Copyright and Authors

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Abstract: For the past several hundred years, publishers have promoted a simplistic view of copyright. Copyright is a matter of fairness to authors, they argue. Authors own their creations and therefore should be free to control them. But the history of copyright and its underlying philosophy contradicts that simple view. Copyright is *not* about fairness to authors; copyright is about balancing interests, including the interest of the public. This article provides a (very!) brief history of copyright and its philosophy in order to show that the publishers' simple view is inaccurate, and suggests that understanding copyright's nature is the first step to solve the problems of copyright in the modern world.

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For three centuries, publishers have touted the virtues of copyright and the need to protect authors. Authors must be treated fairly, they say. Authors must be rewarded for their work. And copyright is the tool by which publishers can do this. The benefit to publishers is incidental.

The argument is illustrated clearly in a recent article by Peter Givler, the Executive Director of the American Association of University Presses (Givler, 2003). The essay has the title "Copyright: It's for the Public Good." In his essay, Givler is condescending. ("The academics and librarians I know are smart, interesting, delightful people, but they do have some peculiar ideas about copyright.") He is a little smug. ("I think I understand academic values well enough, and the challenge of trying to make this scholarly publishing business serve those unbusinesslike ends has made my career interesting...") And he is sometimes misleading. ("Shakespeare, whose works are so well known, yet whose texts exist in so many versions, furnishes an instructive example of the perils of authorship before copyright."[1]) He ends his essay with a rousing declaration that paraphrases Supreme Court Justice Ruth Ginsburg to say copyright is "good law precisely because it is such a powerful force for public good."

Of course, some aspects of copyright *are* good, both for authors and for the public. Without copyright, publishing would fall into anarchy, as it has at certain times in the past. Large parts of our modern world—literature, movies, and music—depend on copyright. Even esoteric scholarly publishing depends on copyright (in spite of recent suggestions to the contrary by some ill-advised members of Congress who want to do away with copyright for all federally funded research). But copyright is not *for* authors, and copyright is not *about* fairness. Copyright is a complex system of laws and traditions, created to balance the rights and interests of three groups involved in publishing—authors, publishers, and public.

Not so, writes Peter Givler. He claims that copyright is simple and self-evident:

> "Words are things. Copyright is a specialized form of property law that recognizes that works of original expression belong to the person who created them. Today that doesn't seem very remarkable; we hardly give it a thought." (Givler, 2003)

[1] While the performance of a play was not copyrighted in time of Shakespeare, the published play was indeed covered by the Stationers Copyright (see below.) The performing company, not the author, owned the work. And the suggestion that the lack of copyright is the reason for multiple versions of Shakespeare's plays is disputed by scholars, who point out that scripts of that day were not as much like published books as documents on the Internet, undergoing continual change.

Oh? There are plenty of people who give it some thought, and they are not merely Givler's "delightful" academics with "peculiar ideas about copyright". The notion of intellectual property is *not* self-evident[2]. The conceit that copyright was intended to protect authors evolved over centuries. The notion of intellectual property evolved as well, promoted by people with complicated motives. The laws that govern copyright have changed dramatically over time and differ dramatically by location. Copyright is neither simple nor self-evident.

Copyright is also neither inherently good nor inherently evil. But even the most casual observer can see that something is wrong with copyright. Today's copyright laws and traditions are dissonant with modern culture and technology, and the dissonance has become more and more apparent in the past few years. If we want to adapt copyright to our modern world—if we want to protect the good aspects of copyright—we need to do more than repeat slogans about fairness and protecting authors. We need to learn something of copyright's nature in order to understand how to solve its problems.

Some History

The notion of copyright begins in England where it evolved following the introduction of the printing press at the end of the 15th century. As book publishing and selling (activities that were not readily distinguished from one another at the time) became profitable, the stationers (publishers) sought ways to protect their trade. The "stationer's copyright" gave a particular member of the Company of Stationers the right to copy a particular work. It was awarded and enforced by the Company. Lyman Ray Patterson describes the purpose in his book on the history of copyright:

> "The stationer's copyright was literally a right to copy—that is, a right to reproduce a given work for sale. The basic purpose of this right was to provide order for the book trade by establishing a method to enable publishers to have the exclusive right to publish a work without competition as to that work. And the sanctions for copyright came from the company, for it was the company, not the author, which granted the copyright. From the stationers' viewpoint, copyright was protection against rival publishers, not against authors..." [3]

Since authors were not members of the Company, authors could not hold the copyright. Copyright was perpetual.

During the course of the 17th century, copyright became intertwined with politics and censorship. The Company of Stationers, which received its legitimacy from a royal charter, rode through the turmoil of the civil war and restitution of the crown, but the previous arrangements to bring order to the trade slowly changed into arrangements to control the press. The Licensing Act that governed the book trade expired in 1692 and the

[2] In China and most Asian countries there is no tradition of owning creative expression (Committee on Intellectual Property, 2000, p. 57).

[3] (Patterson, 1968, p. 71)

House of Commons refused to renew it. There were many reasons, but one of them was the belief that the Stationers had abused their monopoly.

Chaos ensued. The book trade went from a tightly regulated enterprise to a wide-open free-for-all. The stationers petitioned Parliament for relief, and it finally came in 1709 with the Statute of Anne. The outcome wasn't exactly what the stationers wanted.

The Statute of Anne was an attempt to restore order to the book trade and, at the same time, to address perceived abuses by the stationers. It provided two kinds of copyright. For past works, it extended the stationer's copyright for a period of 21 years. For future works, it gave the author (or any assignee!) the exclusive right to print the work for 14 years, with the stipulation that the right could be extended by an author for another 14 years. There are two important points here. First, the statute allowed people outside the Stationer's Company to hold the copyright (although it was the assignees rather than the authors who normally held it). Second, the statute attempted to break the monopoly of the stationers by limiting the term of copyright—a radical change for the stationers, who until then had enjoyed perpetual copyright.

The booksellers were outraged. While the statute restored order to the trade, it also fundamentally changed the nature of their monopoly. A copyright that expired meant a decrease in its value, as well as an increase in risk. The booksellers fought back.

The battle would last for the next 65 years, and soon the booksellers' strategy became evident: Use the authors as a tool. Here is the line of reasoning. If authors own the works they create, then they have the same rights as any property owner. Ownership is perpetual (hence copyright is forever). Ownership is transferable (hence copyright can be given to publishers). The limitations of the Statute of Anne are therefore circumvented: Copyright is once again perpetual, *using the authors as an intermediary*. The strategy was therefore to argue that authors had a natural right to ownership as part of common-law[4].

The subsequent maneuvering from 1710 to 1774 makes fascinating reading[5]. There were bills passed and defeated in Parliament, multiple landmark court cases (some of them collusive) won and lost, and a passionate bitterness that permeated almost every debate on the subject of copyright. The battle culminated in a single court case (*Donaldson v. Beckett)* that was appealed to the House of Lords and settled in 1774. The ruling was both a victory and a defeat for the booksellers. It stated that authors did indeed have a common-law copyright in their works, giving them or their assignees a perpetual monopoly. The booksellers rejoiced. On the other hand, it further stated that the Statute of Anne superseded that common-law copyright with a *statutory* right (legislated law) and that the limitations of that statute applied to copyright.

[4] Common-law is the system of law derived from judicial decisions. Civil law is derived from legislative statute. Countries distinguish their legal systems as predominantly one or the other of these systems, which may profoundly affect copyright law.
[5] (Patterson, 1968, pp. 151*ff*)

The battle was over. The booksellers continued their attempt to legislate changes in copyright, but public opinion seemed to be firmly behind the idea that copyright was governed by statute and that a perpetual monopoly was not in their interest.

Although *Donaldson v. Beckett* was viewed as a defeat for the booksellers, it was also a subtle victory. The ruling established the principle that authors had a common-law right to own their work (even if the right had been taken away by statute). Copyright became an *author's* right—one that, in principle, could be assigned to other people. These were ideas that played out during the next two centuries.

Some Philosophy

Copyright continued to change, often driven forward by the call for author rights. And nowhere were author rights more embedded in the notion of copyright than in France.

During the mid-eighteenth century, French copyright was both a tool for control of literature and a system of trade agreements—just as it had been a century before in England. Copyright was perpetual, administered by powerful guilds but increasingly regulated by the crown (much to the displeasure of the guilds). But while the stationers in England used legal challenges to the Statute of Anne, the French used philosophy.

When the Paris Book Guild saw its literary privilege threatened by the royal Administration of the Book Trade, the guild hired the great encyclopedist, Denis Diderot, to write a treatise that defended the guild's right to literary property. Ideas, wrote Diderot, were the highest form of property because they were so closely associated to the individual *who created them*. "What form of wealth *could* belong to a man, if not a work of the mind … if not his own thoughts, … the most precious part of himself, that will never perish, that will immortalize him?"[6] This was the strongest possible form of an "author's copyright," grounded in epistemology rather than finance. It was based on high moral principles, glorifying the rights of individuals and their creative intellect. It was written at the request of a guild—the publishers of Paris.

Of course, there were opposing philosophical arguments. For over 100 years, intellectuals had argued that the enlightenment was grounded on the free exchange of ideas—ideas that belonged to the world and not to the individuals *who discovered them*. This was a view eloquently expressed in 1776 by the marquis de Condorcet. Individuals could not own ideas as they did property, he argued. "There can be no relationship between property in ideas and that in a field, which can serve only one man. [Literary property] is not a property derived from the natural order …It is not a true right, it is a privilege."[7] As a consequence, copyright existed to protect the free exchange of ideas, not the rights of authors.[8]

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[6] Diderot in Hesse, 1991, p. 101.
[7] Condorcet in Hesse, 1991, p. 103.
[8] Condorcet went so far as to propose a publishing industry that sold ideas rather than works by authors. Such an industry would be based on the subscription model of periodicals rather than the sale of individual books.

This view, however, was soon overwhelmed in 1788-89 by the Revolution. In the Declaration of the Rights of Man, the National Assembly officially sanctioned freedom of the press. Without effective copyright, the freedom was wild and destructive. Anonymous and seditious pamphlets appeared throughout the country; piracy of literary works was rampant; publishers faltered and became insolvent. Officials recognized the need to act, but they debated endlessly, ensnared by the politics of censorship in the midst of the Revolution's turmoil.[9]

As early as 1790, Condorcet *himself* cosponsored a proposal that provided copyright for the author's life plus ten years. The proposal violated the principles Condorcet had declared just 14 years earlier, but he now had another goal in mind following the Revolution (to make authors accountable for what they wrote). His proposal did in fact place some limitations on literary property, but not surprisingly, these were widely criticized by the Paris Book Guild and the royally privileged theatre directors. Once again, they used author rights as their central argument.[10] The proposal never came to a vote.

Astonishingly, after the original sponsors departed, almost exactly the same measure was passed into law in 1793 without discussion, partially propelled by the revolutionary call to respect individual rights and property. French copyright law was a compromise: The law sanctioned the notion of literary property, yet it limited such property and created the notion of public domain. It gave something to those with corporate interests in literary property, but it also took something away. And during the 19th century those corporate interests worked steadily to take back whatever they had lost.

Some claim that French copyright law was born in the Revolution as *droit d'auteur*—author rights. But French copyright continued to change for one-hundred years following the Revolution. (Ginsburg, 1990) What was initially an uneasy compromise between the philosophies of Diderot and Condorcet slowly became dominated by the notion of author and moral rights, until copyright became synonymous with *droit d'auteur* in France.

Modern Copyright

Copyright evolved over the next two centuries. In the United States, copyright law was closely patterned on English law, with an even more practical bent. The title of the first copyright act in the United States began with the opening words from the Statute of Anne: "An Act for the Encouragement of Learning.". The Constitutional authority for the 1790 copyright act was contained in Article I, Section 8, Clause 8: "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." American copyright was meant to be based on practical considerations. Nonetheless, in eight of the newly formed American states, copyright was based on the notion of the natural rights of authors.[11]

[9] Hesse, 1991, pp. 20-32.
[10] Hesse, 1991, p. 110.
[11] Patterson, 1968, p. 168.

Over time, copyright expanded in two directions. First, copyright came to encompass more and more types of "creative work"—art, performances, music, photographs, recordings, moving pictures, videos, and, recently, computer programs. The expansion was driven partly by changing technology, but it was promoted by the financial interests that trade in "creative commodities."

Second, copyright became identified with a complex web of international treaties—the Berne conventions, the Universal Copyright Convention, the WIPO Treaty, etc. The push for treaties and a more universal application of copyright began in the 19th century and continues today (the North American Trade Agreement and various EU directives are the most recent examples). How does one deal with a work published in one country by an author residing in another? What if a copyright infringement takes place in yet another? How does one deal with a performance in one country of a play with copyright in another? What protections are afforded to foreign authors when copyright is adjudicated in the courts?

These are complicated issues, involving trade, international law, and delicate politics.[12] Negotiating treaties to resolve them is a difficult task, especially when the financial consequences are profound for the affected parties. Not surprisingly, those with the strongest financial interest are the ones most intimately involved in the negotiation. Their most powerful weapon is the argument that they are fighting for the rights of the creators—the authors.

As the international treaties moved forward, the goal of promoting scholarship (one of the original motivations) was seldom considered. The "encouragement of learning" became a minor concern. The idea that copyright was a careful balance of the interest of three parties—publishers, authors, and the public—was replaced by the idea of "fairness" to those who "owned" the work.

Today, we live with two cultures of copyright.[13] One views copyright as economic protection for authors—a practical way to provide financial incentives. The other views copyright as a matter of philosophical principle, protecting the natural rights of authors. Both view copyright as something meant for *authors*. In practice, throughout most of the world, copyright gives *publishers* financial protection for the work, guaranteeing a monopoly for up to 70 years beyond the author's life. That period of time has steadily increased, driven forward by the argument that society needs to treat authors fairly—by protecting their property.

This was, in fact, the original booksellers' strategy nearly 300 years ago. In the end, they won.

[12] A comprehensive general reference on the subject is (Goldstein 2001).
[13] The phrase is from (Goldstein 1995, pp. 165*ff*).

Why we should care

Even this very brief history shows that copyright is far more complicated than Peter Givler suggests. Copyright is not merely "giving authors legal control over their own texts." Copyright is far more complex—more nuanced.

But why should we care? Why bother with esoteric subtleties? Why worry about publishers who boast that their only goal is to protect authors? Because allowing such boasts to go unchallenged may lead us to seek the wrong solutions to the copyright problem. It's hard to solve a problem if you don't know its cause.[14]

A good example is the recent attempt to fix copyright for scholarly journals by demanding that authors retain the copyright. Give authors control of their work, the argument goes, and the publishers' monopoly will be thwarted. Give authors control, and the real owners will once again be in charge. Give authors control because it's fair.[15]

The argument sounds convincing at first. But think what happens in practice. A single publisher produces journals with thousands of articles by thousands of authors each year. If all authors retain the copyright, but give the publisher an exclusive license to publish for a period of time, who really benefits? After the exclusive period expires, anyone who wants to make the journals available to the public (for example, in a new format online) will have to contact all those thousands of authors to obtain permission. Some authors will decline; some will be hard to find; some will be missing. Who then controls the journals? Surely not the authors. Surely not the public. The publishers retain control of the journals, even if they do not control the individual articles themselves. As before, authors have been used. They have fallen into the trap the publishers laid down nearly 300 years ago.

The problem of copyright is not author rights—the problem is balance. Copyright is control, with a purpose. Copyright controls the dissemination of works in order to provide incentives to create and to publish; that's good for everyone, authors and the public alike. But perpetual (or nearly perpetual) control works against the public interest, and that's true whether it's the publisher or the author who exercises the control. Encouraging every author to retain copyright simply replaces the deliberate tyranny of the few by the inadvertent tyranny of the many.

What we can do

The problem of copyright is balance. It is therefore ironic that Peter Givler ends his essay on copyright's benefit to authors with a quote from Justice Ruth Ginsburg:

> "Indeed, copyright's purpose is to promote the creation and publication of free expression. As *Harper & Row* observed: 'The Framer's intended copyright itself

[14] It should be noted that copyright experts who advocate reform do *not* make these mistakes. (Lessig 2001) makes a number of suggestions for reform in Chapter 14, none of which merely shift copyright to authors.
[15] For example, see Harnad, S. (2001) For Whom the Gate Tolls? How and Why to Free the Refereed Research Literature Online Through Author/Institution Self-Archiving, Now. http://cogprints.soton.ac.uk/documents/disk0/00/00/16/39/index.html

> to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'"

Justice Ginsburg was writing the majority opinion in a recent Supreme Court case[16] upholding the extension of copyright to 70 years beyond the life of the author (or 95 years for corporations). The decision was remarkable for its *lack* of balance. And surely no one can argue that extending copyright to 70 years after an author is dead (or 95 years for Walt Disney Inc.) benefits authors!

Given the title of his essay, Givler might have quoted instead a portion of the dissenting opinion in that case from Justice Steven Breyer, who wrote:

> "It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who won existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public."

Justice Stevens was concerned about the public good. He was concerned about bringing balance to copyright.[17]

Copyright has drifted out of balance over the years. What can we do to bring it back? Alas, there are no simple answers. Changing copyright laws is difficult. The Supreme Court ruling above shows why; so does the entire history of copyright.

As authors, however, we may be able to restore balance to copyright *without* changing the law itself. There are many groups working to find appropriate ways for authors to dedicate their work to the public domain after a suitable length of time[18]. That's a solution that addresses the real problem—balance.

For centuries, publishers have convinced authors that they are helpless victims in need of protection. Copyright is for authors; copyright is fair; resistance is futile and foolish. But it's possible to resist, and we should do so, in spite of the difficulty. The first step is to replace the 300-year-old publishers' deception with some real understanding.

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[16] Eldred vs. Ashcroft, which challenged the Sonny Bono Copyright Term Extension Act.

[17] Another quote from a Supreme Court ruling is also more appropriate to Givler's title. In Feist Publications. Inc. v. Rural Telephone SerLice Co., 499 U.S. 340, 349 (1991), Justice Sandra Day O'Connor wrote: "The primary objective of copyright is not to reward the labor of authors, but `[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."

[18] How authors guarantee that their work falls into the public domain will vary according to the differing laws governing copyright. Some countries declare certain rights inalienable, making it difficult to devise simple statements that place a work in the public domain. See (Goldstein 2001, 5.2) for a glimpse of the complications. In the U.S., one scheme for dedicating work to the public domain is through an organization called *Creative Commons* (http://creativecommons.org).

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