

Open Education Rising Podcast ([www.openeducationrising.net](http://www.openeducationrising.net))

Hosted by Deepak Shenoy

### Transcript of Episode 7: Wherefore Art Thou Copyright?

Understanding why copyright law exists opens up space in which to think about making it better.

Hello, and welcome to Open Education Rising, a podcast about growing and improving open education. I'm your host, Deepak Shenoy.

In Episode 5, I covered how creative commons licenses are based in copyright law. In Episode 6, I covered the basic nuts and bolts of copyright. This episode builds upon those two. Unlike those, though, this is less a factual primer, and more of a normative discussion.

Living in the cultural environment of the United States, I feel like a bit of a secular heretic asking why we have copyright law. The cultural status of copyright law in the US is very strong. Making an unauthorized copy of something is equated, culturally, to taking money from a bank vault that doesn't belong to you – we call both “stealing.” Copyright has a cultural weight on par with foundational capitalist ideas like private property and free markets. So what's the point of digging into the reasons behind something that seems foundational and beyond question?

When you look at it, copyright law is not immutable. If it is viewed globally and historically, it seems much less like a settled thing than the general concept of private property. The copyright laws vary by country. There have been global treaties that have tried to universalize some aspects of copyright, but the local variety is enormous. This has to do with different cultures, traditions, and the power of certain interests and their relative effectiveness at shaping beliefs and policy. The law has also changed over time, which makes sense, given how much things like books and music are tied to technology. Unfortunately, these changes don't always happen for the best of reasons. In 1998, powerful corporate lobbying groups were able to extend the copyright period in the US from 50 years beyond the creator's death to 70 years. So, though copyright has an almost metaphysical cultural status as an immutable idea, in practice it's a social agreement and policy tool like the rest of the law. In other words, it's possible to talk about reforming it.

If we're going to open up the question of copyright reform, it's helpful to understand the principles behind copyright. These principles help make the copyright law make comprehensible. Despite the skepticism of many open education advocates towards copyright laws, the fact is that Creative Commons licenses are built on the copyright law. So understanding why copyright law does what it does is important to understanding Creative Commons licenses themselves.

The principles behind copyright law are powerful. But they do more than legitimate the status quo. Those principles are so powerful that they themselves can be used to argue for copyright reform. So, after I explain the principles of copyright law, I will also explain how those principles can be used to create space to consider improving the law.

One last note before we get started. This episode is licensed by me, Deepak Shenoy, under a Creative Commons Attribution 4.0 International License.

There's two different perspectives commonly cited for why there should be a copyright law. I think of them as a practical perspective, and a rights-based perspective.

The practical perspective holds that we should judge laws based on the outcomes they produce. This is a common public policy approach that tries to produce the greatest good for the greatest number. In philosophical terms, this is sometimes called utilitarianism.

To be persuaded by the practical perspective, you'd need to believe three pillars. The foundational pillar is that it's an overall social good to advance knowledge and culture. I find this assumption reasonable, and for some very personal reasons. I had severe childhood asthma. A hundred years ago, I might not have survived my childhood. I'm pretty happy that medical knowledge has advanced. Though the civil rights struggle is not finished, as a person of color I'm personally glad that concepts equality have advanced from where they were during colonialism. You get my point. I should be clear that I don't think every advancement is equally good. Obviously, some advancements may even have negative social consequences, as is reflected by legitimate contemporary concerns about technology relates to privacy and addiction. However, I don't think you have to argue that all progress is good to get this pillar to work in justifying copyright law. I think its enough to believe that, on average, advancements of knowledge and culture have value to society.

The second pillar of belief is that the creation of new works is integral to advancing knowledge and culture. Society is changing rapidly in this hyper-technological era we live in, and we need new knowledge and culture to keep up. For example, twenty years ago, there was not much reflection about the ethics of social media use, because it didn't exist. Now it has become a huge topic with things like cyberbullying, misinformation, election interference, and incitements to ethnical, racial, religious and gendered violence. For knowledge and culture to keep up with changes in technology and society, there need to be new creations.

Okay, so we want knowledge and culture to continue to develop, which was pillar one, and we think new works are needed for that, pillar two. The third pillar of belief that follows those two translates them into concrete action. If we need new works, we want potential creators of those new works to feel incentivized to produce. In a business-oriented culture like the United States, it is easy to see how people associate this with monetization, and that's not unreasonable. For example, some authors write for a living, and may not be able to afford to write if they didn't have rights they could turn into a profit. But it also applies to non-monetary rewards, even in capitalist systems. For example, sometimes people produce works without charging for them for other benefits, like the professional reputation gained for publishing in a journal. Of course, there are folks who create knowledge and culture without either money or prestige as incentives. They may create out of a sense of duty, or a sense of generosity or compassion towards others. However, at least at this moment in history, that's not the majority of creators. At this time, absent a drastic a shift in public policy or in attitudes, there are certainly quite a few people who have useful things to contribute who cannot afford to do so without monetary incentives, or will not do so without prestige incentives.

Okay, so if we add up the three pillars, we get a practical argument for copyright law. People who have this view believe the law is necessary to incentivize creators to produce new works to advance

knowledge and culture. I think advantage of this perspective is that you can use it to measure outcomes. You can look at differences in the law in different countries and try to make an empirical measurement of what level and structure of incentives are sufficient to continue advancing knowledge and culture.

By the way, if you're a supporter of Creative Commons licenses, as I am, I think this practical argument should make sense to you. One of the features of all of the Creative Commons licenses is that they include Attribution—clearly acknowledging the creator. That enables a system of recognition, which is believed to increase the desire of creators to produce.

The second way to understand the purpose of copyright law is the rights-based perspective, and it's very different than the practical perspective. To be persuaded by a rights-based perspective, you need to believe there's a fundamental natural right in the act of creation: Someone who produces something ought to own the rights to it, because they put the time and expense and creativity in to make it. If you have spent time trying to create something, particularly something sophisticated, this perspective is understandable at an intuitive level. It takes times to do research, to write and revise novels, to record, mix and master music, and so on. At an intuitive level, many people would say it seems unfair to do all that but not have any rights come from it.

Unlike the practical perspective, the rights-based one doesn't care about the consequences for society—even if there are less optimal social outcomes, rights are paramount. In contrast to utilitarianism, this more resembles the point of view of philosophers who come from a deontological point of view. It's a point of view that doesn't judge the justness of laws by consequences. I don't think people who have this view about copyright are opposed to knowledge and culture advancing. They just feel that advancement is secondary to the fairness issue.

Unlike the practical perspective, I have a hard time thinking of a way to measure the rights-based view. People who take this view have an intuition that copyrights are fair. But that intuition says nothing about how much of a copyright is fair. I mentioned the example waiting period being changed from 50 to 70 years in 1998 in the US. Is 70 more inherently fair than 50? It's hard to say.

Though these two perspectives, one practical, the other based in rights, are very different philosophically, in practice they serve as powerful cultural legitimation for copyrights in places like the United States. Here, violating copyrights is viewed as unfair—as I said in the introduction, that violation has the same cultural status as stealing money. However, people also believe that if copyright law is widely violated, then creators will lose their incentives to produce, slowing the advancement of knowledge and culture. So, together, the practical and rights-based perspectives reinforce the status quo.

However, the power of these principles can also be used to challenge the status quo, and that opens up some critical thinking space.

Let's start with the practical perspective. It is difficult for me to see the purpose of the US's 70 years of copyright protection. I have a hard time believing that posthumous benefits are a major motivator to most creators.

Think about it this way. Imagine someone proposed legislation that extended voting rights to people for 70 years after their deaths. They'd rightly be laughed out of the legislature, because it's a right nobody can exercise.

I don't think the dead are any more likely to vote than they are to author new books. So if you believe the practical argument that copyrights are incentives to produce, it's hard to see why copyrights have to extend past the death of the creator, even for a day.

In fact, the beneficiaries of the now 70-year period in the US are frequently corporations who did not even create the works, but merely purchased the rights from the creator. So the question then becomes, is it necessary to protect the revenues of corporations to advance knowledge and culture? Before the internet, it was plausible to say entities like publishers were necessary to advance society. In the nineteenth century, if someone wrote a medical research paper or a groundbreaking novel, the only way it could reach most people is if someone—usually a publisher—typeset, print, and distributed the work. It was an expensive process that required things like printing presses and supply chain relationships that most creators didn't have. But in a digital, self-publishing world with low production costs, it's harder to argue that the revenues of publishers need to be guaranteed for culture to continue to advance. What value publishers today do or don't add is a different question, a separate debate. But it's harder to argue that they are necessary to advance knowledge and culture, especially to the degree of seven decades of exclusivity that don't actually incentivize the original creator to create more.

In fact, if one goal of copyright is to advance knowledge and culture, it could be argued that we could end the copyright at the author's death without any negative consequences to creation. It could affect the profits of large companies, but that itself isn't going to hinder the advancement of knowledge and culture the way it would have before the internet. And it would get works in the hands of the public freely and faster, allowing new works to be built upon them more quickly. There are other areas of creation, such as patents for pharmaceuticals, where the protected period is shorter than the lifespan of a typical person, and yet that sector continues to be incentivized to produce new things. So, if the practical perspective is compelling to you, it also points to the path for reforming the law in terms of lessening the length of copyrights.

On the other hand, if you do believe in the rights-based perspective, the argument I just made isn't super compelling. Remember, in that view, copyright is about being fundamentally fair to creators, regardless of the social consequences. However, there is a different way in which the rights-based perspective also suggests support for reform.

Think about it this way. It's very hard to actually say, in a philosophical sense, that you really created something all on your own. I'll give you a personal example. I'm a musician, and I wrote and performed the music for the intro and credits to this podcast. By copyright law, those pieces of music are mine. But in a principled sense, it's very difficult for me to say I created those songs all on my own. I have had music lessons with several different teachers who have taught me different ideas and theories that provided the scaffolding for the work I created. I've heard concerts and recordings of other musicians. I didn't copy anything from them, but they have educated, inspired, and influenced me. It's impossible to say whether I could have written these pieces without those inputs, but it does seem highly unlikely.

Don't get me wrong, I'm not downplaying the enormous effort it takes to create. I've suffered sleepless nights remixing music or rewriting drafts. It's hard work. It would seem unfair not to give someone

some rights to somebody after putting in the effort—maybe even most of the rights. But it's very hard to argue that they did it on all their own, and so therefore it's very hard to make the case for an absolute individual right. Most new creations have some debts to society, to work done before by other creators, and that suggests that society should have some stakes in the rights.

As I mentioned earlier, a difficulty with a rights-based view is that it is very hard to measure how strong a copyright is fair. For example, you could argue that since society had some contribution to the work, that the rights should not apply in perpetuity—which is consistent with the current law. But it's hard to say whether its more fair to protect 70 years after the creator's death, 50 years, or none, or something else altogether.

Despite this problem, I still think the rights-based perspective is helpful to the cause of copyright reform, in so far as the communal nature of creation is an opening to say that society has some rights too.

Thank you so much for listening to this episode. We did have to wade into some philosophical waters, but they have direct practical consequences for copyright law and, by extension, open education. The reasons behind copyright law are strong and have merit, but they're not beyond criticism. In fact, when you dig into them, they also create space to discussing making copyright law better. There's a lot out there on the copyright reform topic. I hope this episode inspires some listeners to learn more about those movements and maybe even join them!

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