

Theoretical Inquiries in Law Forum

Volume 12, Issue 1

2011

Article 2

COPYRIGHT CULTURE, COPYRIGHT HISTORY

Intellectual Property in the Age of Capital

A Comment on: "Copyright and Social Movements in Late Nineteenth-Century America" by
Steven Wilf.

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Intellectual Property in the Age of Capital

*Michael Zakim**

Like everything else that could be bought or sold, the legal, social, and even epistemological dimensions of intellectual property were transformed by the rise of capitalism in the nineteenth century to preeminent political status. This is what informed the age's "expanding . . . scope of proprietary rights," that which Professor Wilf identifies as having triggered such sharp contests over the issue of copyright.¹ Debate over copyright was often part, as we see here, of an ambitious effort to "insulate" private property from rival claims, in particular from the claims of the commonwealth. The result was "an ever-shrinking public domain"² that suited industrial capital's insistent program of individualization, or privatization.

Of course, not everyone "bought" into this new, privatized property regime. Some even resisted it. I suspect that Professor Wilf meant to strike an ironic effect in writing that intellectual property became the stuff of popular "political contestation" in the nineteenth century. How could the price of Byronic verse, or even a Dickens novel, have provoked social protest, let alone a popular political movement? Were not the social confrontations of the Age of Capital — what historians once called class war — incited by far more "real" issues, namely, bread and jobs? And, indeed, Professor Wilf observes that rights in the products of the mind have a significantly shorter pedigree than those vested in traditional tangible property. Certainly, "mental labor" was far less central to an American agrarian tradition which continued to assert itself well into the industrial century. "No kernel of nourishing corn can come to him but through his toil bestowed on that plot of ground which is given to him to till," as Emerson typically declared at the time. But, in fact, capitalism had minimal respect for the once self-evident tangibilities of property, including, first and foremost, land. What's more,

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1 Steven Wilf, *Copyright and Social Movements in Late Nineteenth-Century America*, 12 THEORETICAL INQUIRIES L. 123, 125 (2011).

2 *Id.* at 126.

the relentless process of commodification so characteristic of market society was increasingly based on abstractions. "Commodities are transformed into bars in the head and in speech before they are exchanged for one another," as Marx wrote in 1857, for only then was it possible for goods to suspend all other attributes save what made them mutually replaceable, and so "encounter" each other in the market.³

The resulting exchange economy was not, in fact, possible without an explosion of intellectual products, and here I refer to a matrix of new information industries specializing in credit, money, insurance, prices, statistics, patents, communications, and management, which created a commercial infrastructure of invoices, bills of lading, inventory counts, warehouse receipts, cheap postage, uniform accounting practices, price currents, trade journals, and regular travel schedules. Together, these effected a "business revolution" in the 1840s and 1850s, as Thomas Cochran explained some years ago, which constituted the administrative basis for the era's other, more tangible, revolutions being wrought by steam and steel. The knowledge economy is not, in other words, a "post-industrial," and certainly not a "post-capitalist," development. Rather, the "capital of mind" provided early industrial businesses with "a command of their subject" by answering a rudimentary yet essential set of questions: "What has been done? What is the state of the case at present? What can be done next? [And] what ought to be done?" Only with such information in hand could maximizing agents rationally pursue their maximizations. They became dependent, in other words, on multiple, cross-filed records that could bestow a standard, stable form on what was a highly mobile and initially idiosyncratic economic system. "Use the pen," *Hunt's Merchant's Magazine* accordingly advised. "There is no magic in it, but it prevents the mind from staggering about." And, indeed, the continent's two great trading entrepôts, New York and New Orleans, sat an inch apart from each other on the written page, making the broad scale of continental exchange a far more manageable project.⁴

"The producer can no longer embrace the market in a glance, nor even in thought." Thus Emile Durkheim identified the source of "anomie" in the nineteenth century. He was referring to a growing sense of lost control that left persons with little choice but to "trust to chance." Chance, however,

3 MICHAEL T. GILMORE, *AMERICAN ROMANTICISM AND THE MARKETPLACE* 32 (1985) (quoting Emerson); KARL MARX, *GRUNDRISS* 142 (Penguin Books 1993) (1939).

4 Thomas C. Cochran, *The Business Revolution*, 79 *AM. HIST. REV.* 1449 (1974); Untitled, 15 *HUNT'S MERCHANT'S MAG.* 383, 384 (1846); Bruno Latour, *Visualization and Cognition: Thinking with Eyes and Hands*, 6 *KNOWLEDGE & SOC'Y: STUD. SOC. CULTURE PAST & PRESENT* 1 (1986).

was a bad business model. It was certainly insufficient for securing a loan. Capitalists, instead, strove to gain control over the market, doing so by making it legible. They could then inscribe their own course of action onto it. As one sympathetic observer remarked of their consequent success, account books and ledgers "display the mazes of a complicated business with a beautiful regularity." Facts-on-paper, as such, replaced facts-on-the-ground as the determinant operative reality in the capitalist economy, just as "paper work" replaced manual exertion as the symbol of an advanced, bureaucratic economy. The former amplified the effect of mental labor no less dramatically than the steam engine had enhanced humanity's physical efforts. Industrial revolution could never have been sustained without all this intangible intellectual property: no wonder, then, that contemporaries devoted so much social and legal effort to bolstering its proprietary credentials, that is, to rewriting its rules of ownership and control.⁵

William Leggett serves as one of Professor Wilf's subjects for exploring the relationship between capitalist revolution and the battles over intellectual property. Leggett, the Jacksonian-era publicist and leader of the radical Loco-Foco wing of the New York Democratic Party, is presented here as a leading proponent of cheap editions and democratic champion of a copyright-free society, fighting to make culture available to everyone. Language, Leggett accordingly proclaimed in the debates over copyright, should be "the common property of all mankind" rather than the source of "artificial rights."⁶ If one could establish intellectual proprietorship, in other words, then knowledge could be turned into a commodity and thus into an exclusive possession of the moneyed classes. Culture would consequently become the servant of privilege rather than of the community at large. Leggett's views on literature were inseparable, in fact, from his views on another paper system, namely, the exclusive rights of incorporated banks to print money, which enriched speculators and impoverished artisans. And yet, we should recall, Leggett actually began this debate on the other side of the issue. When he first addressed the copyright question in September 1836, significantly enough, he argued on its behalf, referring to copyright as a way to protect the producer's "natural right" to the fruits of his own labor. In contrast

5 EMILE DURKHEIM, *Division of Labor, in* SOCIOLOGY AND PHILOSOPHY 15 (1974); THE DUTIES OF EMPLOYERS AND EMPLOYED, CONSIDERED WITH REFERENCE TO PRINCIPALS AND THEIR CLERKS OR APPRENTICES 23 (New York, J.S. Redfield 1849).

6 Wilf, *supra* note 1, at 131.

to special charters for corporations, he contended, copyright "confers no new privilege or immunity." It simply secures what already belongs to an author.⁷

This inversion in Leggett's position on copyright is indicative of how capitalism effectively inverted the very nature of (intellectual) property itself. The Leggett who initially supported copyright was animated by a Jeffersonian faith in private property as the truest reflection of hard-earned value, and in the market as the most effective, and civic, way of distributing that property throughout the republic. But the industrial economy, unstinting in its pursuit of growth and profits, divorced value from productive work. The fact is, most of its dollars now floated into the hands of non-producers. In this new economy, as Leggett saw it, capitalists would corner the market, not only in unbacked banknotes and problematic debt, but in knowledge as well, turning it into no less than a source of monopoly and privilege. Copyright thus became part of a historic fight over the very soul of the free market. Would it be a mechanism for inclusion or exclusion? And if the former, did this not mean that property rights would have to be severely restricted, an indication that the very foundations of classical political economy were collapsing?

⁷ Jeffrey Sklansky, *William Leggett and the Melodrama of the Market*, in *CAPITALISM TAKES COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA* (Michael Zakim & Gary J. Kornblith eds., forthcoming 2011).