

## COPYRIGHT: PROSPECT VERSUS CAPTURE

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In his 1977 article, *The Nature and Function of the Patent System*, Edmund Kitch argued for understanding broad patent rights as a mechanism to promote the efficient development and exploitation of an invention after its discovery, rather than an incentive to motivate earlier discovery of the invention. This shift, from viewing patents as a mechanism to ensure efficient *ex post* exploitation rather than *ex ante* incentive, proposed a radical re-conception of patent rights. Kitch sought to justify his approach through an analogy to the common pool problem associated with the exploitation of natural resources. Absent legal limits, competition among firms to develop a newly discovered common pool of natural resources, whether oil and gas or a fishery, can lead to inefficient races to exploit the newly discovered pool. Competitors drill too many wells, or operate too many fishing vessels, in order to capture a larger share of the common pool for themselves. The resulting races to exploit both reduce lifetime production from the common pool – less oil and gas produced, fewer fish caught – and increase the cost associated with the resources captured. For natural resources, legal intervention, such as pooling and unification in oil and gas exploration or licensing for fishing, both: (i) reduced the tendency for inefficient races to exploit; and (ii) promoted the more efficient exploitation of the natural resource in question. Kitch argued, by analogy, that races to exploit a newly discovered invention could create similar inefficiencies. Competitors would rush to develop improvements and variations on the original invention, and thereby convert what would otherwise have been surplus into cost. To prevent this, Kitch argued that granting an early and broad patent right over a new discovery could reduce these inefficiencies and promote the more efficient exploitation of the invention. Granting a broad initial patent would empower the initial patent-holder to coordinate and control the pace and direction of the invention's future exploitation and development. Broad patent rights would thus tend to maximize the social surplus associated with any given invention *ex post*, or so Kitch argued.

While normatively controversial, Kitch's analogy provided a descriptively valuable attempt to explain several features of the patent system, including *inter alia* the system's encouragement of early filing and the historical breadth that the courts and the Patent Office gave some pioneering patents. In this paper, I attempt to extend and explore the prospect theory to copyright. Just as the prospect theory accurately described the historical approach to pioneering patents, the approach also accurately describes the broad present reach of copyright regulation for many works of authorship. Write a fictional book that proves popular, and copyright prohibits, not only reproducing the literal text of that book, but essentially any copying at all. Unless the copyright owner consents, using the same characters or the same setting that the first book introduced to tell new stories is strictly prohibited. Indeed, under today's copyright law, nearly

everything that could come out of the first book is set aside as the original copyright owner's exclusive preserve – to develop and explore, or not, as they see fit and in their own due time. As with broad pioneering patents, justifying this broad copyright scope from an *ex ante* incentives perspective is difficult. If Kitch's analogy to the common pool problem in natural resources holds, it may provide a more persuasive justification for copyright's current broad scope. Copyright grants broad protection not to guarantee rents for the original copyright owner – the expectation of which become an *ex ante* incentive to write a popular novel. Rather copyright grants broad protection as a means to control and prevent *ex post* inefficient races to exploit the novel, through sequels and derivative works, such as films.

Despite the prospect theory's descriptive value, it presents a number of normative difficulties. Among others, it may merely shift inefficient races from the follow-on stage, seeking to improve an existing discovery or to create a film from a popular novel, for example, to the initial discovery or writing stage. More importantly, however, it overlooks fundamental differences between invention and authorship, on the one hand, and the common pool natural resources problem, on the other. First, and most obviously, the supply of a natural resource, whether oil and gas, or fish, is finite and limited in a way that discoveries and writings are not and will never be. The problem with overfishing is not mere rent dissipation but that society will run out of fish. There is no similar problem in patent or copyright. If we allow everyone to write Sherlock Holmes stories, there is no natural limit to the number of stories that can be told. Kitch's analogy is therefore built on a flawed foundation. Second, and relatedly, with the natural resource, the race yields faster production of a consistently uniform resource – the same fish, but sooner; the same oil, but sooner. That is not true with discoveries and writings. Allowing more people to write Sherlock Holmes stories does not lead to more of the same stories, but to a wider variety of stories. Similarly, with respect to patentable discoveries, we may see considerable variation in an invention's development over time, if permission is not required to develop and market those improvements.

Nevertheless, even if there is no natural limit on the number of, or variations in, Sherlock Holmes stories, there may be, given the distribution technology available and the nature of consumer demand, an economic limit on the number of stories that can be profitably told at any given time. It may even be that the cost structure of the distribution technology and the nature of consumer demand is such that only one such follow-on work can profitably be distributed at any given time. In such a case, where the economics of authorship create a natural monopoly, a broad, prospect-based scope for copyright regulation may make sense. The economics of authorship would already limit the public to only one follow-on work at a time in any event. A broad, prospect-based copyright regulation would not change the number of follow-on works. It would merely ensure that the one follow-on work that the public will receive in any event is the one that the original author writes, or at least, authorizes. It would also give the original author the time and

leeway to perfect the follow-on work before releasing it, without fear that a third-party would sweep in and satisfy the consumer demand with an unauthorized derivative. To the extent that the public would prefer, on average, the one authorized follow-on work, rather than whatever happened to be the quickest unauthorized follow-on work to reach the market, a broad prospect-based copyright would tend to promote efficient *ex post* exploitation of the initial work, or so the argument would go.

From an empirical perspective, a plausible argument can be made that such natural monopoly factors were commonplace in the analog distribution era. In the analog era, the cost structure and consumer demand for movies may have meant that only one profitable film based upon a novel, for example, could be made and distributed at a time. If so, that natural monopoly character might have justified a broad, prospect-based copyright during the analog era. If we are going to get only one film version in any event, consumers, arguably, would be better off if it is the version that the novel's original author writes or authorizes, rather than whichever film version is fastest to the theaters.

Yet, digital technologies have fundamentally changed the economics of authorship. In the analog era, only the privileged few could share their music, written words, photographs, and videos with the many. Today, in the digital era, anyone can. This change in the underlying economics suggests a need to revisit copyright's currently broad scope. If we can have, as a matter of economics, many Sherlock Holmes follow-on works, why limit ourselves, through law, to only one or to the few that the original author or copyright owner chooses to allow? Just as prospect-theory provided a property-based analogy for the broad copyright of the analog era, other property-based theories, specifically, capture and possession, provide property-based analogies for a sharply narrower conception of copyright more appropriate to the economics of the new digital era. These alternative property frameworks would extend copyright protection only to precisely what an author has captured or possessed: the exact, literal work itself. Under this approach, the right to reproduce the work, *A Study in Scarlet*, assuming it were still within copyright, would be infringed only by an exact, literal copying of the work, as the statutory language states. Such a capture-, or possession-, based approach to copyright would leave others free to explore their own creativity by telling their own Sherlock Holmes stories without waiting for the copyright term to expire. When other authors had done so, they too would capture and possess, and thereby earn a copyright in, their own Sherlock Holmes mysteries. But just as the original author's capture-based copyright was narrow and covered only the author's precise, literal story, so too the copyright on these follow-on stories. Each would have their own copyright, but only a very narrow one, to leave room for even more follow-on creativity.

Under today's copyright regulation, we have to wait for the copyright in *A Study in Scarlet* to expire to achieve such creative competition. But with that copyright's expiration, we can see how a sharply narrower, capture- or possession-based copyright is both viable and seemingly socially optimal from an *ex post* perspective in today's digital

world. Over the last two decades, even if we limit ourselves to professionally produced, film or television broadcast Sherlock Holmes stories in the English language, we find, at least, three offered more or less simultaneously. Robert Downey Jr. starred as the titular character in a pair of movies, *Sherlock Holmes* and *Sherlock Holmes: A Game of Shadows*, released in 2009 and 2011, respectively. Benedict Cumberbatch starred as the titular character in four seasons of a BBC series, *Sherlock*, with the first season released in 2010. Jonny Lee Miller starred as the character in CBS television series, *Elementary*, that aired for seven seasons, beginning in 2012.

Without copyright impeding the process, the economics of both creating and distributing these audiovisual works in this digital age is such that multiple, competing follow-ons, each with the highest level of investment in, and quality of, its production, can occur. If there ever was a natural monopoly problem, that arose from the economics of authorship and the nature of consumer demand on their own, that natural monopoly problem exists no longer.

From a social welfare perspective, consumers are undeniably better off having a variety of high-quality productions of Sherlock Holmes from which to choose. Each consumer can watch the follow-on work that best matches their own preferences. Or if they are a die-hard Holmes fan, they can watch all three. It may be that competition from the other Holmes follow-on works limits the monopoly rents any one can capture, but if so, that is not undesirable rent dissipation. Rather, it is the ordinary and entirely desirable result of competition. The rent is not dissipated, but merely converted from producer surplus into consumer surplus. Moreover, as competition does generally, the expiration of the copyright in the original work and the concomitant introduction of competition into the market for Holmes follow-on works likely reduced the deadweight losses associated with what copyright had theretofore ensured remained a monopoly and thus increased total surplus as well.

With the changing economics of authorship, we should no longer have to wait for copyright to expire for such creative competition to occur. To ensure that copyright leaves room for creativity to flourish, we should use analogies to capture and possession to redefine and sharply narrow copyright's regulatory reach. Under this approach, copyright would follow the literal definition of its statutory scope and only prohibit verbatim, literal, or exact reproduction of the entire work. Reuse of characters or settings or other substantial parts of a copyrighted work on their own or to tell new stories, without the original copyright owner's supervisory control, would not only be allowed; it would be celebrated. By redefining and narrowing copyright, we would let creative freedom reign.

This article explores these issues.