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# Why Copyright Shouldn't Be Considered Property... And Why A Return To 1790 Copyright May Be Desirable

from the *bold-moves* dept – 12/5/12

We recently **mentioned** that Jerry Brito of the Mercatus Center at George Mason University was publishing a book about the "free market case for copyright reform," called **Copyright Unbalanced: From Incentive to Excess**. It's now **available at Amazon**. They also have a **free chapter** available on the site. Brito was kind enough to send me an advance copy of the short book, and it's a worthwhile read.

Not surprisingly, it fits in quite well with our ongoing discussion of the recent RSC paper by Derek Khanna, and more specifically our **recent discussions** on why it makes little sense to assume that **copyright is property** in economic terms. As we've noted, it has *some* property-like attributes and many non-property-like attributes. Ignoring the non-property-like attributes, even though they have vast economic implications, is a huge mistake, and basically means ignoring fundamental economics.

Those posts have led to some interesting (and some less interesting) discussions in the comments. And, in a bit of perfect timing, Brito's latest edition of his "Surprisingly Free" podcast **is with law professor Tom Bell** and makes one of the absolute best arguments I've heard -- from the legal perspective -- for why it's an absolute mistake to claim that copyright is property, contrary to the claim of some of the amateur lawyers in our comments. Seriously, just listen to the podcast, but I'll highlight a few snippets.

> *Copyright is not quite like other types of property. It has some similarities, to be sure, but at its root it is **fundamentally different than tangible property** like fields and houses and cars and computers. And that's because it is non-rivalrous in consumption. Copyright is a special kind of economic good and special kinds of rules should therefore apply to it. Among those rules, you should have those that take into account that you can have too much copyright....*

That, of course, is really no different than what we've said for a while. It has property-like attributes, but many non-property like attributes as well. Brito then makes the argument that copyright *is* a form of property, and then Bell highlights

a few more differences about where copyright originates legally speaking, and also highlights some similarities.

> *I don't want to get into a semantic discussion, but I am not completely comfortable with calling copyright property. Simply saying property. I don't even like the phrase intellectual property. I prefer intellectual privilege. I think copyright is a privilege, because* ***it's created by statute, it doesn't exist in a state of nature, it's not recognized by common law. It's purely the creature of statute*** *and you can't say that about the sorts of property rights we enjoy in our persons and in our farms and our cars and computers. Those rights, the rights in those forms of tangible property... you can't deny they're protected at the common law. And many people, me among them, would say that they're protected in a state of nature....*

*Important ramifications follow from what you call copyright. Me? I like to say* ***it's a privilege that has certain property-like aspects*** *and indeed the best things about copyright -- and there's a lot to like about copyright -- are those features that most resemble property. It's alienable, you can transfer it to other people, you can go to the copyright office and check to see who owns the copyright. There is something like trespass afforded to people who suffer wrongful use of their property. Wonderful things. That's the best thing about copyright.*

Brito points out, in response, that there are other "intangible" forms of property, naming taxi medallions and tradeable emissions permits. Bell points out that those often are **not** considered property.

> *I was just talking to someone who works out here in Southern California in the local regional air quality control board, and we got into this conversation, and he said* ***"we don't call them property, we don't even call them privileges, we call them permits****" I said "well you can buy and sell permits" and he said* ***"there are some things that are like property, but we don't call them property, because we don't want the state thinking, for example, we can't change the rules without suffering a takings claim." And that's true of copyright as well.*** *Look, if Congress decides tomorrow, that we're going to just stop copyright -- they won't, but they might say, per some of the suggestions, of our reformers in our book -- we're going to tinker around the edges, and maybe, just once, around the edges, trim back the restrictions. If they did that, would they face a takings claim? No, no! It's just not part of common law...*

This is interesting, because I had actually believed that copyright likely *would* be covered by a "takings" claim (i.e., a prohibition under the 5th Amendment on

"taking" away some property). But as Bell notes, since copyright is not subject to common law, it seems wrong -- and to him, preposterous -- that it would be subject to a takings claim. Of course, just watch: I bet if copyright *is* trimmed back, the entertainment industry will bring a case under this very theory.

Bell then goes on to point out why, if such a "takings" claim *was* allowed, there would be a pretty big Constitutional problem very quickly. And it stems from the "limited times" clause under copyright. You'd have a bit of a conflict there, wouldn't you?

> *Let's recognize, that if you take that approach to copyright, you pretty quickly run into a tough paradox. And it's that the Constitution, says that "only for limited times" shall lawmakers protect these works of authors. So if you're a fan of real property, intangible property, as I am, you don't want to hear about lawmakers saying "we're putting a fuse on your property rights in your house or your car or your computer. We're going to let you have property rights for, oh, maybe 20 years and then 'poof' it's gone, anybody can take it." No, we would take exception if the federal government said that policy with regard to our 401ks or our houses or cars, and for good reason. Yet that's the policy we have copyrights, and it's* ***by design****. It's in the Constitution. It's as if the Constitution had a clause that said 'oh also, property rights in your farms and factories and houses -- yeah, we're going to end all those after 34 years.' That's not how they treat tangible property. We're glad of that. And yet that is how we treat copyright and I think we should be glad of that.*

From there, Bell goes on to talk about the recommendations he makes in the book for how copyright should be reformed -- and he definitely goes pretty far out there with them:

1. *Reinstate the Founders' Copyright Act,*
2. *Withdraw the U.S. from the Berne Convention,*
3. *Develop misuse doctrine into an escape from copyright,*
4. *Focus copyright policy on consumers' costs, not producers' profits, and*
5. *Reconceive "IP" as "Intellectual Privilege."*

The discussion on those is very interesting, both in the book and in the podcast. I won't spoil it all for you yet, but I will say that, yes, he's talking about going back to what copyright law was in 1790 -- meaning that it only lasts for two 14 year terms, and that it should cover *only* "maps, charts and books" since that's what the founders intended. Also, infringement only happened *if you copied the entire thing*. Copying a section was fine. Interestingly, Bell's next book (also published by Mercatus) will apparently be published under those exact terms. As for why other things shouldn't be covered, well, he notes that the founders didn't appear

to think such expressive works like music, painting and sculpture required copyright, and it's not clear why that should have changed.

There's also the "misuse" doctrine aspect, which is fascinating, in that he thinks it could act as a form of "training wheels" for a world without so much reliance on copyright:

> *How can misuse doctrine open an escape from copyright? The doctrine bars claims of copyright infringement that arise under conditions of misuse. It does not, however, bar claims premised on violations of common-law rights, such as trade secrets or the contractual terms of a license. In effect, misuse doctrine corrects the overweening power that results from combining copyright privileges with common-law rights, by negating only the former. Suppose for instance that a copyright holder wrongly tried to squelch rights protected by the First Amendment and the fair use doctrine by including in its license a clause forbidding public criticism of the work. A court might remedy that misuse by denying the considerable enforcement powers afforded by the Copyright Act even while leaving the underlying contract in force. In practical terms, the dispute would become a matter of state contract law rather than federal legislation. Repeated applications of the same doctrine in other cases would eventually encourage the development of business models premised solely on contract law, tort law, trade secret law, and other common-law devices. Misuse thus opens an escape from a world where copyright comprehensively regulates access to expressive works to one where only common-law rules apply*

I'm not sure I fully agree with that -- and I can actually see how contract law could create a worse scenario (in which things like fair use, first sale, etc. would not be allowed). But it is a thought-provoking discussion.

One other point that was quite interesting. Bell argues that when you claim that copyright is "property" you actually harm real property rights, because things like fair use, first sale and other such "exceptions" suggest that it's equally fine to create similar exceptions to real property, and that's a road that we shouldn't want to travel down.

If you'd actually like to see that discussion *live* and want to see some sparks fly, the Cato Institute is **hosting a discussion of the book** with Brito and Bell, and moderated by Jim Harper... but also with the RIAA's Mitch Glazier to (I am guessing) argue strongly against all of this. I imagine that ought to be entertaining, and it appears they'll be streaming the whole thing live online, Thursday at noon ET, 9am PT. Should be a fun time.