

“Calling off the copyright war”

In battle of property vs. free speech, no one wins

By Jonathan Zittrain, 11/24/2002, The Boston Globe

I grew up watching the Pittsburgh Steelers play football, which means I also watched Steelers fans swinging bright yellow bath towels over their heads to cheer the team on. A Pittsburgh sportscaster named Myron Cope came up with the idea: He called it the Terrible Towel.

A plain yellow towel cost \$4. Eight dollars bought you a yellow towel with "Terrible Towel" stenciled on it. If an entrepreneur sought to buy plain yellow towels, write "Terrible Towel" on them, and sell them in front of the stadium at a bargain price of \$6, he'd soon get a credible cease and desist letter from my father, who represents both Cope and the local school for exceptional children to whom Cope has assigned the towel's profits, a practice that continues today.

Why is this? Myron Cope controls the right to produce and sell yellow towels that say "Terrible" because he holds a trademark. Without trademark protection, someone else's knock-off Terrible Towel might be confused with Cope's, and people could think they were getting Terrible Towel quality when in fact the pretender might be inferior.

Exactly what this means when a Terrible Towel's quality merely depends on it being yellow and labeled Terrible is not entirely clear - no one actually dries off with these things - but even nonlawyers can see some fairness in the claim that what Myron Cope invents, Myron Cope should be able to profit from. If he couldn't turn his intellectual spark into bankable property, Cope might have simply stuck to sportscasting, and Steelers fans would be stuck waving large foam "we're #1" index fingers like everyone else - and, of course, perhaps those wouldn't have been invented either.

Nobody writes for free

The logic of providing incentives for creative work through markets is intuitive and longstanding. As Samuel Johnson put it: "No [one] but a blockhead ever wrote, except for money." The American systems of trademark, patent, and copyright establish the legal fictions that turn ideas into property, so that the mercenary-minded among us will start churning out ideas - the more popular, the more profitable.

The systems demarcating what it means to "own" intellectual fruits consist of hundreds of pages of intricate yet often vague rules, exceptions, and exceptions to exceptions. The rules used to matter only to publishers, writers, and others involved in the industries of professional creation. The political battles fought over the boundaries were ignored by the public, lumped with other industry-specific money conflicts like those over obscure corporate tax breaks, automobile fleet emissions limits, or mohair subsidies.

For example, a few years ago restaurateurs went head-to-head with the American Society of Composers, Authors, and Publishers over whether the latter could collect money from the former when the radio was played for customers while they ate. The result was the Fairness in Music Licensing Act of 1998, which says that any bar or restaurant of not more than 3,750 square feet, not including the parking lot so long as the parking lot is used exclusively for parking purposes, may use no more than six speakers, four in any one room, to play the radio without owing anyone money. Other details establish how large a TV set may be in a bar, or the channel to which it may be tuned - ABC is OK, HBO is not.

Suing the Girl Scouts

At the time, copyright holders saw this law as a stinging defeat because it eliminated some aspects of a monopoly whose logic knows few limits. Indeed, once one embraces turning ideas into saleable items, there is no easy end point. One can claim that a songwriter should be paid when her song is broadcast over the radio, and again when the radio is played in a restaurant - and again when the song is sung by a listener to a group of friends.

It was this reasoning that inspired ASCAP to send thousands of letters to summer camps across the country, demanding hundreds of dollars in annual royalties from, among others, Girl Scouts, presumably for songs sung around the campfire. An ASCAP official explained, "They buy twine and glue for their crafts... they can pay for the music, too." He was right as a legal matter - indeed, it is against the law to sing "Happy Birthday" in public without paying a royalty - and disastrously wrong as a practical one.

The restaurant owners pounced on the overreaching, and with the help of newspaper reports of Girl Scouts learning the Macarena in stony silence, they won passage of the music-in-restaurants law. This, of course, did nothing to change the status of money owed for campfire songs, for which a chastened ASCAP now charges the Girl Scouts a symbolic \$1 per year. They wisely receded on attempting to collect a full profit, while making it clear that the profit remains legally theirs to collect.

ASCAP's foray represents an early clash between the law of intellectual property as understood among sophisticated corporate intermediaries and the reality of intellectual property as experienced by the public. That clash is now in full swing thanks to fast networks and cheap computers: The public has found ways to freely copy intellectual property on a collectively massive scale, and if it continues publishers see a mortal threat to their businesses.

Profits versus public access

Publishers have fought back through tougher intellectual property laws, including attempts to deputize network providers as content police. They further propose a sweeping long-term strategy of altering the very way that computers and networks function, so that the hardware will simply refuse to make a copy of something marked "leave me alone."

Now that the public's tastes and the publishers' profits appear in direct conflict, the publishers also have joined a cultural war, trying to ensure that the prevailing model for the new Internet territory is grounded in the complex legal rules previously reserved for corporations, rather than the informal sense of sharing that has prevailed for individuals. The key is to extend the property label for intangible things like songs and plays as far as possible, reinforcing the idea that any unauthorized use is stealing.

That's an often-overlooked reason why passing laws to extend the duration of copyrights is so important to publishers. If the term of copyright were closer to the 14 to 28 years the framers of the Constitution originally intended, people would become all too used to the idea that the restrictions on using ideas were truly temporary, there only long enough to convince non-blockheads to write in the first instance.

Understanding how to defuse the war means respecting the fundamentals that are driving each side. Two now-opposing principles are embraced by our history and culture. One is crystallized by Calvin Coolidge: "The business of America is business." The other is captured by Thomas Jefferson: "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

Now that the Internet has blended the previously separate zones of ideas as property and ideas as free, it's time to engage in the much-overdue labor of integrating the legalistic rules with the practical if inconsistent

exceptions to intellectual property. The goal should be something that fits both profit models and common sense, recognizing knowledge as something both of valid commercial value and something that people in a free society should be able to share in many instances without getting permission or owing money.

Happy Birthday blues

If publishers can realize that ideas aren't merely commodities like rolled steel or bushels of grain - or yellow towels - the public will ultimately be willing to embrace reasonable boundaries on profit-killing behavior. Few would sneak into a movie if the turnstile were momentarily unstaffed, but almost everyone except entertainment industry lawyers finds it laughable that CBS would sue Fox because its copycat television show, *Boot Camp*, is said to infringe *Survivor's* copyright.

Most important is not to lose the new opportunities raised by the Internet, in which individuals can publish - usually for fun rather than profit. For example, you can read up on Myron's story of the Terrible Towel at www.geocities.com/TheTropics/Shores/2713/towel.html, and you can find lots of programs online that will compel your computer to play "Happy Birthday" for you. Both are likely technically illegal - and yet the world is a better place for their existence.

Indeed, you can see quotations from Samuel Johnson at www.samueljohnson.com/action.html. He died in 1784, and thus even the latest copyright term extensions have failed to keep his work locked up. Similar selections of quotations from more recent, and thus still copyrighted, authors and personalities would be possible but for a legalistic "permissions thicket" through which copyright holders must be sought out simply to allow the quoting of a sentence or two. Bringing the law into line with broad-based social expectations will make remaining restrictions worthy of respect and adherence.

It is precisely at this moment of uncertainty - when publishers worry that their entire storehouses of text, music, and video will be plundered, and individuals worry that attempting to copy and paste a favorite song snippet can result in a lawsuit or blocked Internet access - that compromise ought to be found, and seemingly opposing imperatives can turn out to be mutually reinforcing.

Time for compromise

In the early '80s the movie industry fought the very existence of the VCR. ("The VCR is to the movie industry what the Boston Strangler was to a woman alone," said Jack Valenti, head of the Motion Picture Association of America.) In 1984 the Supreme Court, by one vote, found VCRs not to be illegal tools of copyright infringement, and even Valenti now agrees that it has been a boon to profits through rentals - even though consumers can tape shows, watch them again and again, and even swap them with friends.

Let the Byzantine rules of copyright be curiosities, like the Terrible Towel - rather than an imposition of impenetrable and arbitrary do's and don'ts that increasingly shackle and alienate an otherwise sympathetic public. As the publishers gird for a battle in which they are at risk of overreaching, the public must pay attention - and make it clear, without begrudging rightful profits to artists and publishers, that it's a bad idea to tighten control over ideas and their expressions.

Freedom of trade must not trump freedom of mind.