

Artists' Rights are Human Rights

Chris Castle¹

The human rights of artists are clearly articulated in international law and numerous international agreements. These rights are transcendent and are considered timeless, fundamental expressions of entitlement that are intended to safeguard the personal link between authors and illustrators and their creations.

Introduction

The recent history of the protection of creator rights is a fascinating story that has produced some strange associations. Certain conflicts seemed inevitable: authors fight with print publishers, musicians with record companies, and songwriters with music publishers. We are accustomed to these tensions and conflicts. In the end, all parties were aware that they were part of the same economic niche, and that the economy only tolerated so much infighting, which all respected. Only rarely — aside from the occasional government investigation and a market-clearing accusation of piracy, usually directed at whatever works were successful — did threats from outside the creative community become significant and much less existential.

It may be suggested without fear of much controversy that “Big Tech” companies, such as Google, Inc., view the recognition of artists’ rights as applying the brakes² to what can fairly be described as a technological evolution in the Darwinian sense.³ By understanding the current anti-copyright fashion trend in this context, it is much easier to comprehend its significance... and its danger. If you view the rights of corporate machines, i.e., “innovation,” as a right superior to those rights of humans, i.e., the professional creative class, you would not expect to view

human rights as being at the top of the food chain. Machines, especially super-evolved machines occupy that space, and have been referred to as the “Mind of God” by one dot-commer.⁴ This assumes, of course, that machines should have any rights at all.

Of course, we do not yet accord rights to machines; we accord rights to humans. We view certain rights as inalienable, and unwaiveable through national law or coercion. These rights, be they protections from negative covenants or genocide, are described as the Rights of Man, or as “human rights.” These “human rights” laws are documented in many international treaties, and special international courts address violations of these laws.

These laws are intended to protect individual artists from certain individuals or those large, successful companies, who may choose to promote their own self-serving agendas. These laws often protect the weak from the strong, the poor from the rich, the disadvantaged from the advantaged, and the human from the machine. Nowhere is this issue more crystallized than in the Google Books litigation.⁵

No one author can muster the funds to fight Google; not even a group of authors has the means to collectively fight Google. Google’s business model creates enormous wealth through their Internet search and map enterprises, their large advertising revenue stream, and even a recent Google smart phone initiative. Being a publicly traded company, Google is also capable of raising funds by offering the sale of their corporate securities (common stock). The latter is a benefit not available to most individual artists, authors, and musicians. Because of Google’s success, the company has tremendous resources and immense leverage in the marketplace. This is why some governments around the world and United States attorneys general, as well as many corporations and authors’ groups, have come together to object

1. Copyright 2010, Christian L. Castle. All Rights Reserved. Chris Castle is Managing Partner of Christian L. Castle, Attorneys in Los Angeles and San Francisco. <http://www.christiancastle.com>.

2. Lester Lawrence Lessig III, *Free Culture* (2004). (“The opposite of a free culture is a ‘permission culture’—a culture in which creators get to create only with the permission of the powerful, or of creators from the past.”) <http://www.authorama.com/free-culture-1.html>

3. Verner Vinge, *The Coming Technological Singularity: How to Survive in the Post-Human Era* (1993). <http://www.rohan.sdsu.edu/faculty/vinge/misc/singularity.html> (“The acceleration of technological progress has been the central feature of this century. I argue in this paper that we are on the edge of change comparable to the rise of human life on Earth. The precise cause of this change is the imminent creation by technology of entities with greater than human intelligence.... I believe that the creation of greater than human intelligence will occur during the next thirty years.... From the human point of view, this change will be a throwing away of all the previous rules, perhaps in the blink of an eye, an exponential runaway beyond any hope of control.” (emphasis added)).

4. *Google and the Mind of God*, Touchstone Editors. http://merecomments.typepad.com/merecomments/2006/02/google_and_the_.html

5. http://news.cnet.com/8301-1023_3-10397787-93.html

to the Google Books settlement.⁶ Many professional groups in the U.S., including the Association of American Publishers, the Association of American University Presses, and The Authors Guild have openly criticized Google's Print for Libraries program as "a plain and brazen violation of copyright law."⁷ Concerned artists and others involved in this ongoing creative rights struggle feel that this project represents a massive and unconscionable copyright infringement by Google. Additionally, they feel that it should not be up to Google or any other party to decide when, whether, and how an author's work will be copied.

It should come as no surprise, then, that those artists' rights should be considered as being human rights.

Artists' Rights Compared to Intellectual Property

It is important to distinguish between artists' rights and intellectual property (IP) rights. Artists' rights transcend intellectual property. IP rights, such as copyright, are typically licensed or assigned by the creator to a media company (such as a print publisher or record company), which then owes the creator a royalty or other payment. Only then can the media or publishing company use the work within the scope of these granted rights. "Artists' rights," however, are more expansive than legal rights. Artists' rights relate to the broader protection of the human, moral, and material interests of any authorship, be it artistic, literary, or scientific.

Intellectual property laws are typically crafted following extensive lobbying efforts by large companies and groups on both sides of the issue. Professional creators are generally not represented in these largely legislative processes and mobilizations.

During the mid-to-late 1990s, computing hit a spike as a mass-market enterprise with the rise of the personal computer, particularly when it became apparent that a lot of money could be made from selling peripheral computer devices. Some of these peripherals were essentially networked compact disc duplicators with a portable pod. This began in 1998 with the introduction of the Diamond Multimedia MP3 player, called the "Rio." 1999 was roughly the time that storage capacities of standard issue internal hard drives became very large by comparison. This was not because the computer was being used to save Grandma's favorite recipes or Aunt Dotty's quilting patterns, but rather to accommodate an ever-growing demand for electronic file and media storage.

Right about this same time, a new voice struggled to be heard at the table — that of "the consumer." It was the consumer who wanted to use the networked CD duplicators to tap into the MP3 cloud of largely unauthorized music made available from file sharing enterprises like Napster, Grokster, Kazaa, and Morpheus. This was arguably one of the main factors in the sale of more capable computers, larger capacity hard drives, broadband Internet access, and off-desktop media devices. All creators were struck by these developments.

Because U.S. Government progress relating to intellectual property matters was painfully slow, private industry was essentially forced to do the job that some world governments are now undertaking. This pitted industry groups against the consumer electronics industry, and against what some believe are essentially front groups.⁸ These front groups have been frequently energized by the unifying ideology of Lawrence Lessig (or a pastiche or "remix" of those theories) and the complicit communities of "file sharing" networks, where the disaffected found a home.⁹

Curiously, the messaging of these anti-creator groups typically tried to pit "consumers" or "follow-on creators" against Hollywood or "Big Media." Creators are rarely ever mentioned, except either the "rich" ones, thus extending the wedge, or the "follow on" artist,¹⁰ or "remixer," who simply manipulates (usually unauthorized) works into new, but essentially regurgitative works.¹¹ There are no hard statistics available, but it probably would be safe to say that these two categories exclude a very high proportion of professional creators, who are excluded from the debate.

Yet only a Pollyanna ignores the influence of this wedge messaging, with what is widely called the "copyleft," and their academic, journalist, and policy maker allies. These "copyleft" supporters deny that they oppose copyright—they claim to support copyright and to want to compensate creators. However, they propose to help creators by shortening copyright protection from life-plus-70 years to a single 5 or 10-year term,¹² while at the same time working to undermine the ability of creators to enforce their rights. The reader can determine if these proposals are serious threats, or merely designed to tip the balance in favor of the machine—and its manufacturers.¹³

The human rights of artists are not directly addressed by current opponents of artists' rights. Opponents, such as the noted Harvard Law School academic and lobbyist Lawrence Lessig,¹⁴ may point to passages in their writings,¹⁵ wherein they indicate

6. <http://www.publishers.org/main/Copyright/Google/Release.htm>

7. http://news.cnet.com/Authors-Guild-sues-Google-over-library-project/2100-1030_3-5875384.html?tag=mncol;txt or http://www.businessweek.com/bwdaily/dnflash/may2005/nf20050523_9039.htm

8. Andrew Orłowski *Circular Awards 2009 - now with added Astro turf: Where Freetard honours Freetard* (August 7, 2009). http://www.theregister.co.uk/2009/08/07/circular_awards/

9. One of the "benefits" of the Internet is that it provides an opportunity for people to meet, who previously may have only encountered each other in places like Death Row.

10. Rick Carnes, *Public Knowledge at Odds with Songwriters* (March 24, 2010). http://www.huffingtonpost.com/rick-carnes/public-knowledge-at-odds_b_511678.html

11. In certain cases, such as with medical illustrations, "remixes" can be actually dangerous to the public, a fact never addressed by "consumer" groups.

12. Andrew Orłowski, *Freetards Storm Westminster* (March 25, 2010). http://www.theregister.co.uk/2010/03/25/org_demo_photo_album/

that artists should be fairly compensated. What's "fair" is, of course, a question to be answered in another paper; but suffice it to say that the use of "fair" in these cases hardly ever involves allowing artists to set prices for their works, nor does it support any rigorous protection against "what the industry calls 'piracy.'"¹⁶ It is of interest, though, that even the most radical critics of artists' rights seem to feel the need to justify the positions they take. They surely must know that their collective message is being used by the complicit community of networked infringers as a unifying ideology. This ideology is used by the mob to justify the massive, unprecedented theft of artists' property and infringement of artists' rights.¹⁷

These pro and anti-copyright discussions frequently revolve around the intellectual property rights accorded to creators by law that may be licensed (wherein the grant of rights by the creator is narrow)¹⁸, or assigned by creators to media companies. These intellectual property rights are nation-specific, but are frequently governed by international treaties or agreements. Because intellectual property is by definition the property of the mind wherever the rights finally come to rest, be they with J.D. Salinger or Microsoft, these rights are also inextricably intertwined with other rights that are more universal — the human rights accorded to creators. The debate regarding limitations on intellectual property often confounds the rights of individual creators with intellectual property rights. It is relatively simple manipulation to incite a mob against a multinational corporation over "what the industry calls 'piracy.'" It might not be quite so easy if the mob were told that the purpose of their digital riot was to injure individual creators over what *the courts* call "piracy."

As Jaron Lanier says, "17 years into the Internet and 10 years into Web 2.0, we are losing a generation [of professional artists]... There is no shame in having a radical idea. There *is* shame in failing to recognize that it has failed."¹⁹

There is also shame in failing to protect the human rights of artists against "what the industry [and the courts] call 'piracy.'" I will leave it to the reader to decide whether what has happened to the lost generation of creators rises to the level of a legal atrocity. Even if you would not go quite that far in your thinking, it is difficult not to agree with Lanier that what "hive mind" mentality has done to artists is certainly shameful.²⁰

Sources of Artists' Rights

The human rights of artists are clearly articulated in international law. These rights resonate in a number of documents, but a good starting place is the International Covenant on Economic, Social and Cultural Rights that was ratified by the United Nations General Assembly on December 16, 1966.²¹ The Covenant speaks to the transcendent human rights belonging to individuals—individual artists in our case.

The Covenant recognizes everyone's right, as a human right, to the protection *and the benefits from the protection* of the moral and material interests derived from any scientific, literary, or artistic production of which he or she is the author. This human right itself derives from the inherent dignity and worth of all persons.²² The Covenant recognizes these rights of artists (in article 15, paragraph 1(c): "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author.")

These human rights are transcendent and timeless expressions of fundamental entitlements of humanity that safeguard the personal link between authors and their creations, as well as their basic material interests. These rights are personal to the authors and artists concerned, and are arguably of broader scope than the rights that can be enforced under particular national intellectual property regimes.

13. The term "copyleft" itself appears to attribute a "progressive" element to one of the most widespread persecutions of professional creators in history. Professional creators and their supporters, who are also progressives, frequently find this association uncomfortable and manipulative. The term "copyleft" is thus rather meaningless, and will be discarded in favor of "anti-copyright," which is more accurate.

14. <http://www.change-congress.org>

15. Lester Lawrence Lessig III, *The Solipsist and the Internet (a Review of Helprin's Digital Barbarism)* (May 20, 2009). http://www.huffingtonpost.com/lawrence-lessig/the-solipsist-and-the-int_b_206021.html ("Moreover, nothing in what I've written supports what the industry calls 'piracy.'")

16. *ibid.*

17. Joint Statement of the American Federation of Television and Radio Artists, the Directors Guild of America, the International Alliance of Theatrical and Stage Employees and the Screen Actors Guild. <http://www.aftra.com/72FBB69E88F944C1B8F4765C7BDC5380.htm>

18. A narrow granting of rights would be along the lines of "first publication rights in North America" in the case of book publishing, or administration rights in a song where the songwriter retains 100% copyright ownership but pays an administration fee to a music publisher. Following the introduction of the Kindle, many print publishers found that they did not acquire digital distribution rights in their print publication agreements with authors.

19. Jaron Lanier, "Why Computers Won't Replace Us." <http://www.zocalopublicsquare.org/thepublicsquare/2010/01/29/jaron-lanier-on-why-computers-wont-replace-us/>

20. There seems to be a general belief among "hive mind" advocates that "crowd sourcing" art is a way to success. Lanier compares this kind of thinking to American Idol writ large. "More people appear to vote in this pop competition than in U.S. Presidential elections, and one reason for this is the instant convenience of information technology. The collective can vote by phone or by texting, and some vote more than once. The collective is flattered and it responds. The winners are likable, almost by definition. But John Lennon wouldn't have won. He wouldn't have made it to the finals. Or if he had, he would have ended up a different sort of person and artist. The same could be said about Jimi Hendrix, Elvis, Joni Mitchell, Duke Ellington, David Byrne, Grandmaster Flash, Bob Dylan (please!), and almost anyone else who has been vastly influential in creating pop music." Jaron Lanier, *Digital Maoism* (May 30, 2006). http://www.edge.org/3rd_culture/lanier06/lanier06_index.html

21. <http://www2.ohchr.org/english/law/cescr.htm>

22. A theme echoed by Jaron Lanier in his book, *You Are Not a Gadget: A Manifesto* (2010), Alfred A. Knopf, publisher.

23. <http://www.un.org/en/documents/udhr/>

The human rights of authors are also recognized in other international agreements, including article 27, paragraph 2, of the Universal Declaration of Human Rights.²³ “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author;” article 13, paragraph 2, of the American Declaration of the Rights and Duties of Man of 1948;²⁴ article 14, paragraph 1(c), of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988;²⁵ and article 1 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.²⁶

These precedents clearly enunciate the goals of the international community. The Covenant is closely linked with the right to own property (recognized in article 17 of the United Nations’ Universal Declaration of Human Rights) and workers’ rights to adequate remuneration.²⁷ The “material interests” protected by the Covenant are protected under the right to an adequate standard of living.

These moral rights include the right of authors to be recognized as creators of their works and to object to any modification of their works that would be “prejudicial to their honor and reputation.” The protected interests of artists include the right to just remuneration for their labor, as well as the moral right to the “intrinsically personal and durable link” between creators and their creations that survives *even after the passing of the work into the public domain*. This rule will no doubt come as a shock to those wishing to sell consumer electronics devices to the “remix culture” bent on perpetuating regurgitative “art.”

The Obligation to Protect Artists’ Human Rights

Of course, it is not enough that the United Nations’ General Assembly merely recognize these rights of artists in a number of its international agreements; the member countries should undertake the affirmative obligation to protect these rights of authors. Those protections include adequate legislation and regulations, as well as making effective administrative, judicial, or other appropriate remedies available to authors within each

jurisdiction. Access to such remedies must be affordable; violations of moral rights cannot be remedied if only the rich can enforce their rights.

Enforcing human rights is often met with the cry of “Don’t be moral” from “Big Tech,” particularly from certain authors employed by Big Tech companies.²⁸ Anyone who takes seriously the international human rights of artists will find “Big Tech’s” dismissive use of the term “moral panic” to be deeply offensive to professional creators.²⁹ It is Orwellian to describe as a “moral panic” an allegation of immorality being associated with massive illegal Internet downloading that deprives creators of their ability to pursue work, which they freely chose, and remuneration for that work enabling them to achieve an adequate standard of living.

Conclusion

Protecting artists’ rights as human rights has nothing to do with intellectual property laws that apply to corporations, nor does it have anything to do with superstars. All artists, authors, and musicians are deserving of this most basic protection. The human rights of a national artist in the smallest country should be equal to those of any superstar.

It is not a moral panic to identify the humanitarian dimension in losing a generation or more of artists—it is morally required.

Author

Chris Castle is Managing Partner of Christian L. Castle, Attorneys, with offices in Los Angeles and San Francisco. His clients include artists, producers, motion picture and television studios, as well as technology companies. Chris also consults regarding public policy matters, such as orphan works and net neutrality. Mr. Castle received his Juris Doctor, Master of Business Administration, and Bachelor of Arts, *magna cum laude*, from UCLA. While attending law school he was twice awarded an Olin Fellowship in Law and Economics, and was a member of the *UCLA Law Review*. Chris is a member of the advisory board of the Austin Music Foundation (in Austin, Texas), and co-chair of the legal committee of the American Association of Independent Music. Mr. Castle writes an occasional column on intellectual property issues for *The Register* and the *Los Angeles Daily Journal*, as well as the Music Technology Policy Monthly and the musictechpolicy.com blog found at: <http://www.musictechpolicy.com>
clcasst@christiancastle.com

24. http://www.hrcr.org/docs/OAS_Declaration/oasrights.html

25. <http://www.cidh.oas.org/Basicos/English/basic5.Prot.Sn.Salv.htm>

26. <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

27. <http://www.un.org/en/documents/udhr/>

Not surprisingly, the AFL-CIO has expressed similar sentiments in the “net neutrality” comments and rulemaking procedure in 2010: “The AFL-CIO fully supports entertainment workers, and stands behind them in the fight against the theft of the products they work on and create.” See *AFL-CIO Executive Council Unanimously Supports Anti-Piracy Measures* (March 2, 2010). <http://www.sag.org/press-releases/march-02-2010/afl-cio-executive-council-unanimously-supports-anti-piracy-measures>

28. See, e.g., William Patry (“He is the most prolific scholar of copyright in history”) *Moral Panics and the Copyright Wars* review. <http://www.oup.com/us/catalog/general/subject/Law/IntellectualProperty/IntellectualProperty/?view=usa&ci=9780195385649>; compare Thomas Sydnor (book review), *Moral Panics and the Copyright Wars: A Worthless Book*. http://blog.pff.org/archives/2009/10/moral_panics_and_the_copyright_wars_a_loathsome_bo.html

29. “What’s to stop an online mass of anonymous but connected people from suddenly turning into a mean mob, just like masses of people have time and time again in the history of every human culture? It’s amazing that details in the design of online software can bring out such varied potentials in human behavior. It’s time to think about that power on a moral basis.” Jaron Lanier, *Beware the Online Collective* (December 25, 2006). http://www.edge.org/3rd_culture/lanier06/lanier06.2_index.html