Abstract

Copyright as Post-Industrial Policy
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The statement that the purpose of copyright is to furnish incentives to authors has attained the status of a rote incantation. It is so deeply ingrained in our discourse and our thought processes that it is astonishingly hard to avoid invoking. Yet avoiding the incentives justification for copyright is exactly what we ought to be doing. In fact, copyright has very little to do with providing incentives for authors to do creative work, and to talk about it as though it does is very bad for copyright policy. Creative people are happy to receive copyright protection for their work, and we ought to reward them for doing it, but copyright isn’t why they do the work in the first place. The purpose of copyright is, instead, to enable the provision of capital and organization so that creative work may be exploited. Put differently, copyright is about the proper (post-)industrial policy for the so-called creative industries.

Taking seriously the idea of copyright as industrial policy suggests some different legal analogies. Copyright scholars have pursued explanations for copyright’s fundamental truths in the core common law realms of property, contract, and tort. In other words, we have chosen to think about copyright using the doctrinal tools of the preindustrial property system. This ignores a crucial stage in property law’s history. The postindustrial, information age economy in which we live didn’t emerge directly from the preindustrial economy of property in land. Industrial property – corporate property – came first. The law of the preindustrial property system couldn’t respond to the needs of the industrial age, so the law evolved by developing formal mechanisms for aggregating assets and separating ownership from control so things could get done. Title 17 of the US Code is the Delaware law of the post-industrial property system; it separates authorship from control of creative works so that certain kinds of coordination problems can be solved.

The corporate law analogy foregrounds two kinds of agency problems that have been difficult to assimilate within the framework of copyright theory. One is the problem of the relationship between artists and intermediaries, which can be conceptualized as a variation on the more general relationship between managers and shareholders. The second is the problem of the relationship between the creative industries and the public, which can be conceptualized as a variation on the more general relationship between corporate entities that generate external harms and societies that experience those harms and must devise ways of valuing and accounting for them.