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Openness: Don Lamberton's model of scholarship

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Don Lamberton's research interests were broad. They centred on information and innovation, those elusive drivers of growth and change in the economy, as well as life. Information and innovation require some degree of receptiveness – openness – and Don was always open. His openness permitted me to become his student, as a mid-career practitioner in the film industry. It was, in a sense, his principal teaching. Under his tutelage, I began a reading program that led me a long way from my starting point, and taught me to question views that had seemed settled. Openness, of course, is a fundamental issue in information policy. To what extent should information be proprietary? And when should it be free? These questions were central to my research, which was about copyright and its consequences for authors. The policy tensions in copyright turn exactly on this question of degree of openness. As I studied the question, Don's example came to matter. I mean the way he personally modelled scholarship: his willingness to listen, his constant sifting, his mode of freely sharing books, data and connections. This was scholarship as openness, and it was persuasive.

Introduction

The perspective I brought to my research was that of an author – specifically, it was a filmmaker's perspective. I wanted to understand why the financial returns to filmmakers and their investors were, historically, so poor. I understood the money flows and the bargaining positions of the various parties, the dynamics of film financing. What I did not understand was the deeper structure, how the dynamics had come to be as they are. Copyright seemed to be the key.

Introduction to copyright

Guided by Don, I began to explore the fast-growing literature on copyright. There were some surprises. An institution whose everyday practice seemed settled to the point of dustiness turned out to be a policy war zone. On one side, players such as the Motion Picture Association of America were pushing an expansionist agenda of longer copyright duration and tougher, global policing: on the other, advocacy groups, such as the Electronic Frontier Foundation, were making the case for a reduction in the burden of copyright through shorter terms and broader exceptions. The industrialists had the ear of government and paid no attention to the advocacy groups, swatting them away. The advocates, undeterred, had the ear of the next generation and were laying foundations for a new approach to copyright, summed up in the slogan 'information wants to be free'.

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The warring sides mapped closely the idea, familiar in the literature, that copyright is a contest between public and private interests. Baldly, the public interest wants ready access to works; the private interest wants payment for access. The role of copyright is to balance these interests. This oppositional structure recurs throughout the literature. Thus, those concerned with the public interest argue for an open copyright system with liberal exceptions for educational use and due deference to free speech principles. Private interests favour a closed system under tight control of owners, with narrow exceptions – or, better yet, none at all. In the public interest, there should be weaker copyright, catering for the interests of the reading, viewing, listening public. Private interests want stronger copyright, supporting owners of information. One side sees copyright as a privilege; the other insists copyright is a form of property.

So how should an author or filmmaker view the contest? For people whose livelihood is at stake, it is hard to resist the idea of stronger copyright. Long duration (down to the author's great-grandchildren), broad coverage (to keep pace with new media technologies), effective policing (to reduce the leakage from piracy): what's not to like? In fact, they might argue, why stop there? If copyright really is a form of property, then why not construe it as 'freehold' property, permanent rather than a temporary 'leasehold'? Surely authors, who bring copyright works into being through their 'infinite Labour, Study and Expence' (Defoe, 1709, cited in Rose, 2002), deserve the same legal consideration as landowners. And if great landowners can leave a castle to their heirs, why should great authors not leave a copyright castle to theirs?

Or so it seemed to me at the start. But I kept reading and, with Don's example before me, tried to stay open to the possibilities. I studied Lessig (2001) and Hyde (2010) on the case for a creative commons, entertained the arguments from Boldrin and Levine (2008) and Lange and Powell (2009) for the abolition of copyright, and read the many works of Braithwaite, Deazley, Drahos, Ginsburg, Hargreaves, Kretschmer, Landes, Liebowitz, Netanel, Patry, Plant, Posner, Sunder, Towse and Watts on the law and economics of copyright.[1] In the end, it was the history that was telling. As recounted by Feather (1988), Goldstein (2003), Patterson (1968), Rose (2002) and St Clair (2004), the history of copyright is the story of a medieval guild jockeying for position in the aftermath of the Glorious Revolution. Unable to interest the English Parliament in renewing its long monopoly of the publishing trade, the Stationers Company came up with the idea of an author's copyright – a right that would originate with the author, but pass contractually to the publisher on publication. It was a clever workaround that gave the publishers everything they needed.[2] This was the author as human shield, concealing the economic reality that copyright is fundamentally a publisher's right.

Here, then, was the deeper structure I was seeking. Copyright was not really an author's right and served the author's interest only if and to the extent that the author's interest was aligned with the publisher's interest. So, how closely are they aligned? This question has received surprisingly little attention in the literature. Arnold Plant (1934) raised it in an influential paper (see also Coase, 1994), as did William Patry (2011). For the most part, author and publisher are simply assumed to sit in rough alignment, like boats on a tide, rising and falling together (Landes and Posner, 2003).[3] A close look, however, reveals multiple points of departure. Plant focuses on price, sketching out the different stakes of author and publisher and noting that 'the author's interest…will be better served by a larger edition and lower price

than will pay the publisher best' (p.184). A further difference, no less telling, arises from authors' and publishers' attitudes to copying. For authors, there is always a literary (or film or musical) tradition to which they belong, and an accepted practice of borrowing and re-using elements of that tradition. Aphoristically, 'good writers borrow, great writers steal'.[4] But as far as publishers are concerned, such borrowing and 'stealing' is pure leakage, a loss of prospective licensing revenues, and therefore something to be minimised, if not eliminated. The difference marks a persistent, unresolved tension in the copyright system.

Differences over pricing and copying, sharp as they may be, are differences of degree. More fundamentally, there is a divergence of interest in the very architecture of copyright – its architecture of exclusivity. For London's booksellers, exclusivity was the whole point. With their invention of authorial copyright, they brought into being a new and exclusive right, held initially by the author. The bookseller/publisher could acquire this right from the author and then hold it, undiminished, until its statutory expiration 14 or 28 years later.[5] But think about this right from an author's or filmmaker's perspective. Their goal is to reach an audience, to tell a story, to influence people. Copying, provided it is not plagiarism (people passing the work off as their own), hardly bothers them. On the contrary, copyright is a means and a measure of influence. Naturally, they want to be paid, but many authors would accept lower payment for wider distribution. Some would even give away their work for free – and do. In general, for authors, the wider the distribution of their work, the more publishers compete to publish and sell their work, and the easier it is for audiences to find and access the work, the better. This is the logic of authoring, and exclusivity is a poor policy fit. Exclusivity serves a different master and follows a publisher's logic. Publishers want to maximise profits, not reach. For them, copying is leakage, competition anathema. Monopoly is, and always was, the goal.

Returning to the oppositional structure of copyright, we can see that the public/private, open/closed, weaker/stronger dichotomy masks the opposition between author and publisher. When we add this opposition to the mix of interests, the results is not a two-way, but a three-way, contest between publisher, author and the reading public (in film terms, between studio, filmmaker and viewing public). In this three-way contest, authors sit somewhere in the no man's land between publishers and the public. Although, like publishers, their interest is private, authors lean towards their readers, towards open access and weaker copyright. They want to be paid, but they also want diffusion and influence, and they know they belong to a tradition from which they must borrow, just as others, in time, will borrow from them. They have, in short, a foot in both camps.

We can take this analysis a step further. What if it were possible to construct a form of copyright that did not require exclusivity? Such a copyright would give authors the incentive to create new works, but would not give them a monopoly in the work. Instead they would have a right of remuneration. This possibility has been explored several times in the unfolding history of copyright. It was first proposed by Thomas Watts in a note penned to the *Mechanic's Magazine* in 1837 (Garnett, 1899). Watts, who subsequently became Keeper of the British Museum, argued that the first publisher of a work should have a brief (five-year) period of monopoly, after which anyone would be free to publish the work subject only to payment of a royalty to the author. Watt's royalty scheme made no splash at the time but the ripples carried a long way. It was taken up by Robert Andrew Macfie, a prominent free trader, in the hearings of the Royal Commission into Copyright appointed by Benjamin

Disraeli in 1875. Macfie had the support of key witnesses appearing before the commission, including the former assistant secretary of the Treasury, Charles Trevelyan, who observed:

> The difference between the position of authors and that of publishers underlies the whole subject [of copyright], and it is better to have it out at once. It is for the interest of the author that his work should be sold anywhere and by anybody. It matters not to him who the publishers are, and whether there is one or are one hundred; in fact for him the more the better: the greater the competition among publishers, the better for the author. (Royal Commission on Copyright, 1878, p.9)

In the end, pragmatism and established interests ruled the day and the proposal did not go further, except for a brief revival in Arnold Plant's 1934 paper. Plant strongly backed Watts' original proposal and noted that there was now a precedent in the compulsory licensing schemes applied to musical works, and to the last 25 years of an author's copyright in the 1911 Copyright Act.

A concluding thought

Although the weight of vested interests is against it, the strength of the argument presented by Watts, Macfie and Plant lies in its demonstration of the intellectual feasibility of copyright without exclusivity. Copyright is a very plastic concept: we could remake it in the likeness of Watts' royalty scheme if the political stars were in alignment. Perhaps it will fall to the generations schooled by the advocates of openness and weak copyright to make the change. For me, the journey from closed to open copyright has been a long one. That I made it at all is down to Don Lamberton. He was a remarkable man, a rare man. His demonstration of scholarship as openness proved, for me at least, not only mind changing, but also life changing.

Notes

1. See for example, Deazley (2010), Drahos and Braithwaite (2002), Ginsburg (2004), Hargreaves (2011), Kretschmer and Hardwick (2007), Landes and Posner (2003), Liebowitz and Margolis (2005), Netanel (2008), Patry (2011), Plant (1934), Sunder (2012), Towse (2001), Watts (1837).
2. The Stationers Company had a monopoly of publishing in London. Its members were called 'booksellers' and both sold and published books.
3. In their discussion of how to think about copyright, Landes and Posner (2003, p.38) take the simplifying step of 'ignor[ing] differences in costs or incentives between authors and publishers, instead using 'author' or 'creator' to mean both'.
4. The quotation is variously attributed to Oscar Wilde and T.S. Eliot, perhaps proving its own point.
5. In the original 1710 legislation. The duration is now the author's life plus 70 years.

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