

To: Students and faculty participating in the Chicago Intellectual Property Colloquium

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Re: The History of Copyright and the Film Industry

Dear students and faculty, what follows is obviously not meant to be a draft of a paper. It is rather a description of some of the main themes and arguments I intent to explore in an ongoing project about the common history of copyright law and the film industry in America. My hope is to convey to you in a condensed form some of those methodological and substantive themes as to form a basis for our discussion in my upcoming colloquium. As you can see, the project is currently truly a work in progress. Indeed, a work which is still on the drawing board. Therefore your ideas, comments, or suggestions will be particularly invaluable to me. I am looking forward to our discussion.

Motion Pictures: The History of Copyright and the Film Industry

I. The Birth of (Intellectual) Property Rights

How do property rights come into being? In a 1967 path-breaking article Harold Demsetz supplied an answer to this question that had since become canonical.¹ Specific property rights, Demsetz explained, are created when the total social benefits of such rights (generally and somewhat obscurely described as the internalization of externalities) outweigh the total social costs of creating and maintaining the relevant property rights regime. Demsetz offered anecdotal evidence of his thesis by comparing the appearance of property rights in land among northern American Indian tribes (which he attributed to the fur trade and the increased value of beaver pelts), to their absence among more southern Indian tribes (which he attributed to lower value and higher costs of property rights due to the territorial patterns of hunted animals in those areas).

Given the elegance and influence of the Demsetz thesis it is hardly surprising that it acquired a dominant position within the field of intellectual property. It is a widely shared common—often latent and sometimes explicit—assumption that intellectual property rights come into being as a result of increased value of certain intellectual resources. This increased value results in the shift of the social cost/benefit calculus of property rights in the resource and in the creation of such rights. In the most popular version of this account the increased net value of property rights in the relevant intellectual resource is attributed to a technological change. Indeed, to focus on the field of copyright, it is tempting to tell the entire history of copyright law from this perspective. The development and expansion of copyright law in the last half millennium, this narrative goes, is a direct outcome of technological innovations, starting with the printing press and leading all the way to the Internet and digital technology. In each successive stage of this process, new technology dramatically increased the value of certain intellectual resources by creating new forms of expressions and enabling the establishment and expansion of markets for them. In each stage, presumably at the point when the increased value of property rights tipped the cost benefit balance, copyright law responded by creating new forms of property rights in intellectual resources (the increased value of property rights in the form of copyright is usually thought of in terms of the increased value of preventing free riding and cultivating incentives for creation and investment, but this is not necessarily the exclusive source for such increased

¹ Harold Demsetz, "Toward a Theory of Property Rights," 57 *Am. Econ. Rev. Papers & Proc.* 347 (1967).

value). From this perspective the history of copyright is reducible to a long trail of technological innovations—the press, photography, sound recording, film, etc.—resulting in the opening of new valuable markets, resulting, in turn, in the extension of property rights to the resources traded in those markets.

As already said, the technology-market-property model is tempting in its elegant explanatory power. What if at all is wrong with it then? For starters, the model is a form of technological and economic determinism. It assumes a linear and inevitable progression toward more property rights and more efficiency. It also assumes on a high theoretical level both that newly created property rights are always efficient, and that being efficient they are always normatively desirable. Such a powerful combination of inevitability with an assumption of progress pulls the rug under any attempt to critically assess the outcome of an historical process or to contemplate alternatives: whatever configuration of property rights we ended with is assumed to be both inevitable and desirable. These tendencies are particularly disturbing in regard to the original Demsetz thesis which was stated on a highly abstract level. The original thesis says nothing about the actual causal mechanism through which property rights in a particular society come into being and reflect the cost/benefit calculus. The thesis simply assumes the correspondence between efficiency and the creation of property rights. Finally, the thesis tells us nothing about the actual shape or content of the newly formed property rights. Ever since the legal realist it has been broadly (although not uniformly) accepted in American legal discourse that “property rights” is an empty term, or a placeholder for a variety of institutional forms that differ greatly from one another. Property rights according to the conventional wisdom are bundles of various entitlements that allocate rights, privileges and duties among people, bundles whose exact configuration may change dramatically from one context to the other. The original Demsetz model tells us nothing about the exact configuration of the property right created, or, again, about the causal mechanism that leads from a particular economic change in a value of a resource to a specific legal-institutional form.

Since Demsetz wrote in the late 1960s newer and more nuanced accounts have appeared attempting to provide a thicker description of the appearance and development of property rights. Recently such accounts have begun to appear in relation to the history of intellectual property rights in general and copyright in particular. Such new accounts fill in some of the missing pieces in the Demsetz theory. They study in detail the development of property rights in actual societies with specific institutions, procedures, divisions of interests and power and wealth disparities. Most importantly these newer accounts add the causal mechanism missing in the original theory. In almost all of those accounts this causal mechanism leading (or sometimes failing to lead!) from changed economic conditions to new property rights is interest group politics—the negotiations and battles among competing stake holders as mediated through political processes and institutions. When one adds the elements of politics and attention to the details of institutional and social conditions the Demsetzian

account is transformed. Both inevitability and necessary progress disappear when property rights are understood to be the result not of an abstract economic logic but of the pull and tug of political struggles by interested parties, not just over the creation of property rights but over their exact institutional configuration. Such a perspective highlights both the distributive consequences of the development of property rights—political battles usually produce winners and losers, and the fact that often other values except efficiency were and are at stake—political struggles are seldom just about the most efficient result. Even when focusing exclusively on economic efficiency, the inevitable logic of the abstract theory seems to dissipate. One can assume that the outcome of the political process will follow the social cost/benefit calculus, when the array of interests represented and their relative power completely overlaps the division of private costs and benefits of competing alternatives. In real societies, however, this is not always the case. Systematic disparities of wealth, power, sophistication, knowledge, access, and sometimes local contingencies often channel the political process in particular ways. Moreover, even ignoring the effect of such disparities, patterns of the division of relevant interests often shape the political process. The most common form of this phenomenon is a collective action problem that occurs when a fragmented large group of small stakeholders faces a concentrated block of a few large stakeholders. Some have argued that such a pattern has been endemic throughout copyright's history. All of these complexities that often characterize real historical societies shape the process of creating property rights. A relatively egalitarian society with a broadly accessible political process, or alternatively an array of countervailing powers that tend to balance each other out may result in efficient property rights. However, the economic and social patterns of a particular society may lead to very different results in regard to the many possible forms of property rights. Moreover, whether the specific institutional outcome reached was efficient or not, it would have had distributive effects and often effects on other non-economic values.

Before discussing briefly the case of copyright and the film industry, let me add two elements to the theoretical background developed above. These elements, to some extent, already exist in some of the newer accounts of the history of copyright, but usually only in a latent form. First it is important to realize that the political interest group interaction that gives rise to new forms of property rights is by no means limited to legislatures. Courts have been as important and active in creating or transforming property rights as legislatures. In the copyright context courts were often the main arena where the competition between conflicting interests took place. While the dynamic or process of courts is not the same as those of legislatures, their role in developing property rights is just as subject to the above analysis of political battles and the effects on them of disparities in wealth, power sophistication, and configuration of relevant interests. Historical players certainly understood this point and often treated courts and legislatures as alternative venues for the achievement of a particular configuration of property rights.

Second, adding interest group politics, while it supplies a causal mechanism and introduces a much needed level of complexity to the technology-market-property model, still fails to capture an important part of the historical processes leading to the formation of property rights. To be sure, certain legal forms of property were created because certain interest groups that stood to gain managed to convince legislatures or courts to create them, given a certain background of power, wealth and skill distribution. However, the actions of both members of the relevant interest groups and of those making up the deciding institutions were informed by their ideologies, moral commitments, conceptions of the world, and beliefs about the desirable, the possible, or even imaginable. In the absence of a better term, I will refer to this amalgam as “culture” (which is meant to be a broader notion than the standard technical concept of “social norms”). Cultural elements interacted with technological-economic changes and with the dynamics of interest group politics in shaping newly created property rights.

When one considers all of those elements in trying to account for the process of property rights creation the result is no longer a linear unidirectional progression from technology to market value (through politics) to law. Instead, one is faced with a web of causation in which technology, the market, politics, and culture are intermingled in reciprocal relations of causation. Each of these factors interacted with and in part helped to shape the others. The aim of this project and of the very brief sketch below is to supply a thick description of this causal web as it applied to the relationship between the early appearance and growth of the film industry and American copyright law.

II. Copyright and the Appearance of the Film Industry

The context of the early film industry seems to be a particularly promising one for the exploration of the themes developed above. The rapid genesis of the industry rooted in several late nineteenth century inventions is a dramatic case of technological innovation which opened up almost overnight a new lucrative source of value. The industry that began to emerge at the dawn of the twentieth century became an economically dominant one on a national scale in a matter of a few decades. More importantly, central figures within the industry perceived it as a significant source of immediate and future wealth almost from the outset. Some of those players—Edison and his firm is the quintessential example—enjoyed right from the start significant status, power, wealth, and a high degree of business and political sophistication. Perhaps even more significantly from the earliest days of the industry the dominant players within it were aware of the potential power of intellectual property rights in aiding them to maximize their stream of revenue. Such players did not hesitate to wield the power of such rights and to turn to the courts or the legislatures in order to shape these rights in ways hospitable to their business strategies. The better known aspect of this attitude is the use of patents (in the filming and projection equipment) in the early film

industry, first as weapons turned by industry members against each other, and then as part of an attempt of a small number of dominant players to monopolize and tightly control the entire industry through the use of a patent pool. Somewhat less known but no less important was a similar conscious and aggressive attempt to use and shape copyright law.

If members of the film industry were eager to shape copyright law in the mold that suited their purposes, at the dawn of the twentieth century copyright law itself was in a state convenient for transformation. During the nineteenth century American copyright law and its fundamental defining concepts had undergone a gradual but radical transformation. At the beginning of the nineteenth century copyright was a relatively esoteric regulatory regime limited to the book trade and based on the notion of the exclusive privilege to print conceived of as a limited right of making printed verbatim copies of a protected text. By the end of the century copyright was already expanded to many new forms of expression and copyright protection came to be understood as general control of the value of an intellectual work. Copyright was thus reconfigured as a universal regime based on the principle of protecting creative works of authorship by allowing owners to control the market value of an intellectual work. While the new framework of copyright was manifested in some changed legal doctrines and in the arguments made by judges, lawyers, and treatise writers, the doctrinal body of copyright law did not yet fully reflect it. The state of copyright law was thus ripe for new and innovative development on the one hand, and prone to lead to some conflict between the newer and more traditional conceptions of the field on the other.

The combination between a savvy and law-conscious industry and a fluid copyright framework in a state of transition was fertile ground for mutual influence. For the rest of the century the film industry and copyright law would shape each other in a reciprocal relationship. The project intends to analyze in detail four areas where this process occurred in a particularly salient way. These areas are:

III. Subject Matter: Entering Copyright's Domain

The struggle of the film industry to become a “copyright industry” was brief but it is nonetheless instructive. One may be surprised to learn that copyright protection for films was initially extended and established by the courts rather than Congress. Edison had been registering the films produced by his company since the last years of the nineteenth century. Since at the time there was no statutory recognition of the subject matter category of films the works were registered as photographs that were included in the statute since 1865. When a competitor reproduced a portion of one of Edison's early film (“Christening and Launching Kaiser Wilhelm's Yacht Meteor”) he sued for copyright infringement (some film historians suggest that the lawsuit may have been, at least in part, collusive). The federal district court found that films could not be registered as photographs, rather each individual frame making

the film had to be registered separately and all formalities had to be satisfied per each individual photograph. The opinion explained that it was up for Congress not the court to recognize new subject matter.² The Court of Appeals reversed this decision, taking pains to construe the film as a single photograph and appealing to the constitutional purpose of “promoting the progress of science and the useful arts.”³ The extension of copyright protection to films through a broad construction of the category of photographs was quickly affirmed by another Circuit Court and was not seriously challenged again. The issue was conceived as settled to such a degree that it was not mentioned in the deliberations leading to the 1909 Copyright Act. Films were explicitly added to the statute in the 1912 Townsend amendment that was devoted to the needs of the film industry. By then, however, it was a non-issue to the degree that the thick committee report does not mention it.

The smooth extension of copyright protection to films conforms to the Demsetzian model: property rights were extended the moment a promising new source of value presented itself. The episode, however, also demonstrates the more intricate set of factors that was in play. Underlying the smooth transition through the court was a fundamental change in the basic concept of copyright that took place in the preceding half century. Even in 1883 when this change was already in full swing an authoritative legal source could still defined copyright as “confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the arts of printing in any of its branches.”⁴ By the end of the century, however, a changed understanding supported by a cumulative effect of statutory subject matter expansions of copyright beyond the product of the printing press had appeared. Instead of the unique regulation of the book trade, copyright was reconceptualized as a general field premised on the principle of protecting creative mental labor. The category of photography was both a link in the chain of subject matter expansions that laid the groundwork for the new understanding of copyright and the doctrinal hook used by the courts for grounding their creative recognition of films. The prior experience of photography also helped to soften another set of objections to film as protectable subject matter. Objections to an expressive form based on a mechanical process for representing reality as lacking originality and creative authorship were seriously taken and only narrowly rejected a decade earlier in regard to photography. By the time they were leveled at film they could be effortlessly dismissed.

The judicial recognition of film as copyrightable subject matter was both an effect of the changing concept of the field of copyright and an important element in the further entrenchment of this change. Later commentators looked upon the early film subject matter

² Edison v. Lubin, 119 F. 993 (C.C.E.D.Pa. 1903).

³ Edison v. Lubin, 122 F. 240 (3rd Cir. 1903).

⁴ Bouvier Law Dictionary, cited in Burrow-Giles Lithographic Company v. Sarony, 111 U.S. 53, 56 (1884).

cases as marking a new approach and willingness by courts to engage in aggressive “judicial legislation” based on a broad understanding of the coverage of the field.

IV. Copyright’s Scope

The appearance of film in the field of copyright interacted with yet another fundamental conceptual change undergone by copyright thought in the preceding century. At the end of the eighteenth century copyright was still seen as the traditional printer’s privilege: a limited right of making verbatim copies of texts in print. A belated expression of this understanding was the 1853 *Stowe v. Thomas*⁵ decision in which the court rejected an infringement claim against a German translation of Stowe’s *Uncle Tom’s Cabin* while describing copyright as limited to “the exclusive right to multiply the copies of that particular combination of characters.” By that time, however, this traditional concept of copyright was already under attack. In the following decades treatise writers developed a very different concept of copyright. It combined the notion of copyright as ownership of a new postulated abstract entity—the intellectual work—that could be manifested in an endless variety of concrete forms, with the idea of copyright as the right to internalize the market value of the work in any relevant market. The doctrinal counterpart of this conceptual innovation was the abstraction and expansion of copyright’s scope of protection. The previous limitation to verbatim or near verbatim reproduction was replaced by an approach to infringement that became gradually similar to the modern “substantial similarity” test (limited by a newly created fair use doctrine). Similarly, the entitlements protected by copyright were expanded from a sole focus on the creation and sale of copies to a gradually growing domain, including translation, dramatization, and public performance.

Film appeared at a transitory moment in this respect. The scope of copyright protection was already significantly expanded and abstracted, but no firm equivalent of the loose and shifting modern concept of “reproduction” appeared yet. Similarly, the list of entitlements had grown beyond the core right of making and selling copies, but no general catch all category of making derivative works appeared yet. Film posed a particular challenge in this respect because (inter-film copying aside) it was a very different medium from other expressive works, especially textual works, with which it often interacted. The classic relevant early case involved not an attempt by the film industry to expand copyright protection to a new source of value, but rather an effort by a preexisting industry to capture some of this new value. In the 1911 *Kalem Company v. Harper Brothers*⁶ a producer of a film based on portions of the copyrighted novel *Ben Hur* was sued for infringement. The Supreme Court with much effort found that the exhibition of the film by “jobbers” was an

⁵ 23 F. Cas. 201 (C.C.E.D.Pa. 1853).

⁶ 222 U.S. 55 (1911).

infringement of the dramatization entitlement and that the defendant who created the film was secondarily liable for the infringing exhibition because it supplied copies of the film with full knowledge of their intended use. From a modern perspective the Supreme Court's struggle to find a basis for infringement and its resort to third party liability is a puzzle. Why couldn't it simply find that the film was a reproduction of substantial parts of the novel? The answer is found exactly in the transitory state of copyright thought at the time. In a context in which copyright was still not completely unmoored from a limited notion of making copies the defendants' claim that "[b]ooks and pictures are essentially different" and hence the book "was not copied in the making of the pictures, but they are realizations, in a different art, of some of the ideas to which Gen. Wallace gave a written portrayal" carried much weight. Justice Holmes who wrote for the court was caught between the modern impulse of expanding copyright protection to an ever increasing number of derivative markets, and the traditional doctrinal framework which still did not include a flexible and open ended category of reproduction or derivative works. This produced his tortured reading of the dramatization entitlement and the complicated third party liability maneuver.

Kalem is emblematic of the dual role played by film in regard to the abstraction and expansion of the scope of copyright protection throughout the twentieth century. On the one hand, film appeared in a time in which the understanding of copyright had already gone beyond the older notion of reproducing verbatim copies—a conceptual-ideological element that facilitated the further expansion of copyright in this context. On the other hand, films that constituted a very different medium from those of the works they often used or were used by formed a recurring trigger for the drive to expand and abstract copyright protection. In this dual capacity film seems to have been an important element in the process that shaped our modern expansive concepts of reproduction and derivative works.

V. Ideas and Expressions

Similar to the role it played in regard to shaping the modern framework of copyright's scope, it appears that film was entangled with the development of the modern idea/expression dichotomy. The origins of the idea/expression dichotomy go all the way back to eighteenth century English copyright law. Nevertheless the modern version of the doctrine developed only beginning at the end of the nineteenth century. The old eighteenth century distinction between protectable concrete expression and unprotectable ideas was merely a restatement of the traditional concept of copyright as limited to a restrictive notion of making verbatim copies of texts. It occasionally appeared in theoretical discussions of copyright's nature rather than as an actual practical rule. The much later modern idea/expression dichotomy was very different. It appeared in a time where the old limitation of copyright protection to verbatim reproduction disappeared and became a central norm for deciding actual copyright disputes. It came to function partly as an ideological device for mitigating the dissonance

created in a society committed to the free flow of ideas and information by the expanding scope of copyright and partly as a practical boundary-setting device that replaced the older mechanisms that were swept away by the conceptual change of copyright.

Interestingly, many of the early twentieth century idea/expression cases involved plays, films, or both. This includes *Nichols v. Universal Pictures*⁷ that became the canonical modern idea/expression case in which Judge Learned Hand restated the doctrine in the form of a continuum rather than a clear cut dichotomy. This is not surprising given the fact that these media seem particularly prone to exhibit the phenomenon which Hand presented as standing at the heart of the idea/expression dichotomy: borrowing from other works not by way of concentrated parts of intense similarities, but rather by way of broad defused structural similarities of plot and elements. Thus film, alongside plays, was at the center of the development of one of the most important elements of modern copyright.

VI. The Birth of the Licensing Web

Film was one of the first industries of expressive works to be an intensive user of other works. Creation that drew to some degree on previous creation was nothing new, of course. But the film as it developed at the early twentieth century was a new phenomenon in respect to the degree and intensity it incorporated other works of various media: prose, drama, and music (both in the pres-sound era as live performance and in the “talkies” period as soundtrack). At the very early days some film producers acted as rather free borrowers of the preexisting works they incorporated into their own. This early tendency changed rapidly, however, in part due to the legal developments described above. Film production came to rely either on in house production of the works incorporated into films or on licensing of such works. At the other end of the productive process, the distribution model of films was based not on the sale of physical copies but rather on the licensing arrangements with exhibition venues. Thus film rapidly became one of the first industries based on a complex web of licensing of copyrighted works. This created both a practical norm and normative expectations that were incorporated into copyright law.

⁷ 45 F. 2d 119 (2nd Cir. 1930).