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Mises on Copyrights

by Bettina Bien Greaves

The widespread reproduction and "sharing" of copyrighted music on the Internet led a friend to ask me what Ludwig von Mises would have thought about the situation. The more I pondered the question, the more I concluded that Mises would have considered this just another case where copyright law must play catch-up with new technology.

Many people believe they should be allowed to reproduce and "share" copyrighted material free of charge, some because they don't want to pay for the privilege and others because they believe it is wrong to grant monopolies to authors, composers, musicians, or anyone at all for that matter. But there is more to the problem than monopoly.

Mises once said, more or less facetiously, that while he had known book authors who opposed patents because of the monopoly privilege they give inventors, he had never known a book author who opposed copyrights because of the monopoly privilege copyrights give authors. Mises may have had Murray Rothbard in mind, for in *Man, Economy, and State* and *Power and Market*, Rothbard defended copyrights and criticized patents. Rothbard said it was possible for an inventor independently to come up with precisely the same invention that someone else had developed earlier and had already patented. In that case, the earlier inventor would receive patent protection and the other would be out of luck. Rothbard considered that unfair.

However, Rothbard said it was inconceivable that a second author would ever succeed in arranging words in the same order as they had appeared in a previously published book without having knowledge of the earlier book. Being a unique production, a book is entitled to copyright protection.

Mises, of course, didn't talk about monopoly itself as being "good" or "bad." Monopolies could exist on a free market in the rare case when the owner of a factor of production controlled the total supply of that factor. And in the even rarer case that the demand for a monopolist's product was such that buyers were willing to pay an above-market price for it, he *might* be in a position to reap a greater financial gain by restricting production and selling fewer units at a higher price per unit. Mises considered this perhaps the only instance in which producers could violate consumer sovereignty with impunity.

The case of government-created and/or government-protected monopolies was another matter. He didn't discuss them from the point of view of their "morality" or "immorality," however. He simply talked about their economic aspects, saying that

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government-granted monopoly privileges change the situation by introducing coercion into the picture. Such privileges make consumers pay higher prices for the monopolized good or service and force them to restrict their consumption of other things. Government grants of patent and copyright protection are examples.

However, it appears from what Mises wrote in *Human Action* that he wasn't opposed to copyrights and patents as such. A patent or copyright is defined as an agreement on the part of the government to protect the property rights of an inventor or author to his creation for a certain period of time. The inventor or author pays a price for this protection: he agrees to turn his creation over to the public, at no cost, when the protection expires.

Now if the government is to protect property, it must define that property.

Technological development is nothing new, and when it affects the character of a form of property, it inevitably requires the refining and redefining of the rights of individuals to their private property. The copyright laws have had to be revised and adapted whenever new methods of production and reproduction were developed. The *Encyclopedia Britannica* says that according to Roman law, when a person wrote words on a parchment, the composition belonged to the owner of the blank materials. This definition of ownership must have arisen when monks copied manuscripts laboriously by hand, letter by letter, on valuable parchment sheets furnished by their monastery.

The Development of Printing

When printing came along and books could be copied more cheaply, the question of property rights became more urgent. However, William Blackstone (1723–1780), the authority on British law, said the rights of an author "being grounded on labor and invention" were "too subtle and unsubstantial a nature to become the subject of property and the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate."[1] Copyright was looked on as "a doubtful exception to the general law regulating trade," which at that time was generally opposed to monopoly.

Again according to the *Britannica*, British law began to protect intellectual property with copyrights in 1709 as "in the nature of personal property. . . . A man's own work, in this view, is as much *his* as his house or his money, and should be protected by the state."[2] This, of course, puts the onus on the government to define what personal property is copyrightable.

James Madison, fourth president of the United States, had been a participant in the 1787 constitutional convention in Philadelphia. The U.S. Constitution that he helped to write gave Congress the power to secure "for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Several years later, Madison, when listing the various forms of property the government was "instituted to protect," included a person's intellectual property, his "opinions and the free communication of them . . . [their] enjoyment and communication."[3]

By the nineteenth century, the idea that published books would be copyrighted was widely accepted. Washington Irving, after whom Irvington-on-Hudson, New York, was named, was one of the first American authors to earn a living from royalties received from his books, although not a handsome living—he was usually close to broke. Charles Dickens was another prolific author who relied on the royalties his books earned under British law. His attitude toward America turned somewhat negative when pirated versions of his books were published in the United States.

It may be impossible to describe all the changes that have been made in copyright law over the years in response to the different ways copyrighted material might be disseminated. Adjustments have been made from time to time. For instance, arrangements were worked out over several decades to compensate musicians whose works were played on mass-produced recordings, in movies, and on radio and TV broadcasts.

And as photocopy machines proliferated, it was determined that copying excerpts from copyrighted works for reference, research and study fell within the law's "fair use" principle.

The government's protection of an author's or an inventor's creation makes it possible for the creator to ask a monopoly price. Although monopoly prices generally benefit sellers, harm buyers, and infringe the supremacy of the consumers' interests, Mises saw copyrights and patents as an exception to this rule. He wrote in *Human Action*—and here I quote with some interpolation in brackets:

> If on a competitive market one of the complementary factors, namely *f* [a recipe or invention], needed for the production of the consumers' good *g*, does not attain any price at all, although the production of *f* requires various expenditures and consumers are ready to pay for the consumers' good *g* a price which makes its production profitable on a competitive market, the monopoly price for *f* becomes a necessary requirement for the production of *g*. It is this idea that people advance in favor of patent and copyright legislation. If inventors and authors were not in a position to make money by inventing and writing, they would be prevented from devoting their time to these activities and from defraying the costs involved. The public would not derive any advantage from the absence of monopoly prices for *f*. It would, on the contrary, miss the satisfaction it could derive from the acquisition of *g*.[4]

External Economies

Later in the book Mises discussed patents and copyrights further, pointing out their "external economies," that is, the benefits they furnish to persons other than those who produced the protected material.

> The extreme case is shown in the "production" of the intellectual groundwork of every kind of processing and constructing. The characteristic mark of formulas, i.e., the mental devices directing the technological procedures, is the inexhaustibility of the services they render. These services are consequently not scarce, and there is no need to economize their employment. Those considerations that resulted in the establishment of the institution of private ownership of economic goods did not refer to them. They remained outside the sphere of private property not because they are immaterial, intangible, and impalpable, but because their serviceableness cannot be exhausted.
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> People began to realize only later that this state of affairs has its drawbacks too. It places the producers of such formulas—especially the inventors of technological procedures and authors and composers—in a peculiar position. They are burdened with the cost of production, while the services of the product they have created can be gratuitously enjoyed by everybody. What they produce is for them entirely or almost entirely external economies.
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> If there are neither copyrights nor patents, the inventors and authors are in the position of an entrepreneur. They have a temporary advantage as against other people. As they start sooner in utilizing their invention or their manuscript themselves or in making it available for use to other people (manufacturers or publishers), they have the chance to earn profits in the time interval until everybody can likewise utilize it. As soon as the invention or the content of the book are publicly known, they become "free goods" and the inventor or author has only his glory.[5]

Mises went on to say that this problem has nothing to do with the genius who creates out of the sheer urge to do so; he does not wait for encouragement. But:

> It is different with the broad class of professional intellectuals whose services society cannot do without. . . . [I]t is obvious that handing down knowledge to the rising generation and familiarizing the acting individuals with the amount of

knowledge they need for the realization of their plans require textbooks, manuals, handbooks, and other nonfiction works. It is unlikely that people would undertake the laborious task of writing such publications if everyone were free to reproduce them. This is still more manifest in the field of technological invention and discovery. The extensive experimentation necessary for such achievements is often very expensive. It is very probable that technological progress would be seriously retarded if, for the inventor and for those who defray the expenses incurred by his experimentation, the results obtained were nothing but external economies.[6]

Controversy Continues

Mises understood that patents and copyrights are controversial. "They are considered privileges, a vestige of the rudimentary period of their evolution when legal protection was accorded to authors and inventors only by virtue of an exceptional privilege granted by the authorities. They are suspect, as they are lucrative only if they make it possible to sell at monopoly prices. Moreover, the fairness of patent laws is contested on the ground that they reward only those who put the finishing touch leading to practical utilization of achievements of many predecessors. These precursors go empty-handed although their contribution to the final result was often much more weighty than that of the patentee. . . . [T]his is a problem of the delimitation of property rights. . . ."[7]

It should be noted that merely because copyright grants a monopoly privilege to the producer of intellectual property, there is no guarantee that buyers will pay a monopoly price should the producer choose to ask it. Many books, poems, and musical compositions don't sell well, or may not sell at all, and their authors and publishers may suffer losses. As Mises wrote, "Under copyright law every rhymester enjoys a monopoly in the sale of his poetry. But…[it] may happen that . . . his stuff . . . can only be sold at their waste paper value."[8]

Also, the producers of some copyrighted intellectual property, eager to spread their ideas, readily grant reprint permission for free. For instance, this is true of most articles in *The Freeman*.

With the new technological developments that now make it so easy to reproduce and "share" musical compositions, we are entering a whole new ball game. Without copyright protection, musicians, authors, and composers are in the position of having to bear all the costs of production while the benefits go to others. Thus the new technology calls for further refinement of the rights of private property owners. □

1. *Encyclopedia Britannica*, 11th ed., 1910, vol. 7, p. 118.
2. Ibid.
3. James Madison, "Property," March 27, 1792; http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html.
4. Ludwig von Mises, *Human Action* (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1996 [1949]), pp. 385–86.
5. Ibid., p. 661.
6. Ibid., pp. 661–62.
7. Ibid., p. 662.
8. Ibid., p. 277.