

INTELLECTUAL PRIVILEGE
Copyright, Common Law,
and the Common Good

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Not long ago, in “Five Reforms for Copyright” (chapter 7 of *Copyright Unbalanced: From Incentive to Excess*, published by the Mercatus Center at George Mason University in 2012), I suggested that the United States should return to the kind of copyright the Founders supported: the one they created in their 1790 Copyright Act. The Founders’ copyright had a term of only fourteen years with the option to renew for another fourteen. It conditioned copyright on the satisfaction of strict statutory formalities and covered only maps, charts, and books. The Founders’ copyright protected only against unauthorized reproductions and offered only two remedies—statutory damages and the destruction of infringing works.

This book follows through on that policy advice. The Mercatus Center and I agreed to publish it under terms chosen to recreate the legal effect of the Founders’ 1790 Copyright Act. For example, the book’s copyright will expire in 2042 (if not before), and you should feel free to make a movie or other derivative work at any time. How do we plan to achieve this effect? The book’s publication contract includes the following provisions, under the heading “Copyright”:

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CONTENTS

Introduction: Copyright on the Third Hand.....	1
<i>Part I: Copyright Today</i>	8
Chapter 1: What Is Copyright?.....	11
Chapter 2: Copyright in Public Policy.....	41
Chapter 3: Copyright, Philosophically	59
Chapter 4: Copyright in Everyday Life	79
Chapter 5: The Language of Copyright, an Intellectual Property Privilege	89
Chapter 6: Copyright Politics: Indelicately Imbalanced	101
<i>Part II: Fixing Copyright</i>	110
Chapter 7: Fair Use vs. Fared Use	113
Chapter 8: Codifying Misuse	123
Chapter 9: Deregulating Expressive Works	133

<i>Part III: Beyond Copyright</i>	142
Chapter 10: Uncopyright and Open Copyright.....	145
Chapter 11: Outgrowing Copyright	157
Conclusion: The Packet-Switched Society	167
Acknowledgments	169
Notes	171
Index	213
About the Author	227
About the Mercatus Center at George Mason University	228

INTRODUCTION

COPYRIGHT ON THE THIRD HAND

Two views dominate the debate over copyright policy. The view from the left tends to question all restraints on expression, whether they arise from censorship, copyright, or the common law, and regards property rights as far from sacrosanct. From the right, in contrast, copyright looks like any other sort of property, which as such demands the same respect afforded to tangible property like land, buildings, and tools. Each viewpoint reveals important truths: copyright impinges on freedoms of expression, even while its exclusive rights stimulate the creation of new works. Both viewpoints, however, fail to perceive copyright's most distinguishing feature: its origin as a statutory privilege distinctly different from, and less justified than, the rights Americans enjoy thanks to the common law.

These pages build on that insight to offer a third view of copyright, one that does not quite fit the traditional left-right divide. You might think of it as a (not *the*) libertarian view, given that reasonable libertarians will disagree with many of this book's finer points and some of its major ones. Regardless of how you label this approach, though, it offers fresh answers to unresolved questions about the best way forward for copyright law and policy.

1. LEFT, RIGHT, AND FORWARD

Like most commentators, I largely agree that copyright represents not so much a form of property as a mere tool of policy, one designed to “promote the Progress of Science and useful Arts,” as the Constitution puts it.¹ I thus refer to copyright not as a form of intellectual *property* but rather a form of intellectual *privilege*. So understood, copyright's justification

relies entirely on whether it provides a “necessary and proper” means to “promote the general Welfare, and secure the Blessings of Liberty.”²

As a creature of statute, copyright represents a notable exception to our natural and common-law rights. My friends on the left too often fail to make that distinction, instead classifying copyright as one of the many manifestations of state power that parade under the name of “property” and that they would subordinate to freedom of expression, security from want, distributional fairness, popular will, or other values. I instead hold that the common law, because it largely instantiates our natural rights, merits special regard. Hence my complaint against copyright: it violates the natural and common-law rights that we would otherwise enjoy to freely use our voices, pens, and presses. Hence also the argument I make to my friends on the right: copyright does not merit as much respect as tangible forms of property; as a statutory privilege to violate other, more fundamental rights, copyright instead merits critical scrutiny.

That critique of copyright hardly renders it unjustified *per se*. We can in theory excuse apparent violations of natural and common-law rights, such as the takings effectuated by taxation or the restraints imposed by antitrust law, as the costs of obtaining a greater good. So we might in theory justify copyright, too. But even then copyright would rank as a necessary evil at best. And even then, its status would rely on the contingencies of fact. If, for instance, as argued below, technological and social developments tend to render copyright unnecessary, it will someday rank as simply an evil. Perhaps, in some areas and in some respects, that day has already come. Regardless, we all have an interest in ensuring that copyright stays within its proper bounds. I thus offer here not an attack on copyright, but rather an appreciation of its noble goals, a frank account of its recent excesses, and some friendly advice about how to once more put copyright in the service of the general welfare.

2. ON ONE MORE HAND

On the one hand, we can disparage both copyright and common-law mechanisms for protecting expressive works. On the other hand, we can exalt copyright as a form of property more powerful than any

conflicting common-law right. If we limit ourselves to those two hands, however, we embrace a false dichotomy. Conceptually, at least, we can best grasp copyright policy “on the third hand,” recognizing that it cries out for justification because it violates common-law rights, and justifying it—if we can—only as a necessary and proper mechanism for promoting the public good.

This third view suggests a great deal about both how current copyright policies malfunction and how to fix them. The insights of this distinctly libertarian view of copyright include:

- A picture of copyright’s relation to other forms of intellectual privilege/property;
- A bird’s-eye view of the common law;
- An economic model for maximizing copyright’s social benefits;
- A history of the non-natural, statutory origins of copyright;
- Reasons for respecting others’ copyrights;
- An understanding of copyright as a type of statutory privilege, not property;
- The indelicate imbalancing of copyright policy;
- Fared use as a welcome relief from the misty boundaries of fair use;
- Using copyright’s misuse defense to open an exit to the common law;
- Why and how to deregulate access to original expressive works;
- The benefits of *uncopyright* and an open copyright system; and
- An account of why we will outgrow the need for copyright.

More generally, this perspective opens the prospect of moving beyond copyright’s statutory privileges to once more rely on the common law to promote the common good.

I do not want to claim too much for this book's originality, however. The approach taken here finds its most direct precedents in the work of Thomas Jefferson, Tom G. Palmer, Timothy Sandefur, and other thinkers sensitive to the conflict between natural rights and copyrights. To these influences I add institutional analyses inspired by the likes of Friedrich A. Hayek, who explained spontaneous orders, and of the public choice school, which ably explains the incentives that influence lawmakers' behavior (and, sometimes, misbehavior). Randy E. Barnett has helped me to appreciate the source and importance of natural rights, while Richard A. Epstein and Bruno Leoni have taught me to appreciate the power and elegance of the common law's few simple rules. Economics can teach us a great deal about the function, proper limits, and probable future of copyright; William M. Landes and Richard A. Posner, among others, have influenced me on that front. Though this book aims to construct a new theory of copyright, therefore, it builds on solid foundations.

This book does not offer a comprehensive explanation of the libertarian approach to such fundamental questions as the significance of natural rights, the problems of political failure, and the relative fairness and efficiency of common-law rules. Readers who find the book's discussion of such points too brief should refer to the scholarship amply cited throughout. Readers entirely new to libertarian theory may find its moderation a pleasant surprise. This book nowhere calls for radically rewriting the Copyright Act, monetizing all exchanges of expressive works, or kicking artists to the curb.

The libertarian view of copyright offered here ends up confirming many opinions so popular as to verge on banal—that the Copyright Act pursues noble aims, that we can thank the gift economy for many expressive works, and that great artists merit respect, for instance. The same viewpoint also suggests original criticisms of, fixes to, and predictions about copyright policy. This says something about the virtues of libertarian theory. These pages do not go very far beyond that sort of proof-in-the-pudding to explain or justify libertarian theory, however, leaving that for other works.

3. STRUCTURE OF THE BOOK

Part I of the book describes copyright from a freedom-friendly, natural rights-respecting point of view, a vantage that offers many fresh and telling observations. Chapter 1 provides a quick introduction to copyright, describing its fundamental nature, its constitutional roots, its statutory enactment, and its relation to other legal entities. Chapter 2 turns to copyright policy, explaining the market failure that copyrights aim to cure and evaluating how well they work. Chapter 3 measures copyright against natural rights theory, unveiling a strong case for regarding copyright as an unnatural statutory privilege.

That skeptical take on copyrights does not mean they merit *no* respect. As chapter 4 explains, many moral considerations weigh against infringement. It does mean, though, that we should distinguish copyrights from natural and common-law rights. Chapter 5 describes copyright as an intellectual privilege, one that entitles its holder to restrict others' enjoyment of their natural and common-law rights.

Part I's libertarian perspective on copyright ends with a slightly sinister portrait. In contrast to the many courts and commentators who claim that copyright policy strikes a delicate balance between public and private interests, chapter 6 argues that copyright policy, even at its best, puts those forces into an *indelicate imbalance*: “indelicate” because issued from the rough-and-tumble of political processes; “imbalance” because, even if they wanted to, policymakers could not fine-tune copyright to maximize social utility. Lawmakers do not demand the sort of numbers that delicately balancing copyright would require—numbers that, at any rate, do not exist.

Everyone can agree that copyright has not achieved perfection. Part II suggests several ways to improve copyright, all with the goal of promoting the public welfare more efficiently and treating natural and common-law rights with more respect. Chapter 7 explains why the fair use defense will shrink as licensing opportunities grow, and why we should welcome broader participation in markets for expressive works. Copyright holders might combine their statutory rights with technologically souped-up common-law rights to claim too much control over expressive works, but, as chapter 8 suggests, the misuse defense offers a ready cure for that scenario. Chapter 9 explains how we can open an escape hatch to a better

world, one where the common law supplants copyright in promoting the authorship of original expressive works.

Part III describes a world free of copyrights and yet rich in consent and originality. Chapter 10 explains how uncopyright and ardent amateurs can overcome the supposed market failure that justifies copyright. Chapter 11 offers an economic analysis suggesting that as markets for expressive works grow, the need for copyright shrinks. Together, these chapters describe a future world in which the common law does a better job of promoting the general welfare, and progress in the useful arts and sciences, than copyright has ever done.

4. THE LIMITS OF LABELS

Although I describe the approach to copyright policy set forth in these pages as a libertarian one, I do not claim it as the libertarian one. Friends of liberty do not always agree about copyright. Many famous ones—such as Ayn Rand, Herbert Spencer, and Lysander Spooner—have ardently defended copyrights as both just and prudent. Others, such as Thomas Jefferson and (much more recently) Tom G. Palmer, have cast a skeptical eye on copyrights, seeing them as statutory inventions that violate customary, natural, and common-law rights. For reasons that I hope to make clear, I find the second approach more convincing.

I intend my references to left- and right-wing views only to help identify, rather than to pigeonhole, general points of view. Even someone who generally favors economic regulation over social regulation might voice support for stronger copyrights, just as even a free-market social conservative might argue for a broader fair use defense. Legal academics, in particular, often fail to fit four-square within traditional political stereotypes. Still, it often proves useful to distinguish among left-wing, right-wing, and libertarian views of copyright, because each of those categories marks out a particular relationship between respect for copyrights and respect for natural and common-law rights.