Topic Page: Copyright

Definition: **Copyright** from *The AMA Dictionary of Business and Management*

Legal protection for the owner or originator of an original work, which extends to licensing the work for use by others. Copyright covers many forms of Intellectual property, including books, artwork, drama, film, media broadcasts, speeches, magazine articles, and music compositions and performances, as well as computer programs. Protection is granted by the copyright acts in various countries, as well as the International Copyright Convention, and extends beyond a country's borders. Terms vary worldwide, but in the U.S., copyright protection lasts for 75 years beyond the author's lifetime.

Summary Article: **Copyright**
From *Encyclopedia of Journalism*

Copyright is a legal protection of expressions that are fixed in tangible media. Copyright describes, for example, an author's right to reproduce a book manuscript, an artist's right to duplicate his painting, or a musician's right to perform an original score. Copyright is part of a family of legal interests loosely termed *intellectual property*, which also includes trademarks, patents, and trade secrets.

Origins

Civilizations dating to ancient Egypt have inscribed unique marks on physical objects, such as bricks, to indicate ownership or craftsmanship. Greeks first used marks to indicate a creator's association with more cerebral products, such as art and literature. Romans further distinguished an author's right of ownership from an alienable right to reproduce a work. Chinese as early as the Han Dynasty (206 B.C.-A.D. 200) recognized an exclusive legal right to reproduce written works. But intellectual property notions in ancient Eastern cultures developed less fully than in the West because Eastern philosophical traditions tended to be more communal than individual notions of knowledge ownership.

In the West, the prominence of medieval guilds led to increased legal recognition and protection for marks that identified goods and services. These marks correlate closely with marks recognized in modern intellectual property law: trademarks, service marks, and certificate marks. Guilds also maintained trade secrets that correlate closely with modern trade secrets, protected by law against theft as long as the owner takes steps to maintain secrecy. The concept of the patent also dawned at this time, as governments sought to attract new scientific methods in the development of public works by offering creators exclusive legal rights in their designs.

With the introduction of moveable type in Europe in the mid-fifteenth century, authors and printers joined engineers and the traditional guilds in seeking enhanced legal protection for intellectual property. The Republic of Venice became renowned for obliging and accordingly attracting intellectual talent. Venice is credited with adoption of the first patent statute in 1474. The British Crown in 1557 provided a royal charter to the Stationers' Company, a powerful printers' guild, granting its members exclusive rights to reproduce written works, thus essentially to oversee a system of copyright. Governments thus protected intellectual property against piracy and awarded exclusive rights, or privileges, to intellectual property owners to profit from their graphic or mechanical designs and publications.

More definite statutory precursors to modern intellectual property law developed in Britain in the seventeenth and eighteenth centuries. The 1623 Statute of Monopolies generally proscribed the

monopolization of inventions, but operated as a patent law by protecting a creator's interest in an invention for the first 14 years. The 1710 statute of [Queen] Anne formalized copyright law, superseding the monopoly of the Stationers' Company. The statute established depository libraries for copyrighted works, gave authors a right of reproduction, and allowed them a 14-year term of copyright, renewable by still-living authors for 14 further years.

Following the lead of such eighteenth-century political philosophers as John Locke (1632-1704), postrevolution governments in the United States and France re-envisioned intellectual property as a natural right, rather than as a privilege awarded by government authority. Still, these new governments limited intellectual property rights with statutory terms. The U.S. Constitution of 1787 (Article I, section 8, clause 8) empowered Congress "[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." Congress enacted copyright and patent laws in 1790, the former modeled on the Statute of Anne.

Modern American copyright law was inaugurated by the 1909 Copyright Act. It remained in effect, with amendments, until it was superseded by the Copyright Act of 1976, though the older act remained in effect for works copyrighted up to 1978. The 1909 act doubled the terms of initial and renewed copyright to 28 years each and required that copyrighted works bear copyright notice—for example, the typographical symbol, "©"—and be registered at the federal Copyright Office. The 1909 act did not preempt state common law copyright, which provided some protection for unpublished works.

The 1976 law did substantially supersede state common law copyright, but extended the federal system to protect works from the time they are "fixed in a tangible medium of expression," thus encompassing unpublished works. The 1976 act further extended the term of protection to the life of the author plus 50 years. The 1976 act still required notice and registration of a copyright before the owner could employ the enforcement provisions of the law, but defects of process were no longer necessarily fatal to later copyright claims.

U.S. copyright law was amended in 1988 to allow U.S. agreement to the Berne Convention for the Protection of Literary and Artistic Works, a multilateral agreement dating to 1886 that requires nations to recognize one another's copyrights. The 1988 amendments also relaxed procedural formalities of U.S. copyright, notably the requirements of notice and registration as conditions of enforcement. In 1998, Congress again extended the term of U.S. copyright to life of the author plus 70 years, and corporate copyright to the lesser of 95 years from publication or 120 years from creation. Congress implemented other international agreements on copyright by enacting the Digital Millennium Copyright Act of 1998 (DMCA), which in part prohibited the circumvention of technology designed to thwart the piracy of copyrighted electronic content, such as motion pictures on compact discs.

Copyright law in the United States and around the world has subsequently been amended to conform to the international Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS Agreement, which built on the Berne Convention and established the World Trade Organization in 1995. Significantly, TRIPS provides copyright protection to computer software and limited protection to data compilations.

Theory and Criticism

Like other intellectual property interests, copyright reflects a fundamental tension between the public's

interest in shared knowledge and free-market trade, on the one hand, and private property rights and the public's interest in encouraging innovation, on the other. On the former score, society has an interest in the exchange of information free of legal restriction so as to facilitate the collective attainment of desirable norms such as truth and equality. The free market also depends in part on a free exchange of information, as actors in a marketplace who are better informed are more likely to make rational decisions that maximize productivity and efficiency.

Critics of these justifications for copyright argue, for example, that excessively long copyright terms unjustly enrich content creators and stifle creative expression that might otherwise emerge. Critics charge that affording creators too broad a spectrum of copyright protection contorts free market dynamics; for example, the anti-circumvention provision of the DMCA arguably inhibits development of content-delivery technologies more efficient than what the market offers.

Copyright is understood as an expression of natural rights, which posits that a creator of intellectual property enjoys a unique relationship with the creation; accordingly, respect for the creator demands that he or she be afforded control over the disposition of the creation. The creation is therefore given the legal status of private property with rights of ownership vested in the creator. This arrangement serves the public interest both because it protects natural rights and because it fosters creation of new intellectual property. Authors and artists who know that they will be permitted to profit from their creations are more likely to create again. Historically, this latter concept, termed “incentive theory,” has been important in U.S. law, while the natural rights approach has been of complementary importance in European law.

Because the Internet is an unprecedented medium for the global and nearly instantaneous exchange of content, and by its nature the Internet tends to defy the legal constraints of national laws, it has become a battleground for government regulators, content owners, open-knowledge advocates, and intellectual-property pirates.

Contemporary Law

U.S. copyright law protects “original works of authorship fixed in any tangible medium of expression … from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Original works include the literary (which simply means written or printed—this is not a term denoting any minimal level of quality), musical, dramatic, choreographic, pictorial, graphic, sculptural, audiovisual, and architectural. While copyright protects the expression of ideas, it does not protect ideas themselves. Thus for example, a description of a new accounting method may be copyrighted, but the method itself may not be, and may be described in other words by someone else. Short names, representative symbols, processes, and inventions are not copyrighted, but may be eligible for trademark or patent protection.

A constitutionally required element of a copy-rightable work is originality. That means that the work must have been created independently by the copyright holder, and that the work must embody some minimum of creativity. For example, an author who writes a sequel to a classic literary work may copyright the new, independent creation, but not the pre-existing classic. A publisher of calendars may copyright an arrangement of photographs, but may not copyright the ordinary arrangement of dates in a seven-column table.

Generally, a copyright owner enjoys the exclusive legal right to reproduce a work; to prepare work that

is derivative of an original; to distribute copies; to perform or display a work; to broadcast a sound recording; or to authorize another to exercise the owner's rights.

Copyright is subject to many limitations. For example, a public library may duplicate the contents of a book threatened by physical decay. A system of compulsory licensing authorizes musical groups to “cover” popular songs. Some statutory limitations on copyright are so complex in their interpretation and application, and the demand to use copyrighted content so high, that industries have developed de facto licensing authorities. For example, the American Society of Composers, Authors and Publishers (ASCAP), founded in 1914, is one of three organizations that oversees the licensing of music for performance and radio broadcast. The Copyright Clearance Center, founded in 1978, handles reproduction licensing for many written works in the United States and has sister organizations around the world.

Fair Use Doctrine

An important limitation on copyright is the fair use doctrine. The doctrine was developed by the courts and expressly incorporated into law with the 1976 Copyright Act. A problem of copyright is that an exclusive right vested in one copyright owner is at odds with the freedom of expression enjoyed by all other persons. Indeed, copyright is at some point at odds with itself, as an excessively repressive regime would choke off the very creative expression that copyright is designed to foster. Fair use means to balance these competing interests by allowing limited though unauthorized use of copyrighted works.

Fair use is generally noncommercial in nature, such as an educator using copyrighted material in a class or a journalist using copyrighted material in a news report. A second fair use factor concerns the nature of the copyrighted work. Works with more original creative content, such as a wholly original fantasy novel, are entitled to greater protection than works of less originality, such as the fact-intensive contents of an almanac. The third fair use factor is the amount and substantiality of the use relative to the whole of the copyrighted work. A reproduced page of a medical treatise is less likely infringing than a reproduced chapter. The last fair use factor concerns the effect of the use on the market value of the original. Reproduction of the climactic scene of a suspense film may well infringe copyright if it depresses consumer demand to see the film.

Application of fair use doctrine is often at the heart of legal disputes over copyright. Flexibility of the four factors means that case outcomes are difficult to predict, and unpredictability breeds more litigation. At the same time, a vigorous fair use doctrine offers essential breathing room for free expression.

Issues

Copyright law has given rise to myriad legal issues and a whole subspecialty of legal practice. Moreover, contention has compounded since the advent of the Internet. Key issues include the copyright worthiness of data compilations, copyright protection against parody, the constitutional limits of copyright duration, and the problem of digital downloading.

A first issue in copyright law is the copyright worthiness of data compilations. A landmark copyright dispute over telephone books reinforced the originality prerequisite of copyright and disallowed copyright protection in mere data. In *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), a telephone cooperative sued a telephone book publisher for copyright infringement in the unauthorized

extraction of compiled listings. The U.S. Supreme Court ruled that no infringement had occurred because a data compilation, while generated by “the sweat of the brow” of the compiler, lacks the minimal originality required for copyright protection. Creative choices, such as the arrangement of data in presentation, or the selection of data for inclusion, may merit copyright protection, but the data themselves do not.

Rejection of the “sweat of the brow” doctrine in the United States differs from its acceptance in Europe. In 1996, the European Community protected database content as well as arrangement and selection. International application turns on reciprocity, so that only databases from participating countries are protected. The desirability of database protection and the market consequences of its absence have spurred heavy lobbying by the U.S. information industry to accept the European regime. Accordingly, industry advocates have litigated in the lower courts to erode *Feist*, while researchers, librarians, and information freedom advocates have defended *Feist.* Responding to industry pressure, the TRIPS Agreement explicitly protects the selection and arrangement of data, but the agreement does not extend protection to underlying data.

A second copyright issue is protection for parody. Parody depends for its humor on the resemblance of the parody to the original, so a vital parody market depends on a tolerant copyright regime. Recognizing this problem and the importance of parody as a form of social criticism, the U.S. Supreme Court built protection for parody into the fair use regime in *Campbell v. Acuff-Rose Music, Inc.* (1994). In *Campbell*, the rap music group 2 Live Crew had produced an unauthorized and commercially lucrative parody of the copyrighted Roy Orbison rock song “Oh, Pretty Woman,” borrowing an opening riff and lyrics, but little more. The Court found that 2 Live Crew's taking from the original was not excessive in light of the nature of parody, which must contain enough of the original to conjure it in the mind of the listener. The Court's fair use analysis cut a wide path for parody, recognizing, for example, that a parody's commercial success does not necessarily degrade the market for the original, and might even enhance it.

A third issue has been the duration of copyright protection, specifically, whether the U.S. Constitution places a limit on its duration. The Constitution authorizes copyright protection “for limited Times,” but says nothing more. Intellectual freedom advocates cried foul in 1998 when the Copyright Term Extension Act boosted copyright terms and was made retroactive, extending copyright protection for works soon to slip into the public domain. Retroactivity affected many early Hollywood products, including the Walt Disney Company's earliest Mickey Mouse films. Supporters argued that longer life expectancy and the new markets for derivative works warranted longer protection; opponents claimed that the longer terms defied the “limited” command of the Constitution and stifled creative production. The Supreme Court in *Eldred v. Ashcroft* (2003) sided with the supporters, declaring that short of protection in perpetuity, the limits are left to Congress to determine.

Digital downloading makes it possible, with only a home computer, to make a copy of a work of music, video, or art of such high quality that it is indistinguishable from the original. And the Internet makes it possible for copies to be widely shared. “Peer to peer file sharing” (P2P) systems exploit this technology by making it possible for one person to copy a musical composition, for example, from the computer of another. P2P operates without regard for authorization by the copyright owner, so P2P creators and providers initially contested liability on grounds that offended copyright holders must pursue system users instead. But in *MGM Studios, Inc. v. Grokster, Ltd.* (2005), the Supreme Court unanimously held that defendant P2P software distributors could be held liable for encouraging

copyright-infringing uses of their products. Since *Grokster*, the recording and motion picture industries have been aggressive plaintiffs in combating content downloading, though personal identification of online users and jurisdiction over foreign P2P providers have been persistent impediments.

Journalism and Copyright

Copyright is essential to journalism, as the journalist trades on proprietary expression. A journalist's work is copyrighted when it is fixed in an article or a broadcast story. Disputes involving journalists have concerned copyright ownership, copyright in news reports and in news itself, and government copyright.

Under U.S. copyright law, when a work is made “for hire,” that is, by an employee, copyright ownership vests in the employer, unless the parties agree otherwise. Thus copyright in a print journalist's news story vests in the newspaper, notwithstanding the byline. This “work for hire” doctrine may apply as well to commissioned works, such as a freelance article. However, in *New York Times Co. v. Tasini* (2001), freelancers objected to the republication of their work in electronic databases without additional compensation. The U.S. Supreme Court ruled for the writers, holding that the electronic databases were new works, distinct from the printed “collective works” to which the freelancers had contributed. Thus the *Times* would have to negotiate new contracts with the freelancers to republish their work.

Copyright also impacts short but critical components such as headlines and hard news leads. Copyright may apply to news reports, but cannot apply to the underlying *facts* of the news. Thus, news may be repackaged and republished in new stories without violating copyright. Arguably, though, there are only so many ways to write a headline or lead with minimal words. Repetition is inevitable, prompting a difficult question as to when a headline or lead is sufficiently imbued with a minimum of originality as to warrant copyright protection. This has been complicated with the Internet, as news aggregators clip headlines to serve as links to news providers' content. In a pioneering case that settled before trial, a Scottish court in *Shetland Times Ltd. v. Wills* (1996) preliminarily enjoined headline links. Courts in Japan and Belgium subsequently found sufficient originality in headlines to compensate news providers for infringement. In contrast, in *Perfect10, Inc. v. Amazon.com, Inc.* (2007), a U.S. court ruled that informational and retail websites' use of thumbnail-image links did not infringe publishers' rights to display the original, full-size images.

A related issue arises from the inability to copyright news facts. In *International News Service v. Associated Press* (1918), the Supreme Court decided that an action may lie in state misappropriation law when one news service pirates the scoops of a competitor. The viability of this “hot news doctrine” has been questioned since the preemption of state common law by the 1976 Copyright Act. Nevertheless, a federal court in *National Basketball Association v. Motorola, Inc.* (1997) maintained the viability of the hot news doctrine. The NBA challenged the practice of a Motorola pager service in transmitting real-time scores and information about games. The court found no misappropriation because, applying the court's test for the hot news doctrine, Motorola expended its own resources to ascertain and convey the information and did not exploit a “free ride” on the NBA.

A final issue concerns the ability of government to claim copyright over public records. While the federal government may not copyright its own work, it may have copyright assigned to it, as by an artist whose work is used on a postage stamp. State and local governments are not precluded from copyright ownership; in that event, copyright law can collide with state laws compelling disclosure of

public records. Courts facing this problem have sought refuge in the fair use doctrine. For example, in *County of Suffolk v. First American Real Estate Solutions* (2001), a federal court ruled that copyright law did not preclude disclosure of copyrighted county tax maps under the New York sunshine law, but the sunshine law also would not preclude county action to enforce its copyright if subsequent dissemination of the maps exceeded fair use.

Conclusion

Copyright is a double-edged sword in the law, as it simultaneously fosters and inhibits freedom of expression. As such, copyright is both friend and foe to the journalist. Courts and policymakers will continue to struggle to define the scope of copyright to preserve this delicate balance.

See also

Associated Press, Clipping Services, Distribution, Distribution, Online, First Amendment, Freelance Writers and Stringers, Images, Ownership of, International News Service, Internet Impact on Media, News Aggregators, Sunshine Law

Further Readings

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