Chapter 5

Intellectual property in the digital age
by David Bollier

Introduction

Once a backwater of law that elicited little interest beyond arts and entertainment industries and their lawyers, copyright law has become a major arena of social and political conflict over the past generation. Many clashes amount to tactical skirmishes among companies for competitive advantage—a long and familiar dynamic in copyright law. But much of the turmoil revolves around a deeper issue: What legal principles and social norms should be used to promote new creativity, especially when the Internet and other digital technologies are involved?

Many Internet users, academics, software programmers, artists and citizens criticize the expansion of copyright law and its enforcement as an obnoxious limitation on their basic freedoms. Content industries, for their part (with significant exceptions among large Internet-based companies like Google) tend to regard expansive copyright protection and enforcement as indispensable for sustaining creativity itself.

This chapter describes the profound shifts that copyright law has undergone over the past twenty years as digital technologies have disrupted mass media markets and changed people’s stake in copyright law. The 20th century business models for media industries treated people as passive audiences, whose chief role was to “consume” works made by professionals and sold in the marketplace. This changed with the arrival of the Internet. Telecommunications and digital technologies have enabled ordinary people to become prolific creators in their own right. The “people formerly known as the audience,” in Jay Rosen’s memorable phrase, have become bloggers, musicians, remix artists, video producers, website curators, hackers, academic collaborators, and much else. Ordinary people can generate, copy, modify and share works with a global public without having to deal with commercial content intermediaries such as publishers, record labels or studios.
The rise of this new “sharing economy” outside of the marketplace – in which self-organized communities can generate and manage their own “commons” of content – poses profound challenges to a system of production based on exclusive ownership and control. A commons is a self-organizing social system in which a defined community of people manage the access, use and allocation of resources sustainability without money, legal contracts and other features of markets. Commons-based platforms such as Wikipedia, social networking and open source software divert people's time and attention from commercial platforms, resulting in smaller audiences and lower advertising rates. They also provide new cultural spaces in which amateurs can create qualitatively different new sorts of content that may or may not be marketable, but nonetheless attract considerable Web traffic and thus compete with commercial media and content producers.

This chapter will explore the key drivers of the sweeping transformations in market structures, technology and social practice. It will also examine some of the new “open business models” that are challenging traditional, centralized market structures for the arts and entertainment. Special attention will be paid to the dynamics of new non-market structures for creating and enjoying music, video, books, web content and other creativity and information.

The new models of content production and distribution have engendered intense political and legal conflict. While this strife manifests itself in many areas of law – antitrust, telecommunications regulation, privacy, consumer protection, and more – copyright law is a primary venue in which this drama is playing out.

Despite the new pressures from digital media, copyright law is not destined to undergo a radical transformation any time soon. Existing business models of various arts and entertainment industries remain highly dependent upon copyright protection. Yet, at the same time, the social practices and norms unleashed by the Internet and digital technologies are not likely to disappear, either. User-generated content and personal networking are becoming culturally popular, giving rise to new business models that rely upon “open platforms” accessible to anyone. This latest generation of interactive Web creativity and culture is often known as “Web 2.0.”

In an attempt to ease tensions between industry and consumers, the United Kingdom’s former Chancellor of the Exchequer, Gordon Brown, commissioned an independent review of intellectual property law in 2005. The resulting report, known as the Gowers Review, essentially affirmed the current state of copyright law, while calling for
stronger enforcement action and proposing some concessions to consumers and the public. For example, the report recommended “balanced and flexible rights” to reduce business costs and foster greater market competition (HM Treasury, 2006:4). But it also called for an expansion of the public’s “fair dealing” rights, which allow people to legally excerpt “reasonable” amounts of copyright works for non-commercial research, journalism, criticism and private and incidental uses (HM Treasury, 2006: 61-62).

Despite such searches for a stable equilibrium that might reconcile the conflicting demands of copyright-based industries and the public, copyright law will surely remain an arena of intense political, legal and cultural contestation for the foreseeable future. The most salient points of contention involve industry’s use of encrypted controls on DVDs and CDs using “digital rights management” (DRM); the privacy rights that Internet users may enjoy; the scope of people’s “fair dealing” rights; the legality of Google’s project to digitize out-of-print books in the public domain and works whose copyright owners cannot be found (“orphan works”); and the severity of punishments for Internet users found guilty of violating copyrights.

For the moment, we are caught in a messy interregnum between two different media ages – centralized mass media and distributed networked media – with only fitful, transitory accommodations between the two. Only time is likely to resolve or mitigate the current impasse, as large numbers of people choose which modes of creative production and use they find most efficient, entertaining, valuable and socially satisfying.

A brief history of copyright

The first copyright law, the Statute of Anne, was enacted in the United Kingdom in 1709. It gave authors an exclusive property right to print, reprint and sell their books for fourteen years. After that, the author could renew copyright protection for another fourteen years. The Statute of Anne made it illegal to make or sell copies without permission of the copyright holder.

The law was a major advance in challenging the monopoly of the Stationers’ Company, a trade guild of printers that enjoyed a monopoly on book production. The Statute of Anne diminished this monopoly by vesting rights in authors. The rationale for this shift was that an author ought to be able to protect the fruits of his labor and originality. In practice, despite this recognition of author’s rights and the prospect of greater market competition, book publishers made out fairly well. They typically purchased copyrights from authors, and so had the dominant economic stake in protecting copyrighted works.
In our times, copyright law is generally seen as a bargain between authors and publishers on the one hand, and the general public on the other. The public, via the legislature, grants limited monopoly rights to authors and publishers so that they will have the incentive to create and distribute original works. In return, the public enjoys certain benefits: not just the availability of new works for purchase, but the fair-dealing right to excerpt copyrighted works for private, non-commercial purposes.

The public also enjoys free, unfettered access to the “public domain” of works after the term of copyright protection in a work has expired. This is an important point: the terms of copyright protection are limited so that works may “enter the public domain” and be freely re-usable, and thus benefit future authors and creators.

Many authors and content industries like to portray copyright as a natural right that pre-exists governments. But at least in Commonwealth countries and the United States, copyright has functioned as a utilitarian policy mechanism, not as a moral or natural right. Its primary purpose is not to reward authors; it is to advance public knowledge, education and culture.

The evolution of copyright law since the 1700s has been marked by piecemeal adaptations as new technologies arose or as different industries succeeded in securing expansions of copyright protection for themselves. For example, the performance of dramatic works became eligible for copyright protection in Great Britain in 1833, a right extended to musical works in 1842. Later Parliaments authorized copyright protection for engravings, paintings, drawings, photographs and sound recordings.

The terms of copyright protection, later expanded to a fixed 28-year term, now extend to 50 or 70 years, depending upon a variety of legal variables. To ensure the recognition of copyright laws internationally, the Berne Convention for the Protection of Literary and Artistic Works was adopted in 1886.

Growing tensions between copyright law and the “sharing economy”
A paradox lies coiled within the philosophical core of copyright law: it seeks to promote the creation and distribution of works by artificially restricting access to them, through a state-granted monopoly to authors.

The copyright regime served its intended purposes fairly well when creative works were embedded on vinyl disks, celluloid film or codex of paper. Borrowing or sharing tended to occur within fixed geographic areas, and did not significantly undermine market sales. However, with the arrival of digital technologies and especially the Internet, which make copying and sharing easy and inexpensive, the balance of traditional copyright law has been harder to sustain. The monopoly rights conferred by copyright have also come at a steeper price to culture. Instead of necessarily expanding knowledge or stimulating competition, copyright law in the digital age has in many instances served to artificially limit the circulation of valuable creative works.

Steward Brand put his finger on this paradox in 1984 when he famously declared, “On the one hand, information wants to be expensive because it’s so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other.” (Brand and Herron, 1985: 49).

The astonishing growth of the Internet has only intensified the force of this paradox. As digital technologies help create new markets, content owners are more intent on controlling and profiting from the newly invented “downstream” uses of their products. In the 1980s, for example, Hollywood studios fiercely fought the introduction of the videocassette recorder as a mortal threat, a battle that they lost in the U.S. Supreme Court. The videocassette went on to become a major ancillary source of revenue for film studios.

Nonetheless, content industries continue to try to control ancillary markets as much as possible, to the extent of trying to control the potential uses that people may make of copyrighted products. Film studios and record labels use “geographic coding” on DVDs and CDs, for example, to prohibit their usage on electronic equipment on other continents, and thus prohibit their re-sale elsewhere. Digital rights management is a similar attempt to prevent users from copying works or using them in unauthorized ways.

Besides such technological locks, film and record industries in particular have sought to expand their control over DVDs and CDs by seeking broader public policy protections and stiffer legal sanctions. In the United States, for example, Congress enacted the
Copyright Term Extension Act of 1998 to retroactively extend the terms for copyrighted works by twenty years. The law essentially locked up tens of thousands of works from the 1920 and 1930s – most notably the Disney Company’s Mickey Mouse character – that were due to enter the public domain. The term extension represented a giveaway to major copyright industries and authors’ estates because a retroactive extension of copyright protection could not possibly incentivize a roster of deceased authors (Robert Frost, Walt Disney, George Gershwin, etc.) to create new works. Film studios responded that they would not have an incentive to preserve old films and other copyrighted works without this incentive.

Another major U.S. copyright law enacted in 1998, the Digital Millennium Copyright Act, has been emulated by many countries. The law gives copyright holders the unilateral right to lock up digital content and so preempt fair dealing/fair use rights such as excerpting, reverse engineering and user modifications not authorized by the seller. Content industries see the law as a vital way to protect their “intellectual property” in an era of cheap and easy copying. Critics regard the law as a serious hindrance to consumer rights, innovation, competition and cultural freedom.

Other laws in the 1990s gave companies broader protections under trademark law, limiting how people may use trademarked products and logos. Companies argue that they need to protect the value of trademarks for which they have spent considerable money on marketing; critics retort that trademark laws now attempt to suppress parody and dissent, effectively controlling the public meanings of trademarks.

Internationally, content industries have stepped up their efforts to win stricter enforcement powers to prosecute the unauthorized copying of copyrighted works. Content industries condemn large-scale, authorized copying for commercial purposes as “piracy,” noting that it is often implicated in organized criminal activity. However, content industries have also labelled as “piracy” certain types of private copying, music remixes and video mashups that aggrieved individuals insist should be treated as fair dealing. Thus the term “piracy” itself has become a controversial term. In the U.K., there have been periodic calls for a legal “public right to copy” and the right to “format shift” works for personal use, but none has been formally adopted.

The “Great Value Shift”

Much of the political and social struggle over the terms of copyright law can be traced to the disruptions caused by the Internet and the economic logic of “open platforms”
accessible to anyone via the World Wide Web. Essentially, the Internet provides an infrastructure that enables distributed innovation and sharing to occur at a much lower cost than that of conventional mass media.

Television and radio broadcasting, for example, require large amounts of centralized capital, corporate management and professional control. Their business models depend upon distributing a limited spectrum of content choices to large, fairly undifferentiated audiences. “Sellers” are seen as the prime source of expertise, innovation and production. They mostly determine what choices will be offered, and they tend to have greater market power and cultural influence than large masses of unorganized consumers.

The Internet has disrupted the centralized mass media apparatus by enabling disaggregated individuals to come together to create, collaborate and curate their own content. Whether through blogs, listservs, collaborative archives, wikis, social networking sites, or online gaming communities, Internet users have been able to control their own creative and cultural production, much of which is generated and distributed entirely outside of the marketplace (with no cash transactions, legal contracts or corporate structures).

This new paradigm of creation has been called “the commons” by a number of commentators such as Professors Lawrence Lessig, Yochai Benkler and James Boyle. “What we are seeing now,” wrote Benkler in his landmark book, The Wealth of Networks, “is the emergence of more effective collective action practices that are decentralized but do not rely on either the price system or a managerial structure for coordination” (Benkler, 2006: 60). Benkler’s preferred term is “commons-based peer production” (Benkler, 2006: 59-90). By that, he means systems that are collaborative and nonproprietary, and based on “sharing resources and outputs among widely distributed, loosely connected individuals who cooperate with each other” (Benkler, 2006: 60).

Essentially, peer production on open networks enables people to self-organize themselves into communities, and to devise their own rules for granting access, use and control of resources. The resources can take many forms – the software code that hackers share, the remix songs or video mashups of web artists, user contributions to a web archive on a specific topic, or the collection of leaked documents hosted by WikiLeaks. Commons-based peer production can be seen in the mass collaboration of Wikipedia and open source software projects such as Linux, the computer operating system. It can also be seen in many scientific disciplines that use wikis to amass pools of shared data, and in academic disciplines which publish their articles in open-access journals that can be shared, at no cost to readers,
in perpetuity. Commons-based peer production is evident in NASA’s Clickworkers Project, which has recruited thousands of online volunteers to classify the craters of Mars, and in projects which use volunteer proofreaders to read through book texts for typographical errors.

Such informal social relationships, working in the unregimented, free space of open platforms, are beginning to change economic production and culture. Instead of needing markets and money to animate people to create valuable information, social friendships and cooperation on a mass scale can be coordinated to produce significant economic (and social) value.

Bollier (2009: 122-144) calls this deep structural change in how valuable things are created online *The Great Value Shift*. On open networks, the value of strict proprietary control over works diminishes, altering the value of traditional copyrights. Allowing people to have open access and use of a work on the Internet can prove to be more valuable than outright “ownership” (exclusion) in the traditional sense.

The copyright scholar Siva Vaidhyanathan has quipped that: “The only thing worse than being sampled on the Internet is not being sampled” (Norman Lear Center, 2005: 142). His point is that “value” in Internet contexts increasingly comes from being socially accessible and circulated, and not from being closely held as private property. This shift has far-reaching implications for business strategy and organizational behaviour, and for the very definition of wealth.

On the Internet, wealth is not just financial, nor is it necessarily privately held. It is often “socially created value” that is shared, evolving and non-monetized. It hovers in the air, so to speak, accessible to everyone. Thus, the value of a creative work grows as software code is collaboratively developed by online communities (enhancing its utility and eliminating bugs); as songs and videos are remixed and shared on the Internet (stimulating public exposure and sales); and as academic books and articles are more easily discovered online and cited (enhancing their authors’ reputations and the circulation of their ideas).

Needless to say, copyright-based industries are often confused and threatened by these commons-based models of cultural value. These new models represent a fundamental shift in the structures of “cultural production” and a departure from the logic of traditional justifications for private ownership.
Yet the Great Value Shift is an inexorable force in creative industries. It is one reason that the music industry, after years of resistance, finally capitulated and removed digital rights management from most of its online music. Consumers were rejecting DRM-protected music, and sales were plummeting. As the social circulation of CDs and digital music slowed, so did the consumer market for the music. (The record industry continued to see piracy as the chief culprit, however.) Only now are record companies starting to explore new forms of digital distribution of music, even as independent musicians experiment with innovative business models (see Chapter 2) and law scholars propose policy solutions such as compulsory licensing schemes to remunerate artists.

**Creative Commons licenses and new business models**

Perhaps the most significant impact of the Great Value Shift has been the development of new forms of legal online sharing through Creative Commons (CC) licenses, and new types of business models that exploit “open platforms” on the Internet. The CC licenses have given consumers/users/amateurs greater control over their own creativity. They regard works as things to be shared, and not necessarily as market “products.”

A popular tool for expressing this attitude towards culture is the Creative Commons licenses. The licenses are a series of free, public licenses that let copyright holders make their videos, music, designs and writing freely available, without advance permission or payment. The licenses were expressly designed to let creators bypass the strict controls of copyright law and enable new pools of content to be shared, copied and re-used. Especially since the advent of Web 2.0 software in 2002, the Creative Commons licenses have enabled the creation of new types of information commons for photographs, songs, remix music, video mashups, academic literature and much else. Many scientific disciplines are using the CC licenses to sidestep commercial publishers and start their own open access journals. More than 5,000 open access scholarly and scientific journals are now published, making their articles available for free online in perpetuity.

Free culture has become so popular over the past decade that more than 50 countries around the world and several large-scale legal jurisdictions (such as Scotland and Puerto Rico) have adapted the Creative Commons licenses. Another nine are in the process of adapting the licenses. More than 150 million works are now estimated to be available under Creative Commons licenses.

While CC licenses encourage people to share their works on Web-based commons such as Wikipedia, the Internet Archive and open access journals, digital sharing also occurs
on corporate-hosted open platforms such as Facebook and Flickr, which invite people to contribute and share their own content (“user-generated content”). Unlike online commons, however, these platforms are managed to serve the commercial interests of companies and their investors, and may or may not give users full control of their works. Some open platforms, such as the iPhone, select which applications may run on the platform; others require users to consent to “terms of service” contracts that dictate their legal rights on the site.

A new breed of Internet-oriented companies is developing new business models to take maximum advantage of open platforms on the Internet. They realize that a reliance on open source software, freely available content and an ethic of transparency are more likely to capture consumer attention and loyalty, and therefore leverage the social dynamics of life on the Internet. By contrast, companies that rely upon “closed” business models that seek to manage consumers’ behaviour and impose strict copyright controls are seen as less attractive to consumers and are thus becoming less competitive.

A classic instance of the power of open business models is the Mindstorms robotic kit produced by the Danish toymaker Lego. The kits let young people build a variety of customized robots out of a huge assortment of plastic Lego pieces, programmable software, sensors and motors. When some early users of the kits began to reverse-engineer the robotic “brain” of the system, the company initially considered suing them. Then they realized that their inquisitive customer base represented, in effect, a large and robust research and development team that could actually improve the product over time.

Lego decided to insert a “right to hack” provision into the Mindstorms software license, giving hobbyists explicit permission to invent whatever new robotic innovations they wanted. The best of these innovations are incorporated into the product, which makes them more attractive to customers and improves sales. By treating their customers as part of the creative ecosystem, Lego learned how to transcend the conflicts that often occur between copyright holders and users. Their new, less controlling business model works to the benefit of both the company and its customers.

A leading scholar of user-driven innovation is Eric von Hippel of M.I.T., whose book, Democratizing Innovation, describes dozens of “innovation communities” that work closely with manufacturers. Von Hippel contends that customers – especially the most active, enthusiastic customers – are rich sources of innovation that can benefit industry. The sports drink Gatorade, the sports bra and circular irrigation systems were all initially invented
by individuals, not companies, he notes. As the Internet makes user-driven innovation more feasible and accessible, von Hippel believes competitive companies must learn to develop more open, interactive relationships with user communities.

The politics of owning and sharing culture

Despite the appeal of open business models, incumbent industries have been more interested in resisting than adopting innovative production and distribution models. Much of this has to do with their large, fixed investments in existing ways of doing business, which cannot be inexpensively modified or abandoned. Business scholar Clayton Christiansen (2003) calls this problem “the innovator’s dilemma” – the difficult choice facing businesses that have a lucrative, established commercial franchise that might be undermined or cannibalized by embracing new technologies or business strategies.

Incumbent industries have therefore tended to resist new technologies and business models through lawsuits, lobbying for broader copyright protections and public relations campaigns. The film, recorded music and publishing industries have undertaken numerous campaigns over the past twenty years to encrypt copyrighted content, mandate technological controls to restrict copying, and persuade legislatures and international bodies to mandate stronger copyright protections and penalties.

More recently, industries with large inventories of copyrighted works have worked in collaboration with national governments to forge a trade agreement to “internationalize” their policy goals. Recently, a key vehicle for such aspirations has been the Anti-Counterfeiting Trade Agreement. Negotiated in secret over the course of two years, the agreement deals not just with trademark counterfeiting, but in fact with many copyright issues. It reportedly seeks to expand surveillance of online activities and authorize personal searches of electronic equipment. One apparent provision would require Internet Service Providers to monitor for copyright violations and to cut off Internet service to subscribers with three episodes of alleged infringement.

Civil society has frequently greeted many of the copyright industries’ proposed copyright policies and initiatives with derision, protest and civil disobedience. Hackers and computer programmers have often been at the forefront of such protests, particularly when the rights to reverse-engineer, modify or re-use software has been involved. The Free Software Foundation and Software Freedom Law Center have been two leading advocates for limits on the scope of copyright protection and the right to share and re-use software. Public Knowledge and the Electronic Frontier Foundation are leading policy advocates and
litigants for copyright reform in the United States and internationally. In the United Kingdom, digital activists have often addressed issues of freedom of expression, privacy, innovation and consumer rights through the Open Rights Group.

International copyright activism has become far more organized in recent years. Advocates in Sweden formed the Pirate Party in Sweden in 2006, which soon inspired the formation of national Pirate Parties in more than twenty nations, now represented by an umbrella organization, Pirate Parties International. The Pirate Party in Sweden is now the country’s third-largest party; following the 2009 elections, it won two seats in the European Parliament. Other significant advocacy for changes in EU copyright policies are being advanced by the Free Culture Forum, an international body of free software, free culture and Internet-oriented citizen groups that meets annually in Barcelona.

Case Study: Should Fashion be “Ready to Share”?  

While the music and film industries fiercely protect their copyrights, limiting any sharing and re-use of their works, the fashion industry, driven by similar market interests, readily accepts the idea of derivation and appropriation as a creative tool. To be sure, the fashion industry aggressively protects its brand names and logos, utilizing trademarks and licensing agreements to assure a flow of consumer revenues. However in most cases, the actual creative design of garments is not owned by anyone. The couturier dress worn by a Hollywood starlet on the red carpet can be immediately “knocked-off,” as the fashion world puts it, and legally appear days later on department store racks.

Copying is the norm in fashion. The renowned fashion designer Miuccia Prada was once rummaging through the Paris shop of vintage clothes dealer Didier Ludot. She espied a coat with silk faille and a rosebud print, which had originally been designed by Balenciaga, according to a friend, Mauela Pavesi. Prada loved the design so much that she copied it exactly and sold it as her own.

Ralph Lauren once made an exact copy of a tuxedo that had been designed by Yves Saint Laurent. Designer Nicholas Ghesquiere, a Balenciaga designer, copied a vest that had been designed by Kaisik Yoon for his 1973 collection. Fashionistas note how Adolfo built his fashion business on an interpretation of a Coco Chanel suit; that Tom Ford’s work was clearly derivative of Halston’s designs; and that Alexander McQueen closely copied Vivienne Westwood.
New York Times reporter Guy Trebay (2002) has noted that Gallagher Paper Collectibles, a Manhattan shop with a vast collection of fashion magazines going back 100 years, is a favourite haunt for contemporary fashion designers and their assistants. “We get them all, Hedi Slimane, Karl Lagerfeld, Marc Jacobs big time, John Varvatos, Narciso Rodriguez, the Calvin assistants, the Gucci assistants, Dolce & Gabanna, Anna Suit – you name it,” said Michael Gallagher, the store’s proprietor. “They all come here for inspiration,” Mr. Gallagher added. “At least that’s what we call it.”

Film studios and major record labels consider it self-evident that creativity must be strictly controlled through copyright law, lest it be “stolen” and creators forced out of business. It is a significant point: creators, especially individual artists, need effective, reliable ways to be paid for their work, and copyright offers one important vehicle.

But the fashion industry has show that, despite scant copyright protections, fashion businesses are still willing to invest enormous sums of money in each new season’s creative cycle – and reap substantial profits year after year. Derivative creativity, recombination, imitation, revival of old styles and outright knockoffs are the norm. Few denounce, let alone sue, the appropriator for “creative theft”: they are too busy trying to stay ahead of the competition through sheer power of their design and marketing prowess.

Occasionally someone may protest about a “rip-off” and get murmurs of sympathy. And rightly, the counterfeiting of brand-name products is condemned as theft. However in general, certainly as a legal matter, creative derivation is an accepted premise of fashion. Indeed, the industry’s growth and prosperity has been built upon the famous maxim of Isaac Newton, “If I have seen further, it is by standing on the shoulders of giants.” (QuoteDB, n.d.)

The legendary designer Coco Chanel understood this reality. She once said: “Fashion is not something that exists in dresses only; fashion is something in the air. It’s the wind that blows in the new fashion; you feel it coming, you smell it...in the sky, in the street; fashion has to do with ideas, the way we live, what is happening” (Evan Carmichael, 2010). There are obvious parallels between the legal status of creativity in fashion and on the Internet, especially in free and open source software and viral memes and videos on the Internet.

References


**Further reading and research**


**Online Resources**

http://www.mpaa.com
http://www.riaa.com
http://www.creativecommons.org
http://www.electronicfrontierfoundations.org
http://www.publicknowledge.org
http://www.openknowledgefoundation.org
http://www.openrightsgroups.org