Copyright with an International Perspective for Academics

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INTRODUCTION

He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. (Jefferson, 1813)

Copyright has emerged in the 21st century as one of the hot topics reported on regularly by media. Hardly a month goes by without discussion about the impact of the Internet, in particular on the intellectual property rights of publishers and by implication the creators of content that they ostensibly represent. People who make digital copies of various types of media are cast as the new "pirates" of the digital frontier, often with quite extreme rhetoric:

No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. Today's pirates operate not on the high seas but on the Internet, in illegal CD factories, distribution centers, and on the street. The pirate's credo is still the same—why pay for it when it's so easy to steal? The credo is as wrong as it ever was. Stealing is still illegal, unethical, and all too frequent in today's digital age. (RIAA, 2003)

Most teachers could be forgiven for thinking that copyright, as with other forms of intellectual property protection, is something that has little relevance to their teaching. However, the increasing use of digital materials by teachers and by students, as well as the perception of the Internet as a vast source of freely usable content, means that some familiarity with the operation of copyright is now essential. Institutions' growing interest in maximizing the return from content created by teachers in their employ is changing the culture of free exchange and collegiality that has been common in many fields.

BACKGROUND

Copyright has, from its earliest inception, been used to provide a way of controlling and limiting the ways in which ideas are expressed and communicated. Initially English copyright was controlled through the use of royal charters, with the British Queen, Mary Tudor, granting in 1557 a monopoly that lasted until 1694 to the Stationer's Company in return for their cooperation in suppressing and censoring texts that did not support the monarchy and Catholicism. This was not a new concept, and similar legal controls were established much earlier in European countries as printing technologies became established (Rose, 1993).

In the American colonies, the rights to publish were controlled through a combination of printing cartels and colonial government licenses. The Massachusetts colonial government was the first to pass a copyright statute in 1673, but this was not widely adopted as an approach given the tight control of existing measures.

Authors, as the creators of works that could be protected by copyright, were prominently acknowledged in the 1710 Statute of Anne: "An act for the encouragement of learning…for the encouragement of learned men to compose and write useful books" (British Library, p. 261).

This was essentially an expedient gloss to a statute that was really intended to regulate publishing (Goldstein, 2003) in much the same way as the original Royal Charter that had lapsed in 1694. A principal beneficiary was the publishing industry that regained a valuable 20-year monopoly on their existing stock.

The limitations of copyright as practiced by the monarchy were recognised by the framers of the United States Constitution, some of whom expressed concern at the way in which the laws could be used to limit freedom of expression. Despite this, the 1787 constitutional convention added the clause, "The Congress shall have the Power…to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" unanimously and without significant debate, and this was followed quickly in 1790 by the first United States copyright act described as an "act for the encouragement of learning" (United States Constitution, Sec. 8, Cl. 8).

Jefferson expressly recognised that the creation of new ideas was founded on the ability to learn from the work of others, as observed in the quote at the beginning of the introduction. The monopoly potential offered by copyright was also identified by Jefferson as being entirely at the discretion of the legislature:

Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody. (Jefferson, 1813)

United States Supreme Court Justice McLean noted this in 1834 when he found that copyright was not founded in common law, and that a perpetual intellectual property right was not in the public interest. The limitations of the older laws were also recognised in the United Kingdom during the 19th century with a series of statutes including the United Kingdom Copyright Act of 1842, which for the first time described copyright as a property right and assigned it to the author for 42 years from the date of publication, or the life of the author plus seven years, whichever was the greater.

During the 19th century, the national focus of statutes protecting copyright resulted in the interesting situation whereby imported works could be purchased in the United States for substantially less than the cost of local works. Far from being decried, this situation was initially lauded by authors like Mark Twain:

My notions have mightily changed, lately. Under this recent and brand-new system of piracy in New York, this country is being flooded with the best of English literature at prices which make a package of water closet paper seem an "edition deluxe" in comparison.…I can buy a lot of the great copyright classics, in paper, at from three cents to 30 cents apiece. These things must find their way into the very kitchens and hovels of the country. A generation of this sort of thing ought to make this the most intelligent and the best-read nation in the world. (Twain, 1880)

His position changed later in life however, and Mark Twain wrote a number of passionate articles aimed at getting better copyright protection for authors and publishers. Ultimately, the United States agreed to an international copyright treaty in 1891 that provided some protection for international and local authors. The history of copyright, particularly in the United States, is covered in detail in Goldstein (2003), who discusses many of the key legal and political developments.

The 20th century has seen a change in focus. The key issues have been the length of the term works are protected for, the drive for greater protection of works in international jurisdictions, and the impact of new technologies.

The Statute of Anne defined a term of protection of 28 years for authors and 20 years for works already being published for the publishers. Over the past 300 years, this coverage has been extended in different jurisdictions by different amounts. Some of these term extensions depend on affixing a copyright notice incorporating the © symbol; this is not, however, now a requirement for works to be protected internationally. The changing coverage term and differences between countries have combined to make determining whether or not a work created after 1923 is still under copyright protection very difficult; indeed, some works have passed into the public domain and then been retroactively protected in some jurisdictions (Lindsey, 2003, includes a helpful table for the United States). This steady growth in the length of the monopoly and the associated erosion of the public domain have not been without their detractors. The 1998 Sonny Bono Copyright Term Extension Act attracted considerable negative comment when it extended the term of