The Menace of Zombie Copyrights

Mark Ellis

3/25/05

The phrase "orphan work" suggests something that has tragically lost its proprietor and will not find its place in the world until another owner appears on the scene. Perhaps the copyright extablishment views public domain works as paternalistic slaveowners might view freed slaves.

A more descriptive phrase might be "zombie copyrights." The work in question seems almost to be in the public domain, but we have no way of knowing whether it's being shadowed by an immortal mindless being ready to destroy anyone who gets too close.

Whichever way we think about it, we must admit that the system is doing only what its creators meant for it to do. If we like the idea of corporate entities owning thousands of effectively-eternal monopolies over works purchased from the actual creators or "made for hire" by employees, we shouldn't be surprised that many works of slight or ephemeral economic value fall into the domain of the undead.

In what we may call the "classical" theory of patents and copyrights, as embodied in the U.S. Constitution, there exist individual authors and inventors whose rights a government is empowered to defend against publishers and manufacturers. It is assumed that economic exploitation of the copyright or patent requires the production of physical objects, such as books or widgets, which in turn requires access to the kinds of capital that publishers and manufacturers possess. To "promote the Progress of Science and useful Arts," copyrights and patents grant the authors and inventors monopolies of finite duration over the economic exploitation of their works. During the period of such a monopoly, any publisher or manufacturer must obtain a license from the author or inventor to market goods based on the work in question. The monopoly rights granted under this theory are limited to the right to demand royalties from the first sale of such goods. They don't impose any obligations on those who purchase the goods, who remain free to sell, loan, rent, or give away those goods, and to speak or write to others about the contents of a book or the characteristics of a widget.

The competing "corporate" theory of patents and copyrights, as embodied in legislation designed to enhance corporate power and profitability, differs in important respects from the classical theory. This theory treats patents and copyrights as "intellectual property" that may be produced by employees who

retain no personal rights to their work, or purchased outright from independent authors or inventors. As property, its possession is a matter of right, and doesn't need to be justified by any demonstration of its tendency to “promote the Progress of Science and useful Arts.” Copyrights are intended to last for as long as they have economic value, as shown by the fact that when certain valuable copyrights were recently close to expiring, a “copyright extension act” was hastily passed to keep them out of the public domain.

The dominance of the corporate theory of “intellectual property” in national legislation and international trade agreements, combined with the ubiquity of the products of a very small number of entertainment and software corporations, has created an unprecedented situation in which most of the “popular culture” of the developed nations is treated by law as corporate property. This strange fact must coexist with the fact that the availability of general-purpose communications systems like the Internet is eliminating the need for the special-purpose information distribution systems that were previously the foundations of the old media companies' business models. With the supply side of the economic equation going to infinity, the “intellectual property” owners must drop all pretense of operating in a “free market” - their ability to make money has become completely dependent upon government's power to create scarcity via copyright.

The all-pervasive electronic media, being a bigger part of most people's lives than “nature” or earlier forms of cultural activity, play the role of reality itself in "postmodern" culture. Through sampling and remixing, new music incorporates old music, and may provide an implicit commentary on the old music and on the culture from which the earlier music came. Documentary film and video, and such non-narrative works as music videos, bring us flashes of our culture in new contexts. But postmodern art's drive to repurpose and redistribute earlier work inevitably collides with what the media companies consider to be their property rights.

At this point in history, it seems very unlikely that the corporate theory of copyright will be rolled back without cataclysmic changes in many other aspects of government and society. The measures which would do most to eliminate the menace of zombie copyrights – reducing copyright duration, requiring an explicit renewal process to extend a copyright, and prohibiting the outright transfer of copyrights from creators and their heirs to corporate entities – are never going to succeed while the corporations that profit from “intellectual property” retain their hold on the legislative process.

However, the corporate interests have failed – so far, at least – to prevent

individuals from using technology to create informal distribution channels through which repurposed materials can reach audiences. This does little or nothing to help independent filmmakers and others who seek to put works of unknown proprietorship to commercial use, but it's not insignificant. Personal web sites, peer-to-peer file sharing, and easy-to-use software for music and video editing have pushed much of the public's concept of “free use” in directions quite different from those favored by the mass-media corporations. At the very least, an explicit expansion of “free use” should be available to users of works of unknown ownership. Without this and other concessions to the new possibilities created by the Internet, the legitimacy of the whole “intellectual property” establishment will become increasingly suspect.