13.2.1: The Basics of Copyright

Learning Objectives

After completing this section, you will be able to

- Understand the theoretical and legal underpinnings of copyright.
- Appreciate the important differences between copyrights and patents.

Figure 3.1.1: (credit: Wikimedia Commons / CC BY-SA 3.0)

A copyright is an intellectual property right granted by a government to the author of an original literary, dramatic, musical, artistic, or other eligible creative work that gives them the exclusive right to control how the work is published, reproduced, performed, or displayed—as well as whether or not derivative works (e.g., a movie version of a novel) may be produced.

In the United States, the legal foundation for copyright is set forth, along with that for patents, in Article 1, Section 8, Clause 8 of the U.S. Constitution. This clause gives Congress the authority 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."[i]

Congress and the courts have interpreted the terms "authors" and "writings" very broadly so as to include the creators of a wide variety of artistic and intellectual works. Title 17 of the United States Code authorizes the grant of a copyright to the authors of "original works of authorship"—including literary works, dramatic works, choreographic works, graphic works, audiovisual works, sound recordings, and architectural works. In most cases, a copyright lasts for the life of the author plus 70 years.

How to Obtain a Copyright

In America, the copyright system is administered by the U.S. Copyright Office, which is part of the Library of Congress and maintains a registry of copyrighted works. Interestingly, registration is not required to obtain a copyright. It is automatically granted to an author at the moment of creation—i.e., as soon as the work is expressed in a tangible form that allows it to be seen or copied, such as being written on paper or on a computer, or recorded as video or audio. Registration is only required if a copyright holder wants to initiate a copyright infringement suit in federal court.

Copyrights vs. Patents

Unlike the case with patents, the United States never developed an examination system for determining whether or not a creative work merits copyright protection. That's because while the validity of an invention can be evaluated fairly objectively based on its utility, novelty, and non- obviousness, the merit of any cultural work is a far more subjective affair, as demonstrated by the frequency with which publishers reject novels that later go on to become literary classics.

What the patent and copyright systems share, however, is the recognition that unless the inherent property rights of inventors and authors to their creations are protected, the wellsprings of creation and productivity would be negatively affected by the reduced incentive. Both systems also share the public policy goal of marshaling the benefits of individual creativity—whether technological, as in the case of inventions, or cultural, as in literary works—to the public good so that these promote the progress of the nation and the "general welfare" of its citizens.

How to promote that general welfare, however, was approached very differently by the Founders in the case of patents than it was with copyright.

Figure 3.1.2: A portrait of Supreme Court Justice Henry Baldwin. (credit: modification of work by Wikimedia Commons / Public Domain)

The explicit intention of patent law, explained Supreme Court Justice Henry Baldwin in*Whitney v. Emmett* (1831), was "to benefit the inventor, in the belief that maximizing individual welfare leads to maximum social welfare." Inventors, after all, created tools that enabled the new nation to free itself from dependency on foreign imports and develop industries of its own. Whatever incentives were needed to prod these technologically creative people to take on the challenge and succeed were well worth the bargain (see Chapter 1).

The Rights of Authors and the Public Interest

When it came to copyright, however, the rights of authors were thought to conflict with those of the public to a far greater extent. "Democratic values emphasized equal and widespread access to learning and the importance of information flows for maintaining political freedom, whereas strong copyrights impinged on the fullest attainment of these objectives," notes Bowdoin College historian Zorina Khan, author of *The Democratization of Invention: Patents and Copyright in American Economic Development*, which won the Alice Hanson Jones prize for outstanding work in economic history in 2005.[ii]

As an example, a copyright owner's right to prevent unauthorized use of their work may at times be constrained by the public's First Amendment right of free speech—hence the doctrine of "fair use" (more on this later).

It was believed that a strategy of strong patent rights but weaker copyrights also better reflected the differing incentives that motivated inventors and authors. Inventors, many felt, were driven primarily by economic gain, whereas authors were often interested as much in the prospect of celebrity and reputation as they were in monetary reward.

Supreme Court Justice John McLean emphasized that this distinction between patents and copyrights exists in the structure of U.S. intellectual property law itself. In *Wheaton v. Peters* (1834), the first high court ruling on copyright, he wrote:

> *"It has been argued at the bar that as the promotion of the progress of science and the useful arts is here united in the same clause in the Constitution, the rights of authors and inventors were considered as standing on the same footing. But this, I think, is a non-sequitur … for when Congress came to execute this power by legislation, the subjects are kept distinct and very different provisions are made respecting them."*[iii]

To understand why the Founders gave greater weight to the public domain in copyright law than they did in patent law, it's important to examine the origin and development of early copyright systems and their political and economic impact on society.

Footnotes

- iU.S. Constitution Arr. 1, § 8
- iiB. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790O1920*, Cambridge University Press, 2005.
- iii*Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834)Retrieved from http://supreme.justia.com/cases/fede.../591/case.html *courtesy of B. Zorina Khan.*