

Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity

By Siva Vaidhyanathan

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In the past, copyright law was of interest only to legal scholars and Hollywood film types. Today, however, copyright law is on the front page of local newspapers, argued about in conversations at the water cooler, and discussed by teenagers looking to find free music on the Web. Intellectual property intimidates those who don't understand the underlying principles or those that don't speak the language of copyright law. Siva Vaidhyanathan's *Copyrights and Copywrongs* explains the history of American copyright law in prose that is surprisingly free of legal and academic terminology.

Vaidhyanathan's book surveys the historical developments from the literary works of Mark Twain to the music sampling cases of Napster. The book highlights how copyright law has accommodated the changing ways in which information is disseminated across America. The book is well written and full of examples taken from popular culture that allow the reader to connect with the author and the underlying philosophy of copyright law.

Professor Vaidhyanathan is an Assistant Professor of Culture and Communication at New York University. In addition to *Copyrights and Copywrongs*, he is the author of *The Anarchist in the Library: How Peer-to-Peer Networks Are Transforming Politics, Culture, and Control of Information*, Basic Books, 2004. He has also written for *The*

Nation, *The Chronicle of Higher Education* and *The New York Times Magazine*, among others.

Copyrights and Copywrongs begins with an introduction to copyright law as it relates to popular culture. Vaidhyanathan introduces the reader to the concept of copyright with an anecdotal story of Groucho Marx's *A Night in Casablanca* and the accusations of copyright infringement on Warner Brothers' *Casablanca*. Instead of defining copyright in the Introduction, Vaidhyanathan questions for whom copyright is really meant. This book uses a series of case studies to argue for "thin" copyright protection: that which is "just strong enough to encourage and reward aspiring artists, writers, musicians, and entrepreneurs, yet porous enough to allow full and rich democratic speech and the free flow of information."¹ The author identifies three main goals in writing this book: first, to trace the development of American copyright law through the twentieth century; second, to outline the principles of copyright with an emphasis on the declining notion that copyright should protect specific expressions but not the ideas beneath those expressions; and finally, to argue that a system which guarantees "thin" copyright protection would allow American culture and politics to function better.

American copyright stems from the U.S. Constitution, which directed Congress to create a federal law that would provide an incentive for authors to create and distribute new works. The law grants an exclusive right to copy, sell, and perform a work of original authorship that has been fixed in a tangible medium. Copyright is a monopoly that lasts for a limited time and contains a few exceptions that allow for good faith use by

¹ Pg. 5

private citizens, journalists, educators, and students. Contrary to popular belief, copyright is actually a “bundle” of rights including the exclusive right to make copies, authorize others to make copies, create derivative works, sell the work, perform the work publicly, and sue for relief in case others infringe on any of these rights.

The field of copyright is based on an idea/expression dichotomy. This dichotomy emerged during the discussions at the Constitutional Convention, where Republican leaders recognized that the complete control over writings by the British Crown and the Stationers’ Company had limited public discourse and stifled criticism of royalty and parliamentary policy. Copyright, as intended by the framers of the Constitution, meant to balance between the interests of the author and the interests of the public. When the federal copyright laws were revised in 1976, the idea/expression dichotomy became a part of the federal statute, codifying a principle that had developed through case law during the last century. The first chapter of *Copyrights and Copywrongs* uses examples to demonstrate the idea/expression dichotomy, making it easy for the reader to understand this convoluted copyright theory.

The next chapter introduces the reader to the long fight for extended copyright protection. Mark Twain was a committed advocate for authorship and the concept of literary “property”. As a young writer, Twain supported the American public in their acts of purchasing high-quality volumes of British literature at a much lower price than they were being sold in England. As Twain’s career progressed, his opinion about copyright evolved as he watched publishers in England and Canada pirate his books. By the end of his career, Twain endorsed maximum protection for authors and for the thickest possible copyright.

This chapter is full of history, illustrating the doctrinal differences that have characterized copyright throughout the years. Vaidhyanathan explains the English statutory copyright and the common law developments that formed American copyright law. He explains how the Crown initially used copyright as a censorship tool. Under the Licensing Acts, the Stationer's were only allowed to publish books that were licensed by the Crown. This licensing process gave the Crown an efficient method for enforcing censorship. Eventually the monopoly ended, as the Licensing Act expired in 1710. The Statute of Anne emerged, creating a free market for writers, and allowing copyright protection for 28 years after a work was published. Copyright, as we know it today, was starting to take form. This is the longest chapter of the book and the hardest to get through. Certain parts are very slow and go into far more detail than needed for a book of this type. However, Vaidhyanathan does a thorough job of tracing the evolution of copyright and illustrating the lessons learned along the way.

The next chapter, "Celluloid Copyright and Derivative Works" picks up the pace and grabs the reader's attention once again. This time the topic is copyright in the motion picture industry. This chapter traces the evolution of the motion picture studios from copyright-poor individuals to copyright-rich industry. Previously, all of Mark Twain's pronouncements about copyright law centered on the literary copyright. After the inventions of Thomas Edison and others, it was possible to commercially exploit recorded music and motion pictures. The emerging new markets and technologies forced the copyright industry to evolve once again. Vaidhyanathan uses specific examples to demonstrate the film industry's interest in allowing free and easy adaptation from literary works to film. As the industry developed, however, the studios switched sides, looking

for stronger copyright protection and taking the plaintiff's side in legal arguments.

Vaidhyathan does a wonderful job of juxtaposing the current attitudes of Hollywood executives; easily exploiting nonfiction works from the public domain while at the same time lobbying for increased international and domestic copyright protection for their films.

The theme of exploitation from the public domain continues as “American Music Challenges the Copyright Protection”.² The music industry provides more questions about what exactly constitutes an idea versus an expression than any other industry examined in this book. The expressions used in motion picture films and literary works, the images and words, are relatively easy to separate from the underlying ideas. The ideas and expressions in a musical creation, however, are more difficult to discern. Common questions in this area are: “is the string of six notes that initiates “Happy Birthday to You” an idea, an expression, or both? If it is an idea, there must be another way to express the same idea. Would playing the same notes at a different tempo constitute a new expression of the same idea? Would playing it in a different key be an exercise in novel expression? Is there an idea behind a particular arrangement of musical notes? Is there an idea behind a tone, texture, timbre, or “feel” of a song? Are these features of a song ideas in themselves?”³ Although this chapter doesn't provide the answers to these questions, it does provoke a lot of thought in the area. After considering this type of question, the reader will want an answer, but ultimately begin to understand why even the law doesn't yet have all of the answers.

² pg 117

³ pg 117

This book creatively shows how one genre has “stolen” from another and how even the “original” authors have taken from ethical and cultural traditions that were never subject to copyrights, and called them their own. Ownership is a sloppy and confusing idea when related to the creation of music. The underlying theme throughout this section is that very little American popular music has not been influenced by some tradition of the past. This chapter uses many examples; as a result, each reader will be able to identify with a song or artist they are familiar with. This type of broad survey makes the book appropriate to almost everyone. Unlike other books, *Copyrights and Copywrongs* provides an inside look at some of the most difficult questions relating to copyright and uses examples that appeal to a wide audience.

As if music didn't leave enough unanswered questions, the digital revolution has turned American copyright law upside down. The book eventually gets to a point where it stops discussing the past, and starts examining current copyright issues. The expansion of the Internet and the ease of making high-quality copies have challenged the underpinnings of copyright law. It has become faster and easier for the masses to access information, and as a result the threat of widespread copyright infringement has become even greater. Themes such as the development of UNIX, the buildup and downfall of Apple Computers, the introduction of CSS and DVD players, and Napster are discussed in the final chapter.

Professor Vaidhyathan discusses copyright law of today and of the past with great thoroughness and presents a couple of suggestions for solutions to copyright issues of the future. The book is well written and very interesting, even for those without a background in intellectual property law. Vaidhyathan explains copyright issues in

clear, concise language without unneeded legal jargon confusing the issues. The use of historical examples and current case law illustrate his points in a way in which formal legal writing would fail. The only area of the book that fails to grab the reader's attention is the comparison of the different cultures of copyright. This section is slow and tedious, but a necessary component nonetheless.

Vaidhyathan is a strong advocate for James Madison's philosophy on copyright: a leaky copyright system works best. He argues that when properly balanced, copyright law allows the public to enjoy the benefits of cultural creativity at a relatively low cost through the copyright monopoly. He calls for a thin, leaky copyright system that allows writers to comment on copyrighted works, teachers and students to make copies for educational purposes, and allows busy people to record their favorite television shows for later viewing at their convenience.

Overall, Professor Vaidhyathan's *Copyrights and Copywrongs* is an interesting book for both those that know a little about copyright law and those with only a casual interest. It provides a great background of copyright history and an insight into where copyright is headed. Some areas of the book are tedious and provide unnecessary details, but I would still recommend this book to anyone interested in copyright and the challenges this area of law faces in the future.