

Origins of Copyright

Part 5 of 6 – Economic Measures

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Utilitarian Measures

Jeremy Bentham (1748-1832) introduced the world to the concept of utilitarianism. Utilitarian economists and philosophers measure the value of acts with reference to the net 'good' or 'happiness' that said acts create in the world. 'Good' or 'happiness' is often measured using monetary units as a metric, but while such units of measurement are convenient, their use is not essential to a utilitarian analysis. In measuring the value of a private property right, a utilitarian would compare the aggregate increase in 'good' to society resulting from the grant of that right with the aggregate 'good' which would result from the denial or revocation of that right. If the increase in good resulting from the grant is larger than the good resulting from its denial or revocation, the property right would be justified from a utilitarian perspective¹.

In the copyright context, the utilitarian value of the grant of a monopoly to an individual for a work that she authored would be compared to the utilitarian value of placing that work squarely in the public domain. It would appear to be safe to assume that there is some incentive value to the grant of monopoly which results in the creation of new and useful works, so there is some utility in the grant of copyright. In addition, any wealth that was created as a result of the author's ability to exploit their work commercially would register as added utility. Similarly,

the ability of all in society to make free use of a nonrivalrous work such as a book has utilitarian value, but where the monopoly adds utility for one, free access adds utility for all. A utilitarian would evaluate the relationship between the total utility of the monopoly as incentive to authorship and the total utility of placing the work of those authors in the public domain, and would limit the scope and duration of the copyright monopoly to achieve the greatest aggregate good.

The Bernoullian Relative Standard

Where pure utilitarians measure 'good' in relation to the aggregate whole of society, Daniel Bernoulli introduced a relative standard of measurement which considers the utility-value of a unit of good in relation to the individual to whom it accrues. Bernoulli recognized that as an individual's income increases, so too does utility. However, as the income of an individual increases, the utilitarian value of each additional unit of income decreases. If I earn ten thousand dollars more this year than I did during the previous year, it is clear that utility increases. However, if I made only five thousand dollars in the previous year, the utility value of the additional ten thousand to me is far greater than it would be if I had made a million dollars in the previous year. The utility value of an apple to a starving man is far greater than the utility value of the same apple to the owner of an apple orchard². By contrast, pure utilitarianism would record an identical utility value no matter who was in possession of the apple. If there are two possible candidates for possession of the apple, a Bernoullian analysis would give the apple to whoever needed it most, where a pure utilitarian would not care to whom the apple was given because from a pure utilitarian perspective an apple is an apple is an apple – it has the same value no matter who owns it.

A Bernoullian utilitarian would balance the total utility of the grant of a copyright

monopoly to an individual against the total utility of placing a work in the public domain in a manner very similar to a pure utilitarian. However, instead of assuming a single homogeneous utility value for every individual with access to the work the measure of utility would be relative to the total benefit to each individual. Bernoullian analysis of copyright favours the grant of a copyright monopoly only insofar as that monopoly serves as an incentive for authors to create new works. Perpetual copyright cannot be justified under a Bernoullian analysis.

The Rawlsian View

John Rawls (1921-2002) criticized the utilitarian economic measure of 'good' in society by pointing to the absence of concepts of moral fairness in the utilitarian evaluation. Rawls recognized that a utilitarian analysis might favour a result which is abhorrent to morality. For example, a purely utilitarian analysis might find that utility would be maximized if we as a society were to consume poor or weak members of society, despite the fact that such an action might be horrendously immoral. The immorality of an action has no measure to the utilitarian. Rawls asserted that nothing can be 'good' if it is not also morally right. Utilitarian analysis is not capable of taking into account the societal distribution of burdens and benefits, or the particular characteristics of individuals³.

In the Rawlsian view, perpetual copyright could be justified if the revocation or refusal to grant such perpetual protection would be inherently morally wrong.

A Word on Hardin and the Tragedy of the Commons

Garrett Hardin's famous argument for near-universal private property rights over

limited resources centers on the idea that when a limited resource is shared amongst a large group of individuals, those individuals will behave selfishly by consuming or spoiling that resource for their own private benefit at the expense of other users of the common resource⁴. Hardin asserts that individuals will engage in a pseudo-utilitarian individualistic analysis of their situation and will choose to behave in a manner which will maximize their own *personal* gain even if that behaviour results in a net loss of utility for the group as a whole. Garrett argues that the coercive effect of private property rights will lead to more responsible uses of limited resources. He acknowledges distribution of property will not always be fair or just, and indeed that the concept of ownership itself is not inherently just. However, he declares “*freedom in a commons brings ruin to all*” and suggests that “*injustice [resulting from private ownership of property in limited resources] is preferable to total ruin.*” The tragedy of the commons argument holds well for rivalrous resources, such as a pasture, or radio bandwidth, but may not hold for nonrivalrous resources such as intellectual property.

In fact, for nonrivalrous resources, the reverse argument may be true – that use of the knowledge-commons strengthens and broadens, rather than ruins or depletes that resource. Any use I might make of an intangible idea does not preclude another's simultaneous use of that very same idea, and the end product of the use of ideas is development of the common body of information and knowledge. It is only through the operation of artificial legal constructs – intellectual property monopolies such as copyright – that areas of the knowledge-commons are fenced off. To award perpetual IP monopolies would permanently remove areas of knowledge from general use, to the detriment of the development of the body of collective human knowledge.

- 1 Robert Cooter, Thomas Ulen, *Law and Economics* (4th ed.) (Boston: Pearson – Addison Wesley, 2004) at 115
- 2 *Ibid.* at 50
- 3 Jon Williams, *An Examination of John Rawls' Critique of Utilitarianism*, (2001)
Online: http://ambient.2y.net/jon/phil/rawls_utilitarianism_critique_1.html
- 4 Garrett Hardin, *The Tragedy of the Commons* (1968)
Online: <http://dieoff.org/page95.htm>