

Copyright as a Business Strategy

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1. What topic have you chosen?

There is an on-going fight between the entertainment industry that wants to see every creative thought locked up, and those that feel freeing those creative thoughts benefit society. This fight has manifested itself since the inception of a software program called Napster in 1999. At odds are the ethics of contributing to culture, the inspiration that culture brings to the creation of future works, monetizing that work, and the foregoing of fast revenues for the sake of overall growth. The mechanism of this fight is copyright law.

The latest and most disturbing event in the realm of copyright is the use of infringement awards as a revenue stream.¹ Law firms offer to file lawsuits on behalf of rights holders in return for a share of the proceeds. Those companies then send out pre-settlement letters by the thousands in the hope most will pay the settlement amount. As an enticement to settle, the settlement amount has been carefully calculated to be slightly less than what you would need to consult with an attorney. No business does that, and stays in business very long. This is incredibly short-sighted as a business policy. The practice started in the UK, and recently here as well. The British parliament is looking to possibly outlaw this. We should too. This is going to come to a head as it angers the masses. Yes, every business is in the business to make money, but this is akin to civil blackmail.

Regarding every single use of a product as a revenue stream via copyright is problematic. Strict enforcement is next to impossible. It has turned out to be a major sunk cost with little benefit. It's a bad business case. There is a lot of evidence to prove that in the advent of the internet and sharing, artists do better than before such exposure was possible. The part of the music business doing badly is the recording industry, but not from some kid downloading Lady GaGa. They have failed repeatedly to have any

forward vision and seeing an opportunity. Copyright has become a crutch for bad business.

2. Why did you choose this topic for your paper?

Priceless works of art, writings, and buildings have been thoughtfully persevered by people and governments who recognize their importance beyond a royalty, a tourist attraction, or some other form of revenue. That all changed when the principle of copyright become corrupted with a concept of entitlement.

Through the abusive extension of copyrights, and complete lack of an ethical cultural responsibility by those that hold them, we run the risk of being the first generation in the modern era to be lost historically. Entertainment companies have legislated themselves as sole gatekeepers of the entertainment part of our culture, and they are doing *nothing* to preserve it. But there is hope. Technology and the human propensity to share have created ways to pass those things of value to others while not sacrificing the revenue stream.

My definition of the entertainment industry for the scope of this paper will primarily be the audio recording industry, and the movie/TV industry. I'll refer to them both throughout this paper as necessary. The issues addressed here apply to books as well, but we have had a bit more practice legislatively addressing those issues.

3. What course book chapter applies to your paper?

Planning, decision making, ethics, and innovation and change all have a major part to play in this particular subject.

Business has an ethical responsibility to the community. Part of that responsibility is to give back to the community that is its customers. It is enriching to us as a culture to experience the creativity of our artists. It is our nature to share amongst ourselves. It is their ethical responsibility to give works back for this purpose. Other industries see the value of the giving of their product, both for societal and business reasons.

The recording industry had the opportunity to be on the ground floor of the digital music business, instead they squandered it. Their loss in the Betamax case² gave them a whole new industry, in spite of their lack of vision. The digital revolution is more of the same, all over again.

As people embrace technologies that give artists the ability to produce, market, and distribute what has been traditionally the entertainment industries product, the traditionalists will find themselves of no relevance as their roles are replaced or eliminated.

4. What research supports or provides a positive aspect of your chosen topic?

The incentives created by copyright

U. S., the principle of copyright is embedded in the Constitution as an incentive to create. The copyright clause is part of Article I Section 8.³

“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;”

The founding fathers generally warned against monopolistic policies. However, in this case they allowed an adjustment of a free market for the sake of one of the big ideas of economics, “incentives matter”.⁴ The obvious incentive here is the revenue potential from a sole distribution right to a creative product, which I cover in the next section.

However, there are actually two incentives here, one of which has been largely ignored. The phrase in the copyright clause, ‘for *limited Times*’ was placed there by the founding fathers for good reason. After a limited time, your rights to a particular intellectual property will expire. You can’t sit back on your laurels and continue to rely on old

properties. The concept of the cash cow only exists in publishing for a very limited number of works. Interestingly enough, most of the biggest cash cows are in the public domain.

Money Incentive

The entertainment industry is composed of ‘middlemen’ that market a product produced by a third party, the creative artist. There are several reasons why this arrangement was necessary. It is impractical for an individual to market efficiently to the masses. There are only so many people you can attract to your product. And once you do, how do you get paid? The entertainment companies provide mass marketing resources, and production and manufacturing capabilities that most individuals do not have.

Once a recording act is signed a monetary advance is given to the band, presumably to live off of while they concentrate on making music and touring. This is known as being an “unrecouped” band. As the records begin to sell the band earns royalties that pays off this debt, and covers other production and marketing costs. The record label gets a cut of these profits as their incentive to do business. Jack Valenti, chairman of the MPAA until his retirement in 2004, summed his organization’s mandate as:

“To make sure the American movie and TV program can move freely and competitively throughout the world”

In recent years he added the phrase, “and be protected from theft in the digital environment”.⁵ We’ll get to that later.....

The entertainment industries have been very successful in their mission. The RIAA figures for year end shipments in 2009 totaled 7.6 billion, including 2 billion in digital downloads.⁶ It seems evident the incentive for strong protection is there.

Brand Recognition

While mostly a trademark issue, copyrights can aid in making a brand. A prime example of someone doing this successfully is Gene Simmons. You may know him as the bass guitarist from the 70's rock band named, KISS. Today, that name continues to be a juggernaut of licensing with over 2,500 licenses, and merchandising. This includes everything from concert merchandise to the KISS Kasket. (Yes, the KISS brand sells a coffin.)

5. What research provides an alternative viewpoint or a negative aspect?

Overreliance on copyright promotes low risk strategies

The second incentive of the copyright clause has been largely removed by the industry. The result is to take less risk into new creative ideas on their part. The symptom of this situation is in the overuse of sequels by the movie industry. We have two or three sequels to every movie idea that is out there.

Let's take a look at two titans in the business for a comparison. The first one is George Lucas. He started out his career by producing such films as *THX-1138*, and *American Graffiti*. *THX-1138* was a futuristic sci-fi with a cult following, with cultural references to it, made in subsequent works of the same genre. *American Graffiti* was very well received and provided Lucas with the clout in Hollywood to pursue his next project, *Star Wars*.

We all know the fame of *Star Wars*, but after that, the creative wheels started to slow down. He was involved in *Indiana Jones*, but that was with a push from Steven Spielberg. After his first big franchise, he just kept coming out with sequels and spinoffs. He's adding new material, but in an old story universe.

The second gentleman for our comparison is James Cameron. The list of his works is more widely varied than Lucas, with several unique intellectual properties including

Titanic, The Abyss, The Terminator, and Avatar. Relatively speaking, he has not relied so much on his previous works as the basis for future projects. It's also worth mentioning that he produced the top two grossing movies of all time, *Titanic* and *Avatar*.

It's a pretty safe bet that Lucas has made more money overall than Cameron. But who enriched society more? Cameron certainly gave us more to think about with his variety of subject matter. Is it truly *advancing the progress* that we have turned George into a one-trick pony, albeit a rich one? I argue that George would have had more incentives to risk new ideas once the original Star Wars film was released into the public domain.

One thing we've learned in business this year is to stay ahead of the competition. Consistently relying on low risk strategies yields less than desired results. Hollywood needs to lay off the gimmicks, like 3D versions of everything already done, and focus on good, compelling stories of new material. I'm not saying they don't make a lot of money as is, but their products could make more, be of better quality, and society would have more to show for the effort.

Incentives matter, but not so much for artists

Artists must make a ton of money for those record deals, right? Not so fast. The incentives on the artist side are somewhat different. Music is a form of cultural expression. The argument can be made that to limit its production and distribution, is to limit culture. Is culture enough incentive? Obviously not. If you're going to express yourself for a living, you have to make money. But you also have to love making music for the sake of making music. And they don't get the money you think they do, at least not from the recordings.

While the industry has its superstars, most musicians don't carry such status. In fact, according to the RIAA, most bands never earn back their advance. Sometimes the advance balance even goes up, as the recording label adds on various expenses. Their accounting has been considered creative. The sad fact is most musicians never see a dime of revenue from their recordings. The advance is never paid. Recently, the music industry

has tried to get recordings deemed a work for hire. In the case of Bob Marley, they were successful, denying his family any copyright to his work.⁷

The artist's incentive comes from live shows and touring merchandise. Since the music {i.e. the recordings} has no monetary value to the artist, it is best given away as a promotional item to drive ticket sales, and therefore beneficial to have music shared as widely as possible. In fact, a master thesis by Norwegian School of Management students, Anders Sørbo and Richard Bjerkøe, indicates that artists make more money in the file sharing age than before it.⁸ This promotional sharing is a side benefit to cultural history. The more copies of a work, the less likely that it will eventually be lost. Of course, the publishers don't see, or otherwise don't care, about societal benefit. They are of the attitude that if you don't pay, we'll just keep it to ourselves.

Another problem with the intervention of middlemen is the overhead. Whenever you have someone collect money 'on your behalf', they want a percentage of the profits. They're not all that straightforward how they determine the payouts, and how much they keep in reserve. A case in point is, The American Society of Composers, Authors and Publishers (ASCAP). Their primary function is to collect royalties from "*non-dramatic public performances of their copyrighted works*"⁹ This includes music played in bars, restaurants, and other places of business. Collections to ASCAP for 2009 had increased \$48 million to \$995 million, yet they are cutting the payments to some of their members by 30%. Either they are holding monies back that they shouldn't, or they're not administering their own expenses very well. They have an obligation to their members to do better. I've heard them sometimes referred to as '*ass cap*' for their inept policies.

A hindrance to archiving

Digital music employs copyright protection via Digital Rights Management (DRM). It's a general term meaning technological means of copy prevention. The goal of DRM is based in simple economics. With limited supply, your prices are stable enough to cover costs plus profit. Content providers often argue against price drops in a digital age with lower manufacturing costs. They argue that it *devalues* the music. Once the public gets

used to the lower price, the original price seems absurd in comparison. DRM also allows control of the music source guaranteeing the revenue stream, hence its value. But DRM doesn't work in achieving this goal.

DRM is routinely broken, and it only needs to be broken once. Once one copy is out on the internet, there are thousands more before the week is out. The encryption scheme used for DVD called CSS was cracked easily by two European hackers.¹⁰ More recently, IBM has threatened to sue anyone who uses the hack for the HDCP interface, copyright's latest savior. The following is an excerpt from the article:¹¹

Paul Kocher, chief scientist at Cryptography Research in San Francisco, said in a recent interview that somebody in the business of making HDCP-compatible devices, who had access to at least 50 individual device keys, would have been able to reconstruct the master key by analyzing "mathematical similarities" in the individual device keys. That was a vulnerability in the technology, Kocher said, that was bound to be exploited.

While encryption does not deter infringement, it is a deterrent to archiving of creative works. Archiving and storage by libraries is one of the justifications for disregarding copyright. While a limited exception provision does exist for libraries, it's illegal to produce software to actually allow it. In a report commissioned by the Library of Congress in August of 2010, one of the recommendations was to rewrite the copyright law to compel rights owners to permit use of their work

"....it is in keeping with the spirit of copyright as it appears in the U.S. Constitution, permitting exclusive use for a short period of time followed by wide availability for the diffusion of knowledge."¹²

Consumer backlash is also another thing to consider with the use of DRM. Would you buy a car that is only drivable in Illinois? No. DRM allows use on certain devices under certain conditions. But, the more you limit your product, the less value it has to justify its

price. The record producers were able to raise their prices on iTunes only after they removed DRM. In another example, video games with exceptionally restrictive DRM routinely get a barrage of one-star reviews on Amazon.com, as well as ‘don’t buy’ recommendations from gaming publications.

6. What is your conclusion or opinion based on your research?

I don’t see copyright or its use in businesses, as a good or bad thing. It is a contract. The public gives a monopoly for the promise of release into the public domain later. They get something, we get something.

The problem is balance. The constitutional provision as originally intended had contractual balance. As usual with most law, the lobbyists regulated by this law gained control of it, and usurped it as a retirement plan. That threw the balance of the law off, as well as its provided benefit. The fix could be to get rid of the extensions, or restore balance another way. We need to restore the incentive to release into the public domain.

Once items are released, those items can then be copied by libraries or anyone that fancies them. Derivative works will be freely made without fear of reprisals. Companies and individuals could be free to expand on what has come before, innovate, and improve. (That same argument goes for the patent system, which is also in need of reform for the same reasons.) Given the proper competition by the public sector, companies will see the light in the digital age, as they were forced to do with the VCR. It will open up new markets for them.

We need to remove the lucrative nature of copyright infringement prosecution. This practice is taking money out of the economic cycle business relies on. We need to decriminalize general consumer sharing, or greatly limit the penalties of copying for personal use. The industry will never get the revenues from infringement that they do from their core business, and they’re not ‘educating’ anyone with lawsuits. Litigation only draws them away from the realization that they need to change their core business.

Media companies need to embrace what the consumers want. We want it all, on demand, and at a reasonable price.

¹ Techdirt; [Mass Automated Copyright Lawsuits](#)

² SONY CORP. OF AMER. v. UNIVERSAL CITY STUDIOS, INC., 464 U.S. 417 (1984)

[Cornel University Law School](#)

³ [US Constitution](#)

⁴ Modern Principles: Microeconomics; Cowen & Tabarrok 2010

⁵ Wired Shut; Tarleton Gillespie 2007

⁶ 2009 Year-End Shipment Statistics Report; RIAA Website

⁷ Bob Marley Family Loses Case Over Hit Records; Reuters 2010

⁸ <http://www.scribd.com/doc/37406039/Thesis-Bjerkoe-Sorbo>

⁹ ASCAP Website; <http://www.ascap.com/about/>

¹⁰ Why the DVD Hack Was a Cinch; Wired 1999

¹¹ Intel Threatens to Sue Anyone Who Uses HDCP Crack; Wired 2010

¹² The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age; Council on Library and Information Resources and The Library of Congress August 2010