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FROM PRIVILEGE TO IP

AN AUTHOR WRITES A TEXT. The words used by the author are part of a common vocabulary and belong to no one. But through a specific arrangement of that shared language, the author creates something that is identifiable as individual expression. In earlier eras, that composition of words was likely to be first recorded in a handwritten manuscript; more recently it is generally typed into some sort of electronic device. To sell a manuscript or other tangible object is not the same thing as selling the right to reproduce that array of words in another format. It is also important to distinguish between a specific articulation and the thoughts that are conveyed by it—since copyright protection generally covers expressions, not ideas. What has just been outlined is, therefore, a system where language that belongs to everyone is potentially used to express abstract concepts that are equally open to all, but a particular arrangement of words does become the property of an individual author, who then has the right to exploit its value or transfer ownership.

This description conveys a basic definition of copyright as it was formulated in response to the market for printed books. Today's vast network of intellectual property (IP) therefore emanates from protection for literature initially codified into law during the eighteenth century. There are two important points to take from this thumbnail sketch. The first is the fact that the origins of copyright reflect a response to a specific category of work and associated distribution mechanism: literary expression and the printing press. Each time these protections are extended to additional media and technologies, the criteria for determining what is covered have to be articulated anew. The second point is that the exact scope of what copyright does and does not encompass—and by extrapolation, what remains in the public domain—has always been a highly artificial, perhaps even arbitrary construct.

Looking at the origins of how and why copyright protections were formulated is important for a number of reasons. In the context of today's disruptive technologies, along with evolving IP laws that provide the underpinning for much of their economic power, it is helpful to view recent developments in relation to a far longer history of innovation that is necessarily linked (as both motivator and beneficiary) to changes in legal definitions. It is equally essential, with respect to copyright's ever-expanding purview, to test claims regarding purpose against actual impact. Although the third major component of IP, trademark law, is primarily significant in the context of recent commercial markets, the genesis of copyright and patent protections can be traced back to traditions of aristocratic privilege originating in fifteenth-century Europe. Initial debates about copyright are striking for the questions they raise about the nature and purview of this highly specific form of property. The dialogue quickly extended from text to image rights, and comparisons that articulated key differences in their reproducibility foreshadowed some of the tensions when copyright protections are granted to a multitude of forms. Key distinctions in the Anglo-American and European prioritization of economic considerations versus other types of authorial rights remain important, even during an era characterized by pressure to conform to major international accords.

LITERARY PROPERTY

Just what type of property is a work of literature? This question was asked repeatedly during the early history of what has, over the course of recent centuries, become a pervasive field of intellectual property rights and restraints. But even though copyright legislation was first formulated in response to the dissemination of text, images were not far behind, due to the market for prints. At the same time, protections for texts were sometimes similar to those provided for inventions, reflecting certain shared origins for both copyrights and patents.

The major precursor to modern copyright was the privilege system, which involved temporary monopolies over both printed works and inventions, granted by sovereigns. But this type of aristocratic patronage (often linked to requirements for republica-

tion approval, and therefore control over content) was gradually displaced by market-based systems. The transformation of literature into a form of property was also driven in no small part by the increasing readership for books by the late eighteenth century. Therefore the push for copyright followed the convergence of a number of factors. One, obviously, was the advance that facilitated copying by mechanical or technical means—moveable type front and center, but likewise image production via printed copies. Audience was equally crucial, however, with an expanded reading public as a major impetus for market developments.

Bound up with definitions of literary property are questions about the role of the author and the rights of the public. Theoretically, copyright protections should allow authors to reap economic benefits from the fruits of their labor, as opposed to depending on patronage (the dominant standard prior to the middle of the eighteenth century). According to this model, the author has been described by Mark Rose as the proprietor over a specific type of commodity known as “the work.”¹ But starting with the 1710 Statute of Anne in England, the emphasis on authors in early articulations of copyright was more in name than practice, since printers largely retained control over literary property. Providing benefits to creators was a sympathetic reason to argue for expanding copyright protection, but then, like now, the returns from treating culture as property frequently wound up in other hands.

This history varies dramatically from region to region, based on multiple factors ranging from industrial or economic development to distinctions between systems rooted in common law and civil code. The two major copyright models that eventually developed—Anglo-American and continental—articulated the relationship between work and author differently. Under the common-law framework in England and the United States, the emphasis was economic and utilitarian. Allowing authors as well as inventors a limited monopoly over works shared with the public would motivate them to pursue their creative activity, with the results of this incentive benefitting society at large. Therefore contributions to the public sphere are somewhat counterintuitively linked to the monetization of cultural property. The dialogue in France and Germany, however, was grounded in a romantic understanding of the relationship between author and work, and this led to greater priority for authorial rights (now often articulated as personality or moral rights). If a literary work was a form of personal expression, it was an open question whether something so closely connected to the individual could be fully bought or sold. To the extent that the literary work was not entirely alienable, it was not strictly property. The continental articulation of authorship was potentially achieved at the expense of the public, however, given that protections were not framed in terms of cultural accessibility.²

PRIVILEGE

Options for producing multiple printed copies facilitated by the invention of moveable type in the 1440s were followed in fairly short order by efforts to constrain this