

## Introduction

# Copyright on the Third Hand

Two views dominate the ongoing debate over copyright policy. One view denigrates *all* restraints on expression, whether they arise from the Copyright Act, the common law, or technological tools. The other view equates copyrights to property rights, concluding that both alike merit diligent protection and profound respect. We might say that the former view regards copyright from the left; the latter, from the right. This book offers a third view, one that regards copyright as a statutory privilege distinctly different from, and less justified than, rights that the common law accords to persons, property, and promises.

Like most commentators, I largely agree that copyright represents not so much a form of property as a mere tool of policy, one designed to "promote the Progress of Science and useful Arts" (as the Constitution puts it). I thus refer to copyright not as an intellectual *property* but rather as an intellectual *privilege*. So understood, copyright's justification relies entirely on whether it provides a necessary and proper means of promoting the general welfare.

As a creature of statute, copyright represents a notable exception to our natural and common law rights. My friends on the left too often fail to make that distinction, instead treating all rights as nothing more than manifestations of State power. On that point, I agree with my friends on the right, who aver that the common law, because it instantiates our natural rights, merits special regard. Hence my complaint against copyright: it violates the natural and common law rights that we would otherwise have to peaceably enjoy the free use of our throats, pens, and presses.

That critique hardly renders copyright unjustified *per se*. We can in theory excuse facial violations of our common law rights, such as the takings effectuated by taxation or the restraints imposed by antitrust law, as the costs of obtaining a greater good. It does, however, mean that copyright qualifies as a necessary evil, at best.

You might say, in other words, that this book invokes a physiological improbability: a third hand. Traditional discussions of copyright policy do not require more than the usual allotment of appendages. On the one hand, we can disparage copyright together with common law mechanisms for protecting expressive works. On the other hand, we can exalt copyright as a form of property more powerful than any common law right to the contrary. If we limit ourselves to those two hands, however, we will embrace a false dichotomy. In thought, if not in body, we can best grasp copyright policy "on the third hand," recognizing that it cries out for justification because it violates our common law rights, and justifying it—if we can—only as a necessary and proper mechanism for promoting the general welfare.

This third view suggests a great deal about both how present copyright policies malfunction and how to fix them. Most significantly, it opens our eyes to the benefits of an open copyright system, one that encourages authors to rely solely on their common

law rights—and to fully respect our own. Thus might we someday outgrow copyright, discovering that the common law does a better job of promoting the common good.

Part I of this book aims largely at describing copyright. Chapter 1 offers a survey of copyright law, portraying it through a series of graphical illustrations, and also offers a bird's eye view of the common law. Chapter 2 explains why copyright does not qualify as a natural right; chapter 3 explains why copyright instead qualifies as an intellectual privilege. In contrast to the many courts and commentators who claim that copyright policy strikes a delicate balance between public and private interest, chapter 4 argues that copyright policy, even at its best, can put those interests only into an *indelicate imbalance*.

Part II suggests several ways to improve copyright. Chapter 5 explains why the fair use defense will shrink as licensing opportunities grow, and why we should welcome the resulting market. Copyright holders might combine their statutory and common law rights to claim too much control over expressive works, granted, but, as chapter 6 suggests, the misuse defense, especially if it were clarified through codification, offers a ready cure. Chapter 7 describes how to open an escape from copyright back to common law.

Part III looks to the future, portraying a world where copyright has become largely obsolete. Chapter 8 explains how uncopyright and blockheaded authors might help us to overcome the market failure that alone justifies copyright law. Chapter 9 offers an economic analysis suggesting that as markets for expressive works grow, the need for copyright shrinks. Chapter 10 offers a somewhat whimsical preview, written from the year 2028, of how relying on common law instead of copyright might promote the common good.