The Aesthetics of Copyright

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Abstract:

Copyright law is a crucial part of the normative framework of the artistic and art-related practices in the modern world. It facilitates the production and public accessibility of certain works of art and literature, music, moving images, etc. At the same time, it prevents the production and public accessibility of others which might have been just as interesting as those we got to know. Intellectual property norms imprint our ideas of authorship as well as the ontological constitution of artworks. Yet the interdependencies and interferences between copyright law, aesthetic theories and artistic practices deserve a more thorough analysis.

This paper presents a new approach to an institutional theory of art, analyzing the relevance of intellectual property regimes for the opening and exclusion of certain possibilities in the production, distribution and use of works of art as well as for our understanding of some fundamental aesthetic concepts.

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(1) Imagine there was no copyright law: Would the art we could get to know be all the same — or would it be quite different? Would the books we read, the music we listen to, the movies we watch, exhibitions, magazines and web pages look and sound just like those we know under the existing copyright regime? Probably not. Many of the artworks and mass media productions which make up the substance of contemporary culture wouldn't be there at all, or they couldn't

be produced the way they are now, whereas other forms of art might perhaps be possible that we cannot even dream of.

It is difficult to imagine the forms of art and entertainment in a world without copyright law, because there are so many imponderables in it. Of course, those who profit from the existing intellectual property regime tell us that many of the things we most adore simply couldn't exist, or at least wouldn't be accessible for most of us, if they were not protected by a strong copyright. They argue that the production and distribution of artworks is a business basically like any other business: If you want to have the product someone must have made an investment to facilitate its production. And if you need capital you must make sure there is a good chance for a considerable return. "Fewer movies will be made and fewer creative risks will be taken if piracy continues to rob those who invest in movies."[1] However, the economics of copyright and the relevance of economic incentives in artistic production is a pretty complex issue which I cannot discuss here.[2]

Advocates of "free culture", on the other hand, argue that copyright has become more and more an obstacle to creativity and that it prevents the production and public accessibility of many works that might have been just as interesting as those we got to know.[3] With digital imaging and sound sampling technologies everybody could be an 'artist' or at least produce their own music and videos.

Whatever one might think about the artistic value of many amateur efforts, it is certainly a political issue whether or not we have the right to publicize and share those forms of expression that we find worthy of attention – and who should be entitled to impose restrictions on others in the use of particular forms of expression. I don't want to discuss this political problem here,[4] but rather concentrate on the philosophical questions concerning the interdependencies and interferences between copyright law, aesthetic theories and artistic practices.

(2) Even if our little thought-experiment (*what if there was no copyright?*) would need to be pursued much further to yield any precise results, it already indicates that the institutions of

intellectual property do have a considerable impact on the range and shape of the works of art which can be produced and published under a particular legal regime. The artistic practices and art objects would be considerably different if they were developed in a world without copyright, and they would also be different, perhaps to a lesser degree, in a society with a different copyright law. Therefore I want to suggest that it does make sense to speak of an “aesthetics of copyright” in a sense somewhat similar to the way we speak of, say, “the aesthetics of functionalism”, meaning the way ‘aesthetic‘ objects, or artworks in a broad sense, are designed in order to meet the requirements of certain norms governing the artistic practices and aesthetic preferences in a particular historical situation.

The basic idea is that it should be possible – and also instructive – to describe the influence of the norms of copyright law on the artistic and art-related practices in the modern world in a way that it can become evident how certain ‘aesthetic’ patterns and preferences are shaped with regard to juridical norms. This is almost trivial – for, after all, it’s the purpose of the law to tell people what to do and what not to do in order to avoid interfering with the rights of others. Thus, copyright laws in any legislation today contain some regulations stipulating how to distinguish between cases where a “derivative work”[5] has been produced, that is to say, no “original work of authorship”[6] has been accomplished but the result of the artistic production is to be considered as just another version of an already existing work created by somebody else, and other cases where a new work has been achieved even though its producer might have drawn more or less heavily on previously existing works. A derivative work according to German copyright law[7] is characterized by its ‘dependency’ from the original work which might be transformed or further developed but remains ‘unaltered in its essence’, its fundamental traits. “Free use” in contrast[8] departs from the original model and results in creating a new work with an altogether new essential core and new orignal traits, a wholly independent new creation.[9] Determining the boundaries between these two classes may be not an easy task. Still, it’s the stock-in-trade of copyright lawyers in art cases.

With the norms controlling these distinctions, the law induces criteria for what counts and what is negligible in determining the idenitity of individual works of authorship. The law spreads out certain spaces of possibility where there might be room for new individual works while it precludes others by stating what cannot legally be done regarding a previously existing copyrighted work. It's important to notice that these spaces differ significantly between different jurisdictions, for example the Anglo-American tradition of copyright law and continental European traditions of author's rights laws. Thus, the law does in fact exert an aesthetic regime at least as strict as the normative system of functionalism or classicism. It seems interesting enough to mention this, since it's still one of the first things any student of copyright law would learn at law school that there was absolutely no aesthetics involved in copyright law, that the law must abstain from aesthetic judgment.[10]

(3) The impact of copyright law on the development of modern art reaches deeper still. The most fundamental norm of copyright law is the rule of attribution of a particular work of authorship to an individual author. This has often been criticized by postmodernist or deconstructionist critics as an anachronistic remnant of the romantic ideology of creativity,[11] but that criticism was superficial. We should ask, instead: How does the author-function[12] facilitate certain ways of dealing with certain objects, like 'interpreting' a 'work' of 'art'?[13] It is not self-evident that there should be 'works of art', nor what should count as an artwork in its own right, what as an occurrence or an instantiation or merely as a copy of an artwork, and what as something altogether different, under certain circumstances.[14] The legal institution of copyright law is a crucial part of the normative framework of the artistic and art-related practices in the modern world. Any institutional theory of art[15] will remain futile as long as it restricts its analytical aims to the institutions of aesthetic appraisal in a narrow sense and fails to take into account the relevance of intellectual property regimes for the opening and exclusion of certain possibilities in the production, distribution and use of works of art as well as for our understanding of some of the most fundamental aesthetic concepts.

[1] <http://www.mpaa.org/piracy_WhoPiracyHurts.asp> (14 Feb 2008).

[2] For a comprehensive discussion, see Towse (2001); Caves (2000).

[3] Cf. McLeod (2005); Lessig (2004).

[4] See Ortland (2007); Ortland & Schmücker (2005).

[5] See, for example, the United States COPYRIGHT ACT 1976, 17 USCS Sect. 101; 103.

[6] 17 USCS Sect. 102.

[7] Urheberrechtsgesetz v. 9. Sept.1965 (UrhG), § 23.

[8] German UrhG § 24.

[9] LG München, Urteil v. 29. 11. 1985, GRUR 1988, 36.

[10] See Yen (1998).

[11] Wang (1990); Boyle (1996), pp. 51-6; Douzinas/Nead (1999).

[12] Foucault (1969/1994).

[13] Jaszi (1991).

[14] For a classical discussion of the 'work' concept in the philosophy of art see Osborne (1981); for an account of how the practice of music was reorganized around 1800 by introducing a 'work'-concept into the field that had previously been regulated by ideas of 'harmony' or 'virtuosity', Goehr (1992), for the role of lawyers in that transition, Barron (2006).

[15] Dickie (1974).

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