitlement, Israel Kirzner (1979) writes that within the market system, ownership of property is justified for the entrepreneur who is alert to profit opportunities and who takes advantage of these opportunities. The entrepreneur may be one who is alert to price differentials, or one who mixes his labor with

previously un-owned resources to create something useful. Thus, as Long (1995) observes, those in favor of intellectual property rights see them as “one more instance of an individual’s rightful claim to the product of his labor”--an extension of Locke’s theory of property rights.

While property rights are important, here it is argued that there is a difference between tangible and intangible property and that the two cannot be treated the same. While the protection of tangible property is necessary for economic growth, the protection of intellectual property may stifle progress. In this paper, the focus is on copyright in the music industry and the contention that the elimination of music copyright will enhance cultural wealth through increased diversity and access to music.

The existing literature on this subject covers arguments on both sides of the music copyright debate, and numerous economists have explored the validity of intellectual property. Brought together here an Austrian economic analysis of the validity of intellectual property with specific answers to how the music industry would survive logistically without copyright. After providing background on the issue by exploring the existing literature, another creative industry, the fashion industry, which thrives without copyright and has much to teach the music industry, is examined. Subsequently, the benefits of eliminating copyright are highlighted and some of the strongest arguments in opposition to the elimination of copyright are considered.

Literature Review

The validity of intellectual property is hotly debated among economists. For example, Austrian economist Murray Rothbard (1998: 123) is a proponent of copyright, arguing, “The violation of (common law) copyright is [...] theft of property.” On the other hand, Austrian economist Paul Cwik (2008) is a proponent of intellectual property rights. He argues that the goal of property rights is to minimize conflict, and since there have been “conflicts over intangible, non-rivalrous goods,” ideas should be protected just like material property. He argues that ideas are costly to come by and that rights must therefore belong exclusively to inventors or creators if we are to avoid conflict.

Mises (1998: 278) also favors copyright, saying, “If inventors and authors were not in a position to make money by inventing and writing, they would be prevented from devoting their time to these activities and from defraying the costs involved.” Mises acknowledges that copyright grants monopoly power to holders, but he discounts the impact of these monopolies on the market when he writes:

Under copyright law every rhymester enjoys a monopoly in the sale of his poetry. But this does not influence the market. It may happen that no price

whatever can be realized for his stuff and that his books can only be sold at their waste paper value.

While copyright prevents anyone else from freely duplicating and selling the particular author's material, the poet must still create poetry that consumers want to buy, and he must charge a price that consumers are willing to pay. The poet simply holds a monopoly on his own creations, not the entire poetry industry. From this arises the argument is that his monopoly's impact on the market is insignificant.

The idea that intellectual property is important is engrained in American society, with its place secured in the U.S. Constitution. Article 1 Section 8 allows Congress "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." Trademarks, patents and copyrights fall under this category of rights (Lopez, 2010).

Hayek (1988) was not convinced that intellectual property needed to be protected. He acknowledged that the ability to produce material goods is limited (so it is important to have material property rights in order to ensure that scarce resources are allocated to their most important uses), as is the ability to produce immaterial goods. However, "once [the latter] have come into existence, they can be indefinitely multiplied and can be made scarce only by law..." (Hayek, 1988: 35). Later in the same paragraph, he questioned whether government interference is necessary to stimulate creativity when he writes:

Yet it is not obvious that such forced scarcity [copyright] is the most effective way to stimulate the human creative process. I doubt whether there exists a single great work of literature which we would not possess had the author been unable to obtain an exclusive copyright for it; it seems to me that the case for copyright must rest almost entirely on the circumstance that such exceedingly useful works as encyclopaedias, dictionaries, textbooks and other works of reference could not be produced if, once they existed, they could freely be reproduced.

Once a digital recording is produced, however, it becomes freely reproduced even with today's copyright laws. But we still see the original production of music in this digital age.

Long (1995) argues, "Most of the great innovators in history operated without benefit of copyright laws. Indeed, sufficiently stringent copyright laws would have made their achievements impossible." The plots of Shakespeare and Euripides were never original, and great classical composers such as Tchaikovsky, Ives and Bach included parts of other artists' musical works into their own (Long, 1995).

Andersson (2008: 64) provides an example of how the existence of copyright may cause less innovation. He says, "While copyright law provides added pecuniary incentives before the first profitable publication, it simultaneously lowers incentives for continued creativity after the first market success." To further illustrate his skepticism he writes (p. 64):

[Though] Dan Brown may have earned \$78.5 million in one year from "The Da Vinci Code" (Echeverria: 2006), it is not altogether clear that this does (or indeed should) create an added incentive for writers contemplating whether to write a novel or do something else. Copyright-derived income opportunities do not necessarily provide the best ex ante incentive for embarking on a literary career.

Andersson's (2008) argument is that after the first publication, the creator is able to rest on the laurels of his legally granted monopoly and may not feel the pressure to innovate and create new publications as quickly as he would in the absence of copyright.

The Fashion Industry

There is no copyright in the fashion industry and designers can't rest on their laurels. Labels, brand names, and detachable accessories can be trademarked, but Congress ruled that such functional items as furniture and clothing (among others) are too utilitarian to be granted copyright. Design patents are available, but they are expensive, time consuming, and nearly impossible to acquire. The U.S. patent statutes dictate that a design must be "new, original and ornamental," it must pass the test of invention, and it must advance already existing art in a non-obvious way. Garment designs are generally not held in court to meet these criteria. The fashion industry changes so rapidly that it is impractical for designers to pursue design patents (Scruggs, 2007). Thus, virtually every design that has ever been created in three-dimensional form is in the public domain. Any designer can imitate, replicate and sell it (Blakley, 2010).

Some of the existing discussion in support of bringing more accessible copyright to fashion stands on normative "fairness" grounds. The executive director of the Council of Fashion Designers of America, Stephen Kolb (Goetz, 2010), insists:

Designers invest a lot of time, a lot of resources, a lot of energy into creating their collections. [...] So when they present those collections and somebody can just steal them right off the runway, within seconds, and their profit from their work, their energy, their intellectual property - it's not fair.

Yet from society's standpoint, such copying is just a transfer of resources. It is only when individuals change their behavior in response to copying that

society is made poorer. There are two main ways that designers can change their behavior. The first is to engage in rent-seeking activities to protect what they see as their intellectual property rights. Such rent-seeking activities clearly make society poorer (Tullock, 1967). The second way is by engaging in less of the activity because they cannot reap the full benefits of their creativity. Empirically, however, the lack of copyright has not been costly to the industry (Lopez, 2010). Rather, it encourages innovation and competition.

Because designs can be copied, a designer with the most popular collection one season must be quick to come up with next season's designs in order to stay on top of the industry. UCLA law professors Raustiala and Sprigman (2010) observe, "The interesting effect of copying is to generate more demand for *new* designs, since the old designs—the ones that have been copied—are no longer special. [...] We call this surprising effect the "piracy paradox." Trends do not stay popular for long, and those designers who are especially quick and innovative are the most successful (Blakley, 2010). Blakley argues that designers like Gucci are not hurt by fast fashion chains that copy their designs, such as Forever 21, because they have different customer bases. The customers who shop at the lower-end knock off retailers are generally not the same customers who shop at the high-end designer stores.

The absence of copyright also means that fashion is available at a broad range of prices. Raustiala and Sprigman (2010) explain on the Freakonomics blog:

Consumers benefit enormously from the fashion industry's freedom to copy. Because of copying, the latest styles are not restricted to the wealthy – indeed, copying has played a major role in democratizing fashion.

Popular designs are accessible to a greater number of consumers as copyists compete to create less expensive versions of high-end couture. The allowance of slight alterations also means that a greater variety of designs are available to consumers.

A reasonable person might make the argument that fashion is different from music. A high-end designer has her or his own customer base and may not be hurt by copyists selling a less expensive version of their design. But a musician directly loses revenue when people download her songs for free. One may argue that the artist (or label) would have received those revenues himself or herself if people hadn't "stolen" the recordings.

But the fact is, if copyright existed in fashion, anyone copying designs and selling them would be taking revenue directly from the original designer as well. The original designers never see the revenue that is generated by copies sold of their designs, just as original artists would not see the revenue generated by artists who cover their work, artists who sample their work, or free song

downloads. As Lopez (2010) observes, original designers have developed indirect methods of bringing in revenue by lending their “reputational capital to perfumes, cosmetics, and accessories, whose high markups afford handsome licensing fees.” We see the same thing occurring with popular artists.

In the absence of copyright, the music industry contains the same potential for innovation as in the fashion industry. Just like an old design, once other artists copy a piece of music it generally will become less popular and there will be demand for something new. Similar to fashion, there is generally a rapid turnover rate with the popularity of music. Blakley (2010) argues that artists will surely sample what others have done, but they will still have the pressure to come up with something new and original because that is how they will set themselves apart to be successful. Artists are not going to revert to solely copying others just because they can. Just like designers, they must be innovative and different enough to stay on top. With each new “season,” it is never guaranteed that an artist will be on top unless he or she is continuously creating novel innovations in music that the public wants to hear.

The music industry has fought countless legal battles against copyright infringers, and the industry would like to be able to proceed using its old business models. Our goal as economists however, is not to invent solutions that protect the profits of special interests, but to make consumers better off. Technology has always changed society, and with these changes, society has developed new ways of making money. The development of the automobile interrupted the business model of the horse and buggy. But it would have been completely backwards and detrimental to consumers to prohibit them from taking advantage of what technology had to offer in order to protect the profits of the horse and buggy operators (Falkvinge, 2007). File sharing will only become easier with the passage of time. We are in a technological age where it is possible for consumers to have access to a vast library of knowledge and culture.

Some might object to getting rid of copyright because of its effect on record labels. Recording revenues have already been on the decline since the development of peer-to-peer file sharing in the 1990s, but labels have continued to exist. Yet today, copyright acts as an asset for artists who may not have sufficient funding to pay a label to produce their work. Instead of paying money up front, the artist can use her or his copyright as payment if the label anticipates being able to generate revenue from her music. Without the existence of those rights to hand over a piece of music, the business model of the recording industry would have to change. Then labels might not continue to be as prevalent as they are today, but big names would still pay to have their work professionally produced. In addition, an area in which labels are exceptionally skilled is marketing and promotion, and artists will always need to be promoted. One possibility may be that labels would take a greater share of concert revenues in exchange for marketing services.

Another concern for a music industry without copyright is what will happen to the incentive for individual musicians to create and share their creations? Ultimately, this is an empirical argument. Certainly for some artists, the financial return from the production of new songs is directly linked to their desire to make new music. However, there is considerable non-pecuniary profit in being a musician and creating new music.

This is not to argue that money doesn't matter, but the reality today is that recording artists generate most of their revenue, not through recording sales, but from live performances. The creation of new music is often a precursor to becoming a successful touring artist. In the past bands would go on tour to promote an album. Now albums promote the tour. We see the biggest names in the industry setting up long, grueling schedules to perform all over the world. File sharing on the Internet actually helps artists, because the more their music is shared, the less they have to spend on advertising and dissemination. It is a rapid and effective way of marketing that costs little and helps to sell more concert tickets.

Conclusion

If the goal is to maximize cultural wealth in society, it is important to examine the rules in place that govern the market for music. We know that property rights are important for the functioning of the market, but not every property right provides the greatest benefit to the public. Current music copyright law is structured to protect record label/copyright holder profits and does not maximize the amount of cultural goods available to the consuming public. As Menell (2007: 39) explains:

Institutional economists see vibrant competition as a more positive force in spurring invention, innovation, and diffusion of technology than coordinated development by a single prospector. For this reason, narrower and weaker rights structures may be more efficacious in promoting innovation in particular fields.

An elimination of copyright law in the music industry does not mean that the music industry would disappear and society would no longer be able to enjoy music. The reasons why people make music are varied, as are the ways that individuals earn income from that music. While market changes following an elimination of musical copyright cannot be perfectly predicted, there is strong evidence from the fashion industry that the result would be increased competition, innovation and consumer welfare.

References

- Andersson, D. E. (2008). "The Double-edged Nature of the Hayekian Knowledge Problem: Systemic Tendencies in Markets and Science," *Studies in Emergent Order*, vol. 1, pp. 51-72.
- Blakley, J. (2010). [Interview with Russ Roberts]. "Blakley on Fashion and Intellectual Property Rights."
http://www.econtalk.org/archives/2010/06/blakely_on_fash.html
- Cwik, P. F. (2008). "Is There Room for Intellectual Property Rights in Austrian Economics?" Paper presented at the *Austrian Scholars Conference 2008*, Auburn, AL.
- Electronic Frontier Foundation. (2008). "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing," Web (April).
<http://www EFF.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>
- Falkvinge, R. (2007). [Speech]. "Copyright Regime vs. Civil Liberties." *Google Tech Talks*. Web. (July). <http://video.google.com/videoplay?docid=-2541736281918823479#>
- Goetz, K. (2010). "Designers Get Fierce With Copyright On The Catwalk," National Public Radio, Morning Edition. Air date: 16 September. Transcript at: <http://www.npr.org/templates/transcript/transcript.php?storyId=129834984>
- Hayek, F.A. (1988). *The Fatal Conceit: The Errors of Socialism*. Chicago: University of Chicago Press.
- Kinsella, N. S. (2010). "Rethinking Intellectual Property: History, Theory, and Economics." *Mises Daily* (October). <http://mises.org/daily/4769>
- Kinsella, N. S. (2008 [2001]). *Against Intellectual Property*. Auburn, AL: Ludwig von Mises Institute.
- Kirzner, I. (1979). *Perception, Opportunity, and Profit*. Chicago: University of Chicago Press.
- Lehmann, V. (2005). "Copyright in the Music Industry: For Whom the Bell Tolls." Masters Thesis. http://www.emle.org/_data/Volker_Lehmann_-_Copyright_in_the_Music_Industry.pdf
- Long, Roderick T. (1995). "The Libertarian Case Against Intellectual Property Rights," *Formulations* vol. 3, no. 1 (Autumn).
<http://www.freenation.org/a/f3111.html>

Lopez, E. J. (2010. "Fashion Design and Copyright." *The Freeman* vol. 60, no. 10 (December).

Menell, P. S. (2007). "Intellectual Property and the Property Rights Movement," *Regulation* vol. 30, pp. 36-42.

Mises, L. (1998 [1963]). *Human Action: A Treatise on Economics*. Scholar's ed. Auburn, AL: Ludwig von Mises Institute.

Raustiala, K. and C. Sprigman. (2010). "Is the Design Piracy Prohibition Act a Good Idea?" *Freakonomics Blog* at *The New York Times*. Online at: <http://freakonomics.blogs.nytimes.com/2010/03/12/should-fashion-be-protected-by-copyright-laws-a-guest-post/>

Rothbard, M. N. (1998 [1982]). *The Ethics of Liberty*. 2nd ed. New York: New York University Press.

Scruggs, B. (2007). "Should Fashion Design Be Copyrightable?" *Northwestern Journal of Technology and Intellectual Property* vol. 6, pp. 122-137.

Tullock, G. (1967). "The Welfare Costs of Tariffs, Monopolies, and Theft," *Western Economic Journal* vol. 5, pp. 224–232.

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