
Resolving Conflicts between Information Ownership and Intellectual Freedom

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ABSTRACT

THE TENSION BETWEEN information ownership and intellectual freedom emerges both from the balancing of economic and political interests and as a result of the underlying structure of communications and information industries. This theme is addressed in the context of a review of the articles by Eaton, Milevsky, and Wilson which appear in this issue of *Library Trends*.

INTRODUCTION

The current legal and economic view of the statutory mechanisms by which we establish and enforce ownership rights in intellectual property—copyright and patent—is that they seek to balance the incentives for authors, artists, and inventors to create new works with the benefits to society from having such works available freely (Braunstein et al., 1977; Bush & Dreyfuss, 1979). But the origins of copyright are not based in this balancing approach nor does this logic necessarily carry over to other forms of protection—e.g., trade secrecy rights, in the commercial context, and national security restrictions such as “classification.”

The tension between ownership of (the exercise of property rights in) information and the concept of intellectual freedom arises from two foundations: The first is the perceived need for state power and the desire of the state to exercise control—and sometimes limit the control of others—over communications media and messages; the second is the underlying economics of the production and distribution of information, especially the interplay of communications

technology and economics. This article describes the nature of this tension and, in so doing, analyzes several of the points raised in the articles by Eaton, Milevski, and Wilson which appear in this issue of *Library Trends*.

THE ROLE OF THE STATE IN DISSEMINATING OR RESTRICTING INFORMATION

The potential for conflict that Wilson sees between intellectual freedom and ownership rights in intellectual property is not new. One can go back to the original meaning of "copyright"—the privileges granted to certain printers by the Crown. In England, prior to the Statute of Anne in 1710, copyright referred to the exclusive rights given to members of the Stationers' Company and was seen as a legal means of restricting unbridled use of the new printing technology. Starting with the Statute of Anne, copyright in Europe was transformed into a means of protecting the rights of authors. That this transformed notion of copyright is meant to provide incentives for the creation of literary and scientific works can be seen in the provision in the United States Constitution: "The Congress shall have power 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" (U.S. Sect. 8, Para. 8).

But the tension between dissemination and control has never been eliminated. We currently consider it to be mostly between competing economic interests—rewards for authors versus benefits to society. Wilson shows that the recognition of "derivative" rights, the right "to prepare derivative works based upon the copyrighted work" (17 U.S.C., § 106, 1976) in the revision of the U.S. Copyright Law moves the conflict between property rights and intellectual freedom from merely an abstract concern to reality.

Wilson believes that a uniform system of copyright (across all levels of originality and all technologies) is a primary factor in the tension between rights in intellectual property and intellectual freedom. He draws on an Office of Technology Assessment (OTA) analysis of the difficulties in applying copyright law to new technologies to support his view. The OTA report distinguishes between works of art, works of fact, and functional works, and argues that different degrees of protection may be appropriate across these three classes (U.S. Congress, OTA, 1986).

In that the OTA report focuses on the technological origins of the distinctions across the classes, it owes much to John Hersey's (1979) dissent from the software recommendations of the National Commission on New Technological Uses of Copyrighted Works (CONTU). Hersey primarily distinguishes communications which

have human beings as both sender and receiver from those with machines, but it is clear that he sees further problems raised by the existence of "adaptations." In this, his concerns parallel many of those raised by Wilson.

We are reminded by Milevski (in this issue of *Library Trends*) that governments continue to restrict the flow of information. One might question her contention that the need for national security controls on the flow of information is noncontroversial and wish for the debate to be put in the broader context of restrictions in the flow of information. Nevertheless, her discussion of the changes in the approach to, and methods of, implementation provide a useful overview of the topic.

THE ROLE OF ECONOMIES OF SCALE IN MEDIA STRUCTURE

The major economic factor influencing both the structure of communications and information industries and the pressure for government regulation of many of these industries is economies of scale. Loosely speaking, economies of scale is the low cost of serving another user given one has made the investment in production and/or distribution facilities (or both); its presence or absence is, at least partially, determined by the underlying technology. Scale economies are often known by industry-specific names such as high "first-copy costs" in printing and publishing, and "network economies" in point-to-point telecommunications. The presence of economies of scale, even if unchecked by government action, does not immediately lead to monopoly production or distribution. Among the factors that influence the number of competing entities in a given market are the distribution of tastes of the consumers, the relationship between the size of a firm with low production costs and the overall size of the market, and the viable technologies utilized and the mix of products and services produced (see Baumol et al., 1988; Scherer, 1980).

Economies of scale and related phenomena have been cited as the primary reasons for the need for a single ubiquitous telephone network, the death of competing large city newspapers, the growth of newspaper chains, and the dominance of the three commercial television networks. Ignoring for the moment that the technologies in many of these areas are changing, the traditional policy responses generally include licensing and public utility regulation. For example, Eaton states in this issue of *Library Trends*:

With the exception of film, which originally was viewed by the courts as an entertainment medium and therefore not covered by the First Amendment (but which now enjoys full First Amendment protections) (ALA, 1986, pp. 22-23), other new technologies have not been viewed as appropriate to First Amendment protections. Public policy in the United States veered from the First Amendment approach of an earlier

paper communications environment and began to rely instead on anti-trust law and licensing of channels, cables, or wavelengths. (Eaton, this issue of *Library Trends*).

But this statement ignores the significant differences between common carriers on the one hand and broadcasters on the other. This is the fundamental choice as to whether the medium is to serve primarily as a conduit for messages and programming provided by others or whether the owners of the medium are to be able to exercise editorial control. Furthermore, it leads one to an erroneous dichotomy as illustrated in Eaton's next statement:

While the various media allow for very broad public access at output, they also narrow access at the point of input since those who control the channels, airwaves, and cables also control what is broadcast or transmitted. (Eaton, this issue of *Library Trends*)

In other words, while the limits on access (at the point of input) and control appear to be determined by technology and economics, they are fundamentally determined by the policy choice of how a given communications medium is to be organized. The Communications Act of 1934 has two major sections, one relating to broadcasting and the other to common carriage (47 U.S.C., § 151, 1970). Although the policy choice to view and regulate radio (and, by extension, television) as other than a common carrier was made prior to the 1934 Act, this question was partially reopened with the emergence of cable television. Cable television, it has been argued, has characteristics of both a broadcaster and a common carrier, and, as a result, was considered by the FCC to "fall between the cracks." Without legislative guidance, the ultimate decision on which regime to apply was left to the courts (see *FCC v. Midwest Video Corp.*, 1979).

The distinction between broadcasting with its editorial control and common carriage can define the terms of access. This is true both of access by program producers to the means of distribution and of access by the public to a diverse mix of programming (see Owen, 1970). However, it has been shown that while mandated access by programmers at rates fixed by regulation may increase access by programmers, it has the potential of reducing the diversity of offerings available to viewers (Besen & Johnson, 1982).

VERTICAL RELATIONSHIPS

Analyses of economies of scale focus on the appropriate size and number of entities at only one level in the production-distribution-usage chain. But often we find a single entity that operates at more than one stage on this chain, possibly through common ownership of divisions that operate at two or more levels. Furthermore, it is possible that exclusive relationships might keep a supplier at one

level from selling to a distributor at another level (or vice versa). While these vertical relationships have the possibility of restricting access, it is also argued that they enable new material to be produced. This can be the result of the financial resources that the multidivisional organization can bring to the market or the reduction in risk and transactions costs that result from having a guaranteed source of supply (or guaranteed market, depending on one's perspective).

The Lacy Commission argued for dropping any restrictions on the entry of American Telephone & Telegraph (AT&T) into the information services market (ALA, 1986). Eaton, on the other hand, worries about the risk of competitors being overwhelmed by AT&T (this issue of *Library Trends*). The divestiture of the Bell System may have reduced any need for concerns about bigness per se; however, the specific issues that are raised by vertical integration are still present in a world where the "Baby Bells" (the former Bell System local operating companies and their seven regional holding companies) are mounting a new drive to provide a variety of information services. Unfortunately, these more complex issues are not covered well in either the Lacy Report or Eaton's article.

WHAT DOES FREE ACCESS MEAN?

Both Eaton and the Lacy Commission appear to move between two different concepts when discussing "free access" to information (see Eaton's article in this issue; ALA, 1986). This is most likely due to the dual meaning of the word *free* in the English language. We use the same word to mean "unhindered" and "without charge" while many other languages use two different words for these separate concepts (compare "liber" and "gratis" in French, for example). This problem of dual definition appears in the discussion of government user fees restricting access to federal data sources and in the notion that it is "inherently discriminatory" for a library to charge for access to electronic databases. (Eaton, this issue. See also, ALA, 1986).

The Lacy Commission seems implicitly to be aware that the imposition of fees can, under certain circumstances, improve access by encouraging entry of additional information providers and by providing libraries with funds that are often otherwise unavailable (ALA, 1986). Eaton points out, however, that such views are in conflict with stated ALA policies.

CONCLUSION

As Eaton points out, the Lacy Commission argues for "a consistent policy to maximize the availability of information from the government to its citizens" (Eaton, this issue. See also, ALA, 1986). But this consistency should be limited. If we accept the premise that, at least in some instances, user fees can generate revenues that

allow producers of information to expand or at least continue their operations, it is reasonable to support the imposition of such fees so that more information is made available. But should this policy be extended to fees charged by public libraries? If not, is the rationale based on sound logic or simply on a bias toward having a base level of service provided without charge?

Similarly, should the desire for consistency prevent us from having different forms of property rights for different types of information even if, as Wilson shows, maintaining consistency can lead to a reduction in intellectual freedom? It may be time to reconsider the notion of a single form of copyright which is applicable across works that may have far different levels of originality and that are produced in a variety of technologies.

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