NYU Law Global Research Fellows Forum  
8 October 2013

Research Project: 
Copyright, Left & Center: Studies of Anglo-American Copyright in a Political Context

The long-term aim of this research is to produce a book that will address the relationship between copyright policy and political ideologies over three-hundred years of Anglo-American copyright legal development and discuss the implications for future discussions of copyright reform and policy. The method for the work is intellectual historical, based both on primary sources and biographical information (primary and secondary) to analyze the political views of individual participants in the development of copyright. While at NYU Law, I will be focusing on research relating to the American examples and on drafting chapters on early American copyright and on internationalization of copyright in the nineteenth and twentieth centuries.

This research project employs an unusual legal historical methodology. In addition to using methods of ideological analysis from political theorists, I have selected (or will select) a number of individuals as examples and focuses on their ideas and biographical information. This biographical contextualized approach to legal history is one that I proposed and applied in my doctoral work. Necessarily, they have to be individuals who have express on copyright and uses biographical information to explore why they arrived at particular conclusions and how their views on copyright can be reconciled with their political and social opinions. It is not a strictly historical description of the development of copyright alongside political movements, which would be another possible way of approaching the problem, nor is it intended to be comprehensive, but it is argued that this approach may be more illuminating as to current debates than a descriptive chronology.
This project seeks to:

Demonstrate the unusual apparent disjunction between copyright policy and political ideologies.

Use historical examples from Anglo-American copyright development to attempt to explain this disjunction.

Apply an innovative biographical legal historical method in order to explore the complex relationship between individual’s view on copyright and how they are reconciled with political ideologies.

Highlight (a) property theory and (b) freedom of expression as areas where broader ideologies necessarily inform copyright policy, even if not explicitly.

Argue that discussions of copyright policy cannot be excepted from broader political ideologies, as it will increasingly become part of mainstream political discourse.

Introduction

While considering copyright law in the context of social or economic impact has long been a standard practice, and the application of theories of property or aesthetics to copyright law is also familiar, attempts to position copyright policy in an external political context have been rare. The prevailing view is that copyright issues are dependent on doctrine, theory, policy, and economic analysis that are internal and specific to copyright. This ‘copyright exceptionalism’ has been challenged by Sag, Jacobi and Sytch, whose empirical research has attempted to show that US Supreme Court Justices’ views on copyright are indeed influenced by external ideologies.¹

Unlike other areas of law considered to be heavily politicized, however, copyright law is not easy to place amidst a standard spectrum of political ideologies, or indeed, most party politics. Whether an individual votes Conservative or Labour in the UK, or whether one is a registered Republican or Democrat in the US—that fact alone does not indicate one’s position on the proper scope and extent of copyright protection.² Even in nineteenth-century England, T.E.

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Scrutton explained ‘the reform of the Copyright laws is not a “party question” and authors are not deemed to have votes’.  

Copyright law is, however, fraught with its own internal politics. Back in 1997, James Boyle called for the development of a ‘politics of intellectual property’ akin to the environmentalist movement. In 2013, his aim has largely been achieved; it would be difficult to claim that copyright is not politicized. Perhaps copyright discourse has even passed into the realm of ‘politics by other means’—William Patry describes the present debate over copyright law in the United States as the ‘Copyright Wars’. In writing about the ‘The Politics of Intellectual Property’, Jessica Litman finds the military metaphor unfortunately apt and identifies a damaging polarization amongst copyright scholars.

This project is concerned with the way in which political ideologies may influence the development of copyright policy and how discourse on copyright law should reflect this reality. It begins by attempting to identify why copyright is rarely discussed in the context of political ideologies. Examples from throughout the history of copyright (primarily Anglo-American copyright) are used to examine the nuanced relationship between copyright policy and political ideologies. The history of copyright suggests that there are two areas where debates over copyright necessarily require engagement with political ideologies: first, with regard to property theory as implicated in economic policy-making and, second, with regard to freedom of expression. Both of these subjects are at the heart of most mainstream political ideologies. Both of these subjects are at the foundations of any copyright regime. As conflicts between copyright and freedom of expression become more prominent and the question of copyright as a property right—raising potential human rights implications—continues to be debated, it is increasingly important to examine how copyright policies fit within broader political ideologies. Only then,

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5 William Patry Moral Panics and the Copyright Wars (OUP 2009).
can we identify what those policies are hoping to achieve and critically assess whether their goals are being reached.

**Political philosophy, political ideologies, and political parties**

The primary ideologies that arise in this analysis are familiar ones: liberalism, conservatism, socialism, and communism. Less familiar ideological positions creep in the further back in time, with various strands of Whig ideology requiring more extensive explanation. Political philosophies are relevant to this research, since they form the foundations of ideologies, but the focus of this research is on ideology rather than philosophy. By ideology, we are concerned with how principles guide us to conclusions or positions on particular issues rather than political philosophies that provide theories of law and governance and a more general level. Political ideologies lead to political action in a way that political philosophies do not. As Charles Blattberg has explained, ‘ideology…is the stuff of political culture, of law, institutional design, and policymaking.’ Michael Freeden has made a compelling case for the importance of studying ideologies on their own terms. Ideologies should not be dismissed as the poor relation of political philosophy when they can and do have profound and direct effects on political and social movements. This project owes a debt to Freeden’s work on analysis of ideologies in the field of political theory. Its aim is ‘to explain, to interpret, to decode, and to categorize’ political ideologies and their complex relationship with copyright policy, not to prescribe action nor support any particular theoretical position.

**Copyright and Party Politics**

In 1880, Scrutton made the following observation about the 1878 Royal Commission on Copyright:

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9 Freeden, *Ideologies and Political Theory*.
10 Ibid 6.
We have a commission, appointed by a Conservative Government and presided over by a Conservative peer, recommending a form of legislation with regard to literary property which is denounced as the most pernicious communism when applied to land; and, while the measure of our earlier history, concerning “forestallers and regraters,” and fixing the price of bread and other material necessaries, are considered as monuments of the obsolete errors of our less enlightened ancestors, we find the same commission in effect advising that the price of literary commodities should be fixed by the state.\(^{11}\)

As Scrutton’s words illustrate, politics are no more predictive of views on copyright policy than political ideologies. While political parties cannot be considered a direct proxy for political ideologies, particularly due to well-observed patterns of tribal behaviours, they can demonstrate some interesting connection or correlation between party politics and copyright policy. There is obviously a distinction between political ideology and electoral politics. While acknowledging the distinction, this paper considers both because political ideology does play a role in electoral politics—and one that is more than simply rhetorical.

Historically, affiliation with political parties—their platforms informed by political ideologies—has never been predictive of views on copyright policy in an Anglo-American context. Nationality and geography have been much more relevant to prevailing views on copyright. The twenty-first century, however, has witnessed the advent of political parties aimed specifically at intellectual property law reform. But these movements deliberately eschew mainstream political ideologies. The most prominent, the Pirate Party, which began in Sweden and has spread to dozens of countries, restricts its political platform to reform of intellectual property and privacy laws. It has maintained its position aloof from the traditional left-right political ideologies in order to drum up support from all sides of the political spectrum.\(^{12}\) The self-styled ‘CopyLeft’ movement refers to a mode of licensing to allow for greater user freedom


\(^{12}\) ‘Pirate Party Declaration of Principles 3.2’ (December 2008) available at: <http://docs.piratpartiet.se/Principles%203.2.pdf>.
rather than any association with the political left; indeed, its support could be on the left or the right.13

Even in its earliest days, party lines were not drawn over controversial copyright debates. Following the 1774 decision in *Donaldson v Becket*14 that copyright was solely the creature of statute, which consequently rendered their supposed property worthless, the booksellers petitioned for relief in Parliament. A bill was brought that would extend the statutory protection of books for another fourteen years to mitigate the financial effects of the House of Lord’s decision in *Donaldson*.15 The question of copyright was not considered by Whigs to be a party issue.16 So despite the opposition of a powerful Whig like Lord Camden, when the booksellers’ bill came before the House of Commons, Whig politician Edmund Burke spoke in its favour,17 with fellow Whig Charles Fox in opposition.

Although politics changed dramatically in the nineteenth century, particularly after the 1832 Reform Act, copyright still remained outside the realm of party politics, as such.18 When Thomas Noon Talfourd attempted to extend and consolidate copyright legislation in the 1830s, he had the support of (then) young Tory politicians Gladstone and Disraeli—the former attempted to win Peel to the cause and the latter gave several speeches in the Commons on the subject.

I am glad to hear from her Majesty’s Government that the interests of literature have at length engaged their attention. It has been the boast of the Whig Party, and a boast not without foundation, that in many brilliant periods of our literary annals, they have been the patrons of letters….As for myself, I trust that the age of literary patronage has passed…and it will be honourable to the present

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13 Well-known copyleft spokesman Lawrence Lessig might broadly be deemed to be right of centre, for example, having clerked for conservative judges Posner and Scalia, while Richard Stallman, GNU General Public License creator, could safely be placed on the political left. Terminology poses a challenge. Left and right, liberal and conservative have multiple, disputed meanings that change as one crosses centuries or oceans. For ease of the discussion, ‘left’ and ‘right’ are used when discussing contemporary politics, as readers have at least broad familiarity and agreement with the connotations, though the use of a left-right spectrum may be anachronistic if used historically.
14 (1774) 4 Burr 2408.
16 F Lock *Edmund Burke* 362.
17 *Parliamentary History*, xvii. 1077, 1089, 1402.
18 Robert Andrew Macfie, *Copyright and Patents for Inventions* (Edinburgh, New York: T. & T. Clark ; Scribner and Welford; etc. etc., 1879) v.
Government if, under its auspices it be succeeded by that of legislative protection.\textsuperscript{19}

Disraeli distinguished the Tories from the Whigs by referring to the Whig’s tradition of providing patronage to authors, such as James Thomson, who would then praise in verse the Whig nobles who sponsored them. His implication was that the Tories would support copyright protection for authors in a way that the eighteenth-century Whigs like Lord Camden had failed to do, but this was not to become a consistent Tory position in the nineteenth century. Moreover, Talfourd himself was a Whig.

Influential ideology of free trade was beginning to take hold and it was not at all clear how copyright fit into free trade ideology. Talfourd’s initial efforts were to fail. Macaulay’s famous speech on the Copyright Bill in the Commons presented copyright as a necessary evil to prevent the greater evil of patronage but disapproved of term extension beyond what he deemed absolutely necessary.\textsuperscript{20} In doing so, he attempted to appeal both to those sympathetic to natural rights theories and those who were not.

I agree... in thinking that property is the creature of the law, and that the law which creates property can be defended only on this ground, that it is a law beneficial to mankind. But it is unnecessary to debate that point. For, even if I believed in a natural right of property, independent of utility and anterior to legislation, I should still deny that [copyright] could survive the original proprietor.\textsuperscript{21}

Yet, not all Whig free trade advocates agreed on the subject of copyright. Harriet Martineau, the Whig/Liberal writer and bestselling author of \textit{Illustrations of Political Economy} had been an active supporter of copyright extension and reform, assisting Serjeant Talfourd in his efforts.\textsuperscript{22} In her \textit{Autobiography} she described the reaction of some of free traders who viewed Macaulay’s speech as a betrayal:

Mr Macaulay was another Member of Parliament who associated his name very discreditably at first with the copyright bill, which

\textsuperscript{19} B Disraeli, Letter of 18 December 1837, \textit{Lord Beaconsfield's Letters 1830-1852} (1887) 125.
\textsuperscript{21} Thomas Babington Macaulay, Speech in the House of Commons, 5 February 1841
\textsuperscript{22} C Seville, \textit{Literary Copyright Reform in Early Victorian England} 176, 182-3.
was thrown out one session in consequence of a speech of his which has always remained a puzzle to me. What could have been the inducement to such a man to talk such nonsense as he did, and to set at naught every principle of justice in regard to authors’ earning, it is impossible, to me and others, to conceive. Nothing that he could propose,—nothing that he could do, could ever compensate to him for the forfeiture of good fame and public confidence which he seems to have actually volunteered in that speech. He changed his mind or his tactics afterwards; but he could not change people’s feelings in regard to himself, or make anybody believe that he was a man to be relied upon.23

By 1882, Gladstone was a Liberal Prime Minister who had long ago accepted free trade orthodoxy. He was no longer sure how copyright fit with his broader ideology:

I was an old & zealous supporter of Talfourd, but I am shaken in my first opinions without having positively settled down upon others—Using the negative forms of speech, as in this case the most convenient, I am not sure that the present form of laws is the best for them any more than for the public.24

More recently, in the UK, the recommendations for copyright reform presented in the Gowers Review (2006) under the Labour Government were not radically different from proposals in the recent Hargreaves Report, commissioned by a Conservative Government.25 In the US, the Sonobono Copyright Term Extension Act lengthening the copyright term to life plus seventy years was passed through Senate and House with support from both political parties, and essentially no dissent from either.26

The controversy in the US over the Stop Online Piracy Act (SOPA) and its counterpart in the Senate, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA), further illustrates the disjunction between political ideologies and positions on copyright policy. SOPA was first introduced in the House of Representatives by a Republican, Lamar Smith, but had Democratic co-sponsorship.27 PIPA, the Senate version of the Bill, was sponsored by left wing Vermont Democrat Patrick Leahy, also with bipartisan

support.\textsuperscript{28} Opposition also came from both sides. Individual Democrats and groups like the American Civil Liberties Union opposed SOPA on the grounds that it threatened free speech.\textsuperscript{29} The right wing ‘Tea Party’ element of the Republican party expressed their disapproval, identifying it as an attempt by Democrats and some Republicans to curry favour with the entertainment industry and also citing free speech-related concerns about government interference with personal websites.\textsuperscript{30} The Tea Party’s involvement did not escape notice in the press. As Stewart Baker, a technology lawyer and former government official in the Bush administration observes, although most of the Tea Party Republicans had never paid much attention to intellectual property issues, many had relied on conservative bloggers who opposed the bill. Baker writes that these Republicans ‘began to ask why they should risk the ire of their Internet supporters to rescue an industry that was happily advertising how much it hated them. Pretty soon, far more Republicans than Democrats had bailed on SOPA, and the Republican presidential candidates had all come out for what they called "Internet freedom."\textsuperscript{31} Right wing SOPA opponents ‘Don’t Censor the Net’ even collaborated with left wing SOPA opponents ‘Demand Progress’ to create a ‘Vote for the Net’ website.\textsuperscript{32}

The SOPA controversy demonstrates that copyright activism transcends the usual political divisions. Still, one may ask: to what extent do political ideologies influence views on copyright policy? The debate over SOPA suggests that in contemporary US politics, politicians’ support for stronger copyright protection may be informed by their reliance on financial support from the creative industries; or their opposition based on opponents’ reliance on financial support from the creative industries. It also shows that a more abstract ideological principle—freedom of speech—can play a role. Now that copyright affects so many individuals on a day-to-day basis, we see copyright becoming a visible issue in electoral politics as it has not been before. As a mainstream political issue, copyright policy will be informed by political ideologies.

\textsuperscript{28} S. 968 (2011) <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:3:./temp/~bdzDMR::/bss/d112query.html>
\textsuperscript{32} Available at: <http://voteforthenet.com/>. 
While copyright policy has historically been viewed as outside the realm of party politics, the connexion between party affiliation and views on copyright and the manners in which political ideologies do inform copyright policy are both worth closer examination.

**Copyright’s Contradictions**

As with other areas of law, different people may believe in different, conflicting normative bases for copyright law—the clearest distinction being between those who believe in an instrumentalist justification and those who believe in a natural rights justification. Some people believe that copyright law exists solely as an incentive to the creation of works, while others believe that it is natural justice for creators to gain rights in their creations. But how does a person reach that decision about which normative basis to favour? While some people might begin with a pre-existing political ideology and then seek to develop a theory of copyright by logical extension, most don’t make such an attempt; in part, because copyright law has long been perceived as esoteric and difficult to understand and also because it is considered extra-political. Copyright law as a policy question is not likely to attract an individual’s attention until it affects them personally in some way, whether as producers or consumers or as politicians targeted for lobbying by interest groups. Without a consistent prescription from within the ideological structure, people will usually acquire convictions about copyright from their personal experiences, which they seek to fit into their political ideology post hoc.

The observation that positions on copyright protection come from personal experience rather than carefully-reasoned philosophical analysis is hardly surprising. And it does not explain why copyright would be viewed differently from any other legal or political issue where peoples’ positions arise much the same way. What distinguishes copyright law is the flexibility of arguments for and against strong copyright protection. A person can make up his mind about the optimal scope and level of protection, then decide on the justification(s) for copyright law and make it all fit into his broader political beliefs without too much trouble. The extreme positions within copyright’s own political spectrum—say ‘strong protection’ versus ‘low (or no) protection’ are flexible and complicated enough to allow him to do so. In consequence,

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33 Boyle 1997.
disagreement about copyright’s normative foundations and the complexity of its application has always created strange enemies and bedfellows.

Because of this, and as we have already seen, copyright policy defies predictions based on individual political attitudes. Roughly, one might predict that an individual on the right of the political spectrum who favoured private property might also favour the strong protection of copyright, or such an individual might see the law as government intervention creating monopolies that interfere with the free market. One on the left might be more sympathetic to the government’s regulation of the market through copyright law or he might be more concerned with the limitations of placing proprietary control on information in private hands.

Apparent contradictions abound. Left-wing academic Linda Lacey argued that copyright law, by taking account of the public interest and limiting the private property right, is an attempt to impose socialist ideals upon a capitalist framework.34 Far right-wing libertarian US constitutional theorist Randy Barnett has gone so far in his defense of individual property rights as to defend anarcho-capitalism,35 but he calls for the abolition of copyright law, arguing that more property is not necessarily better.36 Yet libertarian property theorist Richard Epstein argues for intellectual property’s place in classical liberal conceptions of property.37 Lysander Spooner, a nineteenth-century abolitionist, libertarian, anarchist reformer much admired by Barnett, wrote a treatise demanding perpetual copyright.38 Leo Tolstoy became an increasingly radicalized anarchist,39 but he was opposed to copyright and gave up his own rights to his novels.40 A decade or so later, one might have expected the communist system of the Soviet Union, with its planned economy and attempt at control over all spheres of life, including the cultural, to have immediately abolished copyright, but copyrights under the Czars were still valid immediately after the revolution, and a system of authorial rights was retained, if reformed, after 1922.41

39 Henry Gifford, Tolstoy (OUP 1982) 54, 58.
40 ibid 72.
Radical free trader Robert Andrew Macfie, was sceptical of copyright because he believed that copyright was contrary to classical liberal ideas of political economy. But radical American protectionist Henry Carey opposed international copyright agreements and was sceptical of copyright more generally because it rewarded the ‘middle men’ he found so detrimental to society; he thought it benefited most those who clothed the ideas of others in their own expression rather than rewarding those who produced the original ideas.

Liberal jurist Scrutton himself approved of copyright, but described its nature as “communistic”:

Literary and artistic productions are treated as property, but that property is created in, and limited by, the interests of the community. Strictly dealt with, it should be limited until further limitation defeats its own ends. This of course is nothing else than reversion of a man’s property to the community on his death, a system which was one of the first steps by which individual property was carved out of the property of the community, and which is one of the suggestions of Communism or Socialism at the present day. I do not point this out as an objection to the system, for I think it the right one, but rather that its true character be seen.

Yet Froude, a critic of the Liberal free trade movement, thought that a proposal to eliminate copyright in favour of a Government-organized royalty system was far more socialistic than the existing proprietary copyright regime. Asking provocatively whether “the Board of Trade has been converted to Socialism?,” Froude observed that the Government was not prepared to set prices for necessities like food and clothes but the Board of Trade’s proposal to set mandatory royalties was akin to setting prices for books.

These examples, and many others, demonstrate that arguments for and against strong copyright protection are liquid enough to be moulded into contradictory political frameworks. Yet, one cannot easily argue that copyright is a wholly extra-political issue, even though it is difficult to situate it within larger political ideologies.

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42 See pp 168-69.
44 Scrutton, The Laws of Copyright 290-91.
So why consider copyright in a political context at all? Sometimes, examination of the broader political basis for a position is necessary to clarify the discussion and helps to examine the validity of a position. It can be tempting to mine the history of copyright law for the ‘pro-copyright’ (Mark Twain was all for it!) or ‘anti-copyright’ (Macaulay said it was an evil!) statements of well-known figures, irrespective of the broader political ideologies upon which those statements rested. But one must understand and scrutinize the political views that informed positions on copyright law at a particular time rather than simply assembling arguments ‘for’ or ‘against’ in a political vacuum. Justin Hughes has observed that the use of select quotations from Thomas Jefferson on intellectual property law is misleading, not only because Jefferson’s views were not consistent, but also because ‘it does not make much sense for intellectual property commentators to appeal to the economic thinking of a political intellectual who advocated..., in turn, agrarian-based self-sufficiency, then laissez faire trade, then protectionism’. Modern scholarship frequently praises Macaulay’s influential 1841 speech on the copyright bill; in fact, Patry opens Moral Panic and the Copyright Wars by lauding Macaulay’s speech before the Commons as the ‘greatest speech ever given on copyright’ and is saddened that Macaulay no longer lives to defend his position. But it seems unlikely that Patry placed the speech in the context of the Whig free trade ideology that largely informed Macaulay’s position. Indeed, later in the book, he observes ‘Free market fundamentalism is dead, but not before it destroyed many of the world’s economies.’ Why then take lessons on copyright policy from a speech grounded on its economic principles?

Fundamental philosophical differences about the purpose of copyright law, the empirical challenges presented by assessment of its effects, and the flexibility of arguments for and against copyright protection, made it difficult to assign it a clear role within larger political ideologies. As we have seen, it is easy for individuals with apparently similar political and economic views to differ radically or subtly on copyright policy. In forming an opinion on copyright, an individual is likely to have one priority that renders all of the other considerations secondary.

49 Patry Moral Panic xvi, xviii.
50 Patry Moral Panic 102-103.
That priority comes to the forefront and the other arguments for and against are pushed to the background. Once that consideration becomes paramount, the flexible nature of copyright arguments allows the other relevant considerations to be diminished, set aside, or argued into submission. This is an observation rather than a criticism—an explanation of why so many copyright discussions result in the participants talking across each other—in the hope of improving communication.

Freedom of expression and property rights are both recognized elements of copyright discourse and overtly political issues. Commentators on the law can longer be able to treat the politics of copyright as entirely distinct from the politics of politics. The fact that copyright affects so many more people in the digital age—increasing the numbers of producers as well as consumers—has led to widespread popular interest in the subject. Politicians are beginning to realize that copyright is no longer esoteric. Recent events such as the existence of the Pirate Party and the debates over SOPA suggest that copyright could easily become an issue in party politics in a manner unprecedented in copyright’s history. Copyright’s uneasy compromise between perpetuity and nothing will continue to receive close examination.

The fact that it is difficult to tease out the broader political assumptions in any proposal dealing with copyright reform does not mean that it should not be attempted. Even though copyright is malleable, it is worth questioning the ideology behind the copyright policy and scrutinizing how well the policy achieves the desired social aims. While it is unnecessary to call for the greater politicization of copyright law, we can no longer pretend that copyright policy-making, law-making, and interpretation can be held aloof from political ideologies.